

**CITY COUNCIL AGENDA ITEM**  
CITY OF SHORELINE, WASHINGTON

<b>AGENDA TITLE:</b>	Adoption of Ordinance No. 634 Amending Shoreline Utility Tax Regulations Regarding Deductions from Gross Income and Tax for Sewer and Water Operations
<b>DEPARTMENT:</b>	Administrative Services Department City Attorney's Office
<b>PRESENTED BY:</b>	Robert Hartwig, Administrative Services Department Ian Sievers, City Attorney
<b>ACTION:</b>	<input checked="" type="checkbox"/> Ordinance <input type="checkbox"/> Resolution <input type="checkbox"/> Motion <input type="checkbox"/> Discussion <input type="checkbox"/> Public Hearing

**PROBLEM/ISSUE STATEMENT:**

Ordinance No. 634 exempts a utility without a franchise from payment of the periodic use fee for right-of-way site permits for aerial and underground rights or other property interests used to site facilities in the City's rights-of-way where the utility pays a Shoreline utility tax. The credit in that ordinance is consistent with the approach taken in Shoreline Municipal Code (SMC) Chapter 12.25 regulating franchises, where utility taxes may be credited against the 6% franchise fee for utilities in good standing.<sup>1</sup> The periodic use fee is the equivalent of the franchise fee if the general terms and conditions of a long term franchise cannot be negotiated. Ordinance No. 634 completes this legislative intent of avoiding both a use or franchise fee, and a utility tax for water and sewer operations by 1) allowing a deduction for franchise fees from the utility tax paid by water and sewer utilities in good standing, and 2) removing deductions for wholesale cost for sewer treatment or water supply from gross revenue for these two utilities to make the formula for gross income the same for purposes of calculating the 6% franchise fee or utility tax. The City Council reviewed Ordinance No. 634 and the related staff report on April 23, 2012.

**RESOURCE/FINANCIAL IMPACT:**

There are no financial impacts. No assessment of the utility tax will be made at this time to Seattle Public Utilities, Ronald Sewer District or Shoreline Water District since they are currently utilities in good standing.

**RECOMMENDATION**

Staff recommends Council adopt Ordinance No. 634 amending tax regulations applicable to sewer and water utilities under chapter 3.32 of the Shoreline Municipal Code.

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<sup>1</sup> Utilities in Good Standing are defined in SMC 12.15 as franchised utilities that may take advantage of minor right-of-way and blanket use permits under that chapter.

Approved By: City Manager **JU** City Attorney **IS**

## **BACKGROUND**

The Washington Supreme Court in the *Burns*<sup>2</sup> case acknowledged legal uncertainty as to whether cities could impose a tax on another municipalities' water or sewer operations. The Court retraced the history of decisions that lead to this conflict, primarily *Bellevue v. Patterson*<sup>3</sup> and *King County v. Algona*<sup>4</sup>. The issue involved in both cases was whether a code city's authorization to tax was explicit enough to satisfy constitutional standards. In *Bellevue* a city tax imposed on a water district and sewer district was upheld, the court stating the municipal corporation as a class enjoy no exemption from taxation. In *Algona*, the court invalidated the city tax against a King County solid waste operation. Although the court acknowledged that solid waste disposal was a governmental function unlike the proprietary operations of water and sewer systems in *Bellevue*, its discussion of governmental immunity from taxation and overruling *Bellevue* to the extent it was inconsistent lead to a belief that the prohibition against taxing another municipality was broader than intended. Finally, *Burns* clarified that the impediment to taxation of another municipality found in *Algona* related to taxation of another municipality's *governmental* function not those proprietary functions such as providing electrical operations, or waterworks<sup>5</sup> where it acts for the advantage of the city and its residents as a business concern.

The legal uncertainty in 2000 prior to *Burns* is reflected in Shoreline's utility tax adopted in that year. "This tax is also levied upon any public or private operator of any municipal domestic water distribution and supply system or municipal domestic sewer system as a public utility, to the extent that such tax is or may in the future be authorized by law." SMC 3.32.010. Water and sewer utilities are subject to the 6% utility tax under SMC 3.32.020. It is recommended that SMC 3.32.010 be amended to provide notice that the tax is now authorized under the recent case law for assessment against private and public water and sewer utility systems, and this amendment is included in section 1 of Ordinance No. 634.

## **DISCUSSION**

Since 2003 Shoreline has managed its rights-of-way with a uniform approach to compensation by utilities using these properties. Utilities in good standing pay a 6% franchise fee, but may receive a credit for utility taxes against the fee. Where utilities operate without a franchise, compensation for use of the right-of-way is paid under a periodic use fee for a right-of-way site permit in addition to processing fees for the permit.

To be consistent with past practice of not imposing both a use fee and tax, Ordinance No. 633 allows a waiver of the periodic use fee where the utility pays a utility tax under SMC 3.32. Ordinance No. 634 completes this approach to right-of-way compensation

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<sup>2</sup> 161 Wn.2d 129, 164 P.3d 475 (2007)

<sup>3</sup> 16 Wash.App. 386, 556 P.2d 944 (1976)

<sup>4</sup> 101 Wn.2d 789, 681 P.2d (1984)

<sup>5</sup> *Stieffel v. Kent*, 132 Wash.App. 523, 132 P.3d 1111 (2006) [water utility is a proprietary function]

set out in SMC 12.15 (right-of-way permits) and 12.25 (franchises) by allowing water and sewer utilities in good standing to deduct the 6% franchise fee or “Right of Way Agreement” payment from the 6% utility tax. To make the 6% franchise fee equivalent to the 6% utility tax, Ordinance No. 634 also removes the wholesale cost of water or charges for sewer treatment as a deduction from gross revenue under the utility tax, making this revenue the same for both fee and tax.

The definition of revenues that currently exists in the Shoreline Water District (SWD) and SPU franchise agreements does exclude some revenues that would not be exempt from the utility tax provisions, such as late fees and connection charges. The SWD provided the following information on revenues from the last few years that they believe would be subject to the utility tax that is currently not subject to the franchise fee:

	<b>2011(Unaudited)</b>	<b>2010</b>	<b>2009</b>
Non-Water Sales Revenue	\$827,302	\$567,837	\$669,285
6% Utility Tax	\$49,638	\$34,070	\$40,157

Staff does not recommend modifying the definition of revenues subject to utility taxes, given that the definition used by the City is the prevalent definition used by cities and allowed pursuant to state law. Of course, a utility in good standing with a franchise agreement prior to May 21, 2012, is exempt from the utility tax requirement for the term of the franchise agreement.

**RECOMMENDATION**

Staff recommends Council adopt Ordinance No. 634 amending tax regulations applicable to sewer and water utilities under chapter 3.32 of the Shoreline Municipal Code.

**ATTACHMENTS**

Attachment A- Proposed Ordinance No. 634

**ORDINANCE NO. 634**

**AN ORDINANCE OF THE CITY OF SHORELINE, WASHINGTON, AMENDING THE SHORELINE UTILITY TAX BY CLARIFYING THAT UTILITY TAXES ARE APPLICABLE TO WATER AND SEWER UTILITIES BY PRIVATE OR MUNICIPAL PARTIES BUT AMENDING EXEMPTIONS FOR THOSE UTILITIES IN GOOD STANDING FOR DEDUCTION OF AN EQUIVALENT FRANCHISE FEE; AND AMENDING CHAPTER 3.32 OF THE SHORELINE MUNICIPAL CODE**

WHEREAS, Shoreline Municipal Code section 3.32.030 applies a utility tax of 6% to Water Distribution Operations and Sewerage Operations; and

WHEREAS, there was uncertainty at the time Shoreline adopted its utility tax as to whether statutory authority to assess a utility tax by cities included a power to tax utilities provided by another municipal corporation even where the utility was a proprietary but this area has recently been clarified by the Washington Court to allow taxing of other municipalities' proprietary utility operations such as water and sewer; and

WHEREAS, a full credit for franchise fees paid by Utilities in Good Standing against the proposed 6% utility tax against water and sewer operators will result in no net increase to ratepayers for Seattle Public Utilities and Shoreline Water District;

WHEREAS, this action is exempt from SEPA as an assessment of taxes under WAC 197-11-800(14)(b); now therefore,

**THE CITY COUNCIL OF THE CITY OF SHORELINE, WASHINGTON, DO ORDAIN AS FOLLOWS:**

**Section 1. Amendment.** Shoreline Municipal Code section 3.32.010 *Imposed* is amended to read as follows:

.030 Imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in utility occupation activities as defined in Section 2. Such tax shall be measured by the application of rates against the gross proceeds of sales from customers within the City. The tax provided for in this ordinance shall be known as the "utility tax," and is levied upon the privilege of conducting the business of manufacturing or distributing natural gas, telephone, cellular telephone, cable television, or solid waste collection business within the City of Shoreline. This tax is also levied upon any public or private operator of any municipal domestic water distribution and supply system or municipal domestic sewer system as a public utility, ~~to the extent that such tax is or may in the future be authorized by law~~. All revenues collected pursuant to this ordinance shall be deposited into the General Fund and shall be used for the funding of general City services or capital projects as the City Council shall direct through its annual budget process.

**Section 2. Amendment.** Shoreline Municipal Code section 3.32.020 *Definitions* is hereby amended to read as follows:

.020 Definitions. As used in this ordinance, unless the context or subject matter clearly requires otherwise, the words or phrases defined in this section shall have the indicated meanings.

A. “Cable television services” means the one-way transmission of video programming and associated nonvideo signals to subscribers together with subscriber interaction, if any, which is provided in connection with video programming.

B. “Cellular telephone service” means two-way voice and data telephone/telecommunications system based in whole or substantially in part on wireless radio communications and which is not currently subject to regulation by the Washington Utilities and Transportation Commission (WUTC). Cellular telephone service includes cellular mobile service. The definition of cellular mobile service includes other wireless radio communications services such as specialized mobile radio (SMR), personal communications services (PCS) and any other evolving wireless radio communications technology which accomplishes the same purpose as cellular mobile service.

C. “Gas distribution business” means the business of selling, furnishing, or transmitting gas, whether manufactured or natural.

D “Gross proceeds of sale” or “Gross income of business” means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction for losses.

E. “Pager service” means service provided by means of an electronic device which has the ability to send or receive voice or digital messages transmitted through the local telephone network, vial satellite or any other form of voice or data transmission.

F. “Person” means any person, firm, corporation, association, or entity of any type engaged in a business subject to taxation under this ordinance.

G. “Solid waste collection business” means every person who receives solid waste or recyclable materials, or both, as defined in this section, for transfer, storage, or disposal including but not limited to all collection services, public or private solid waste disposal sites, transfer stations, and similar operations.

“Solid waste” or “wastes” means all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials.

“Recyclable materials” means those solid wastes that are separated for recycling or reuse, such as papers, metals, and glass, that are designated as recyclable materials pursuant to SMC 13.15.020.

H. "Telephone business" means the business of providing network telephone service as defined in this section. It includes cooperative or farmer line telephone companies or associations operating an exchange.

"Network telephone service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, or the providing of broadcast services by radio or television stations.

"Competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under RCW Title 80 and for which a separate charge is made.

I. "Sewerage Operation" means operation of sanitary sewer facilities, including collection, treatment and disposal facilities, and combined sanitary and surface water drains and outfalls.

J. "Water Distribution Operation" means the ~~business of operating~~ operation of a plant or system for the distribution of water for hire or sale.

**Section 3. Amendment.** Shoreline Municipal Code section 3.34.030 *Utility occupation activities subject to taxation* is amended to read as follows:

.030.

A. Upon every person within the city in the following activities; as to such persons, the amount of the tax due with respect to such business in the city shall be equal to the gross income of the business, multiplied by the following applicable rates:

<b>Activity</b>	<b>Tax Rate</b>
A. Gas Distribution Business	6%
B. Telephone Business	6%
C. Cellular Telephone Service	6%
D. Cable Television Service	6%
E. Solid Waste Collection Business	6%
F. Water Distribution Operation	6%
G. Sewerage Operation	6%
H. Paging Service	6%

B. Tax Credits, Exemptions. Water Distribution Operations and Sewerage Operations in good standing with a franchise or right-of-way use agreement pursuant to chapter 12.25 SMC executed prior to May 21, 2012 shall be exempt from taxation under this section for the term of the franchise or use agreement. Thereafter, a credit for franchise fees or right-of-way use agreement payments executed pursuant to chapter 12.25 SMC will be applied as a credit to the tax assessed under this section.

**Section 4. Amendment.** Shoreline Municipal Code section 3.32.040 *Deductions* is amended to read as follows:

.040 Deductions. The following items may be deducted from the total gross income upon which the tax is computed:

A. Credit losses actually sustained by taxpayers whose regular books are kept on an accrual basis.

B. That portion of gross income derived from charges to another telecommunications company for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate services, or charges for telephone service which the purchaser buys for the purpose of resale.

C. Adjustments made to a billing or customer account in order to reverse a billing or charge that was not properly a debt of the customer.

D. Amounts derived from a business which the City is prohibited from taxing under the constitution of this state or the Constitution or laws of the United States.

E. Grants from governmental agencies.

~~F. For municipal sewer utilities, the amount paid to another municipal corporation or agency for sewer interception, treatment, or disposal.~~

~~G. For municipal water operations, the amount paid to another municipal corporation or agency for water distributed within the City.~~

**Section 5. Publication and Effective Date.** This ordinance shall take effect five days after publication of the title of this ordinance as an approved summary of the ordinance in the official newspaper of the City.

**PASSED BY THE CITY COUNCIL ON MAY 14, 2012.**

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Mayor Keith A. McGlashan

**ATTEST:**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Scott Passey  
City Clerk

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Ian Sievers  
City Attorney

Date of publication: , 2012  
Effective date: , 2012