Revised Stormwater Utility Opinion

Provided by Christopher Quinn, Deputy Prosecuting Attorney – Civil Division December 1, 2018

Gary,

I am writing in reply to your request for input on the proposed stormwater fee rate being considered by the Lake Whatcom Stormwater Utility Service Area ("Service Area") citizen's advisory board. Specifically, you asked for my opinion on a proposed two-part fee that would include 1) a flat per parcel fee charged to all non-exempt parcels located in the Service Area and 2) an additional parcel fee based upon the amount of impervious surface on the developed parcels (small, medium, and large.)

In short, I believe that under the circumstances this proposed fee structure is an appropriate funding mechanism for the Service Area pursuant to RCW 36.89.090. This statutory authority, along with case law examining the subject, supports the proposed collection of fees from the non-exempt properties located in the Service Area that receive services or benefits, or that contribute to any increase in surface water run-off in the Service Area.

Furthermore, I do not believe the proposed charges constitute a tax or a special assessment. I also have no reason to believe the actual rates will be set in an arbitrary and capricious manner. Both of these points are important to consider because they would be the likely basis for a legal challenge to the fees.

My opinion on the proposed Service Area rate structure assumes the following:

1. Whatcom County established the Service Area pursuant to the authority granted under RCW 36.89.030 (Ordinance 2017-076);
2. Whatcom County established the Service Area for purposes of maintaining, protecting, and improving Lake Whatcom water quality for those citizens who rely upon Lake Whatcom as their drinking water source;
3. Lake Whatcom water quality regulation serves to protect the health, welfare, and safety of Whatcom County citizens both in and outside the Service Area;
4. Fees shall be assessed pursuant to the authority of and consistent with RCW 36.89.080;
5. The parcels to be charged within the Service Area either 1) will receive a service benefit or 2) contribute to the surface water run-off in the Service Area, regardless of whether the parcel is developed.
6. The funds collected will be deposited into a special fund(s) in the County treasury to be used on for purpose of paying all or part of the cost and expense of maintaining and operating storm water control facilities, all or any part of the cost and expense of planning, designing, establishing, acquiring, developing, constructing, and improving any such facilities, or to pay or secure the payment of all or any portion of any general issue of general obligation or revenue bonds issued for such purposes. RCW 36.89.080(4).

Follow-up Questions and Answers Between Christopher Quinn and Committee Members

Q: "*Do we all agree land in its natural state can be assessed a fee ?"*

(Although this is a question directed to the committee, I'll contribute the following observation for their consideration. It is also relevant to Ms. Alyanka's subsequent questions.)

A: As regulatory fees, the proposed Service Area charges are properly assessed against all properties that either 1) contribute to the "burden" (i.e, stormwater run-off) or 2) that otherwise receive service in the area. Although one of these two relationships must exist, there is no requirement that the parcel charged be a developed parcel.

Q1*: "Considering how disproportionate the flat per-parcel fee is, would a parcel fee based on parcel size be more defendable ?*

A1: The answer is yes, assuming the question contemplates 1) undeveloped parcels that do not receive a related service (see question 3) and 2) whose only distinction for purposes of "burden contribution" is size. Although the law doesn't require precise calculations of a parcel's contribution to the burden when determining whether a fee is appropriate, there still needs to be a "practical basis" for the assessment. Parcel size satisfies this practical basis requirement by providing a direct and defendable relationship between the fee charged and the burden produced. As you'll see below, there are a number of factors that can be properly considered.

Q2: "*Is a parcel fee based on parcel size also an appropriate funding mechanism for the Service Area pursuant to RCW 36.89.080* ?"*

A2: Parcel size is a properly considered factor for purposes of setting fees. Under RCW 36.89.080 a county's legislative authority, in fixing rates, may consider "the character and use of land or its runoff water characteristics" and "any other matters which present a reasonable difference as grounds for distinction" among other factors listed below.

RCW 36.89.080

Stormwater control facilities—Rates and charges—Limitations—Use.

(1) Subject to subsections (2) and (3) of this section, any county legislative authority may provide by resolution for revenues by fixing rates and charges for the furnishing of service to those served or receiving benefits or to be served or to receive benefits from any stormwater control facility or contributing to an increase of surface water runoff. In fixing rates and charges, the county legislative authority may in its discretion consider:

(a) Services furnished or to be furnished;

(b) Benefits received or to be received;

(c) The character and use of land or its water runoff characteristics;

(d) The nonprofit public benefit status, as defined in RCW 24.03.490, of the land user;

(e) Income level of persons served or provided benefits under this chapter, including senior citizens and disabled persons; or

(f) Any other matters which present a reasonable difference as a ground for distinction.

(2) The rate a county may charge under this section for stormwater control facilities shall be reduced by a minimum of ten percent for any new or remodeled commercial building that utilizes a permissive rainwater harvesting system. Rainwater harvesting systems shall be properly sized to utilize the available roof surface of the building. The jurisdiction shall consider rate reductions in excess of ten percent dependent upon the amount of rainwater harvested.

(3) Rates and charges authorized under this section may not be imposed on lands taxed as forestland under chapter 84.33 RCW or as timberland under chapter 84.34 RCW.

(4) The service charges and rates collected shall be deposited in a special fund or funds in the county treasury to be used only for the purpose of paying all or any part of the cost and expense of maintaining and operating stormwater control facilities, all or any part of the cost and expense of planning, designing, establishing, acquiring, developing, constructing and improving any of such facilities, or to pay or secure the payment of all or any portion of any issue of general obligation or revenue bonds issued for such purpose.

Q3: What type of service is meant in the statement, "undeveloped parcels that do not receive a related service?" (see highlighted above)

A3: By undeveloped parcels I meant Service Area properties in their natural state or unimproved. Services refers generally to those stormwater projects (new works, maintenance, retrofits, etc.) or other LWSUSA actions that can be said to benefit certain properties more directly in the SA. (e.g., private property or residential area stormwater projects)

For purposes of your question, I assumed the parcels were in their natural state and that the sole basis for assessing a fee would be their contribution to the run-off ("the burden" being addressed). Further, I assumed that the parcels received no identifiable service or benefit from the LWSUSA. Under these specific circumstances a fee based on parcel size, which represents the proportionate contribution to the burden, is supported by the necessary relationship between the fee and the burden contributed. Keep in mind, this analysis considers no other factors provided for under RCW 36.89.080, which may justify a different fee structure.