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MEMORANDUM

March 8, 2010

TO: County Council

C: Pete Rose, County Administrator
Jon Shannon, Public Works Director
Karen Vedder, Chief Civil Deputy Prosecutor

FROM: Randall K. Gaylord

RE: Solid Waste Excise Tax

I. Question Presented

May the County Solid Waste Disposal District impose a flat annual charge on every property to be used to pay for capital or operations of a solid waste disposal system under the District's authority for an excise tax in RCW 36.58.140?

II. The Statute

RCW 36.58.140

Solid waste disposal district -- Excise tax -- Lien for delinquent taxes and penalties.

A solid waste disposal district may levy and collect **an excise tax** on the privilege of living in or operating a business in a solid waste disposal taxing district sufficient to fund its solid waste disposal activities: PROVIDED, That any property which is producing commercial garbage shall be exempt if the owner is providing regular collection and disposal. The excise tax shall be billed and collected at times and in the manner fixed and determined by the solid waste disposal district. Penalties for failure to pay the tax on time may be provided for. A solid waste disposal district shall have a lien for delinquent taxes and penalties,

plus an interest rate equal to the interest rate for delinquent property taxes. The lien shall be attached to each parcel of property in the district that is occupied by the person so taxed and shall be superior to all other liens and encumbrances except liens for property taxes.

III. Discussion

A. Excise Tax

A disposal district may only impose a tax that is authorized by the legislature. In this case the legislature specified a certain type of tax, an excise tax. In our opinion, a flat rate charge to each property owner is not an excise tax authorized by RCW 36.58.140.

An excise tax has two components. First, it must be imposed on a voluntary act of the taxpayer, which affords the taxpayer the benefits of the occupation, business, or activity that triggers the taxable event. Second, an excise tax is directly imposed (roughly) based upon the extent to which the taxpayer enjoys the taxable privilege. *Sheehan v. Central Puget Sound Regional Transit Authority* 155 Wn.2d 790, 799, 123 P.3d 88, 93 (2005) (internal citations omitted). The proposed property fee is not tied to a transaction or taxable event, and would be imposed annually based on the status of property ownership or the fact of property development. Moreover, the flat rate charge would be paid regardless of the volume of solid waste which the taxpayer disposes in the district. For these reasons it would not meet the test of an excise tax.

This conclusion is supported by three decisions of the Washington Supreme Court. The first case involved a lawful excise tax pursuant to RCW 36.58.140 charged by the Whatcom County Disposal District. *Whatcom County v. Taxpayers of Whatcom County Solid Waste Disposal Dist.* 66 Wn. App. 284, 294, 831 P.2d 1140, 1145 - 1146 (1992). In 1990 the Whatcom district imposed a 10 percent excise tax on invoices paid by customers to certificated haulers. This was challenged and declared lawful in a declaratory judgment ruling by the Washington Supreme Court. The court described the taxable event as the transfer of waste from the generator to the hauler and not as charge against the property.

“The taxable event in the instant case is the transfer of refuse from a residential or commercial customer to a hauler of refuse; the tax is not imposed on the ownership of property. The tax bears no relation to the value of property, thus, the tax is not a property tax. Therefore, we hold that the tax is properly characterized as an excise tax.”

In the second case, the city of Kennewick charged a flat rate \$2.60 against each water and sewer service customer for the privilege of having ambulance service available. The Washington Supreme Court declared this charge unlawful in *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 368, 89 P.3d 217, 222 (2004). That case distinguished the decision in *Whatcom*

County v. Taxpayers, by describing the taxable event in that case as the transfer of refuse, not the mere ownership of property. (*Id.* at 368). The court also rejected the notion that the status as a water and sewer utility customer has no relationship to the provision of ambulance service to that customer.

There is some language unnecessary to the Kennewick decision (*dicta*) that suggests that the authorization in RCW 36.58.140 extends to a tax on the privilege of “living ...inthe ... district.” *Id.* But, in our opinion, the simple act of living in the district would not be supported as “a transaction” that for purposes of an excise tax *or* a privilege tax. An excise tax on each person living in the District (instead of on each property owner) would probably be viewed as an unlawful poll tax because it would be assessed on each person, as opposed to being assessed on property or a transaction. *See* McQuillan, *Municipal Corporations* 44.189. Moreover, a flat charge against every property is not a privilege tax. “A privilege tax, although also passed to raise revenue, and as such is to be distinguished from the license tax or regulatory charge imposed under the state police power, is imposed upon the right to exercise a privilege, and its payment is invariably made a condition precedent to the exercise of the privilege involved.” 103 ALR 18 (Quoting California Case).

We believe the approach taken by the Whatcom County Disposal District is consistent with treating solid waste disposal like a water, sewer, telephone or electric utility. When authorized, a utility excise tax may be imposed on the transaction involved. But, there must be a purchase of the service for the utility to charge the excise tax. That approach, and not a per parcel charge, has been judicially approved as authorized by RCW 36.58.140.

A third case involves an excise tax on automobiles imposed to pay for the Seattle monorail system. In *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 799-801, 123 P.3d 88, 93 - 94 (2005). In *Sheehan*, an annual charge based on a vehicles value was determined to be a lawful motor vehicle excise tax authorized based the legislative authorization of a “vehicle excise tax” and 70 years of history that recognized that approach to motor vehicle excise taxes and because valuation at time of annual registration is a rough proportionate way to measure the owners use of the privilege of using a vehicle on a public way. Unlike the charge in *Sheehan*, there has not been a judicial recognition of a flat annual assessment against property owners as an excise tax: to the contrary, the *Kennewick* case strongly indicates such a charge would be found to be unlawful.

B. Guidelines for Development of a Fee Schedule

We recognize the desire of the County Council to explore all lawful ways in which the County Council or the disposal district could impose charges to pay for solid waste operations and capital expenses. The disposal district has broad authority to impose regulatory charges for providing the service of collecting and disposing of solid waste, which are commonly called disposal rates or tipping fees. The district is afforded a great deal of discretion in developing a

fee schedule. A precise linear relationship between volume and charges is not required. The test for a lawful fee is determined by examining three factors, commonly known as the *Covell* Factors. These factors should guide the Council's discussion in considering tipping fees and other charges as regulatory fees. These factors are set forth verbatim from the *Arborwood v. Kennewick* decision.

The first factor is whether the primary purpose of the county or city is to accomplish desired public benefits which cost money or whether the primary purpose is to pay for a regulatory scheme, a particular benefit conferred or mitigation of burden caused. *Samis*, 143 Wn.2d at 806, 23 P.3d 477; *Covell*, 127 Wn.2d at 879, 905 P.2d 324; *Hillis Homes I*, 97 Wn.2d at 809, 650 P.2d 193. If the primary purpose is to raise revenue used for the desired public benefit, the charges are a tax. If the primary purpose is to regulate the fee payers--by providing them with a targeted service or alleviating a burden to which they contribute--that would suggest that the charge is an incidental tool of regulation. *Samis*, 143 Wn.2d at 806-07, 23 P.3d 477; *Covell*, 127 Wn.2d at 879, 905 P.2d 324; *Teter*, 104 Wn.2d at 239, 704 P.2d 1171.

The second factor is whether the money collected must be allocated only to the authorized purpose. *Samis*, 143 Wn.2d at 806, 23 P.3d 477; *Covell*, 127 Wn.2d at 879, 905 P.2d 324; *Teter*, 104 Wn.2d at 233-34, 704 P.2d 1171. If the money must be allocated only to the authorized purpose, the charge is considered to be a fee. *Samis*, 143 Wn.2d at 809, 23 P.3d 477.

The third factor is whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden *373 produced by the fee payer. *Samis*, 143 Wn.2d at 806, 23 P.3d 477; *Covell*, 127 Wn.2d at 879, 905 P.2d 324; *Teter*, 104 Wn.2d at 232, 704 P.2d 1171. If no such relationship exists, the charge is probably a tax in fee's clothing. *Samis*, 143 Wn.2d at 811, 23 P.3d 477. On the other hand, if such a direct relationship exists, the charge may be deemed a fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer. *Id.* at 811, 23 P.3d 477; *Covell*, 127 Wn.2d at 879, 905 P.2d 324. As long as a direct relationship exists, only a practical basis for the rates is required, not mathematical precision. *Samis*, 143 Wn.2d at 811, 23 P.3d 477; *Teter*, 104 Wn.2d at 238, 704 P.2d 1171.

C. Additional Observations

The legislature authorized the use of the excise tax in 1982, before the modern approach to secure revenue to solid waste programs by using "flow control" to assure that solid waste generated in a district is disposed within a district. The excise tax assured county solid waste districts a steady source of income, even if the solid waste was taken out of the district for disposal.

Today, using flow control, a solid waste program can assure that those who generate

waste pay for the cost of providing and administering the service by adjusting the rates or fees charged for disposal. If for some reason there is a concern that solid waste is bypassing the county collection site or that haulers will collect solid waste and then take it from the district for disposal, then an excise tax on invoices to the certificated haulers will assure that the district continues to receive a certain revenue, even if the waste is taken elsewhere.

In San Juan County, the cost of ferry transportation is a major roadblock to haulers collecting garbage and taking it out the district for disposal, but that does not mean we do not need a more restrictive flow control ordinance. So long as all solid waste flows through the system, every contributor will pay a fair share based upon the rates charged.

Tipping fees can be used for future capital expenses by selling revenue bonds which dedicate a portion of the tipping fees to the repayment of the bonds.

As a general rule, a fee system will withstand a judicial challenge if the fee charged is based on the amount of waste generated. So long as the rate is reasonably based on usage – i.e., the amount of the property owner's contribution to the problem – the fee will be considered directly related to the service provided. *Tukwila School District No. 406 v. City of Tukwila*, 140 Wn. App. 735, 750 (2007).

RKG/tb