



CITY OF BEND

MEMORANDUM

To: City Council, interested members of the public

From: City Attorney's Office

Re: Fee v. tax—Transportation Fee

Date: 9/25/2023

Why isn't a vote required?

Oregon laws require a vote to add an operating levy (a tax imposed on owners of property, and used for certain governmental operations), or a general obligation bond (a tax imposed on owners of property and used for capital construction). The Bend Charter requires a vote on a direct sales tax, but specifically states this requirement does not apply to "fees or charges imposed by the City for services or products provided by the City". Bend Charter, Section 40.

The proposed transportation fee will not be charged on sales, so it is not required to be put to a public vote by the Bend Charter. The proposed transportation fee will not be a property tax, charged against the assessed values of property in Bend, so is not subject to a vote as an operating levy or general obligation bond. The transportation fee is a charge for transportation maintenance and improvement services provided by the City, so is not required to be put to a public vote.

What is the City's authority to implement a transportation fee?

The broadest authority is the City's home rule authority. City home rule authority comes from the Oregon Constitution and is very broad. With home rule authority, cities in Oregon do not need enabling state statutes to carry out the functions listed in a city's charter. This is true unless federal or state law expressly or impliedly preempts a city from certain functions.

The City of Bend's charter establishes its home rule authority under the state constitution. Bend Charter Chapter II, Sections 4 and 5. Under its charter, the City of Bend has all the powers expressly or impliedly granted or allowed to a city, and all powers under the charter are to be liberally construed, so that the City may exercise all powers possible under the charter and under United States and Oregon law. The City is the road authority for roads within city limits (see ORS 810.010 and Bend Code chapter 6.10), and has authority and responsibility to maintain City streets within its boundaries (See, ORS 223.105, 223.930). The City therefore has the authority to expend and raise funds for its transportation system.

What makes a transportation fee a "fee" rather than a "tax"?

Oregon courts look to the use or expenditure made with collected revenue to determine whether a government charge is a "tax" (used or available for general government purposes) or a "fee" (used to regulate or benefit the paying party).¹

In Oregon, a property tax is defined as: 1) Any charge imposed by a governmental unit; 2) Upon a property owner; 3) As a direct consequence of their ownership of that property; and 4) Does not include any incurred charges and assessments for local improvements. (Oregon Constitution, Article XI, Section 11b and ORS 310.140(1)). Property taxes in Oregon are limited by Measure 5 and Measure 50. A full discussion of Measures 5 & 50 is outside the scope of this memo.²

A fee, by contrast, "is imposed on persons who apply for or receive a government service that directly benefits them." McCann v. Rosenblum, 355 Or 256, 261 (2014). "The distinction between a tax and a fee is whether the 'charge is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.'" Rogue Valley Sewer Services v. City of Phoenix, 357 Or 437, 446-447 (2015).³ The Rogue Valley court concluded, "a fee, then, is imposed on particular parties and is used to regulate or benefit those parties rather than being used for general public purposes or to raise revenue for such purposes." Id. at 447. See also Knapp v. City of Jacksonville, 342 Or 268 (2007) (Oregon Supreme Court held that city ordinance imposing a public safety surcharge was not a "property tax" subject to Measure 5 and 50 limits where the city would not impose a lien on property for unpaid

¹ See, League of Oregon Cities: TUF Solutions for Local Street Funding, Jan. 2008 (available at: <https://www.orcities.org/application/files/3015/7481/0598/TUFReport2011.pdf>).

² For more information on Measures 5 & 50 and Oregon's property tax system, see Oregon Department of Revenue, "A Brief History of Oregon Property Taxation", June 2009 (available at: <https://www.oregon.gov/DOR/programs/gov-research/Documents/303-405-1.pdf>).

³ The direct relationship between the fee charged and the service received by those who pay the fee, even if the charge is not individualized to the benefit or burden associated with each fee payer, is a fairly common standard to distinguish between a fee and a tax. See McQuillin Mun. Corp, Section 44.24 User fees distinguished from "taxes" (3d ed).

amounts, and the obligation to pay was not a direct consequence of property ownership); Roseburg School District v. City of Roseburg, 316 Or. 374 (1993) (City storm drainage fee was a fee for service and not a charge against property owners due to their ownership, but was imposed on person responsible for paying city's water utility charges; thus, fee was not a property tax subject to Measure 5).

Oregon courts have heard arguments on the “fee vs. tax” debate, and have repeatedly ruled that fees for government services (such as public safety fees, stormwater fees, etc.) are fees, not property taxes, so long as they are not charged to property owners as a consequence of property ownership and are charged for the service being provided and/or the use of the public facilities. For example, a fee added to a utility bill would be responsibility of the person who holds the utility bill; this could be a property owner but could also be a tenant or other occupant of a property. A tax is a charge which may become a lien on the property and is imposed on owners of property as a consequence of that property ownership. Numerous cities in Oregon have had successful transportation and other utility or service fees for decades. (See fn 1, and cities analyzed in the League of Oregon Cities publication).

The City's proposed transportation fee would be charged on utility bills, to individuals or businesses that hold utility accounts, and is proposed to be allocated based on an approximation of impact on the transportation system.