Right-of-way fees: Just compensation or just another tax?

As a public works official you have pleaded your case about the importance of implementing an effective right-of-way management program to your road agency management. In the end, both the elected officials and municipal management agree that the road agency must have a proactive program to control its interests within the public's right-of-way. You have succeeded!—at least with the first step. You are now ready to fund and implement the program. Now what?

First, congratulations—you have successfully sidestepped the mistake of addressing the funding issue in detail prior to obtaining this authority. Although you did indicate that you would develop a fair and reasonable system for funding with input (not necessarily support) from all stakeholders, you were intentionally vague on the details. That meant that your adversaries didn't have a financial leg to stop you at the political level. You indicated that the authority was necessary first and that it was not reasonable to obtain support for the program from those who were about to be regulated.

The question now is, how will it be funded? Should there be a direct fee for services or should the taxpayers fund it? The program can't operate without money. What do you do? What should you do?

These and other questions like this, related to fees, are the foundation of any new or improved right-of-way management and oversight program. Only after careful consideration of all the aspects of raising funds will you, the right-of-way program manager, be able to justify your charges and implement an effective program.

To balance the pros and cons of the various funding mechanisms, a fine line must be drawn on who contributes to the program, who benefits and why. Justification and documentation must be readily available in case someone asks, "How the heck did you come up with that number" and "Why do I have to pay you for that" from the utility and development community.

Start with the basic premise of charging a fee. In general, fees for the commercial use of the public rights-of-way do not constitute a burdensome general tax, but instead are charges imposed on the commercial user, the utility/service provider, who may pass it on to those who purchase the service.

If you don't charge an individual permit fee you will need to tap some other account. Most road agencies' only alternative is the general fund. If the city has a policy of subsidizing new
development and utilities, the general fund will be the way to go.

Next, determine how much of a general property tax subsidy this program should contribute. Researching the actual subsidy policy, if available and if in writing, will provide a defined direction on this item. Without a policy, develop and justify a percentage of contribution from the property tax fund. In one particular city this percentage is a 60/40 split program, whereby every dollar of regulatory fee is subsidized 40 cents by the general property tax fund. This was developed as a compromise with the local development community whose position was that their "improvements" increase the tax base, and any fee for reviewing their plans should be from that fund and not a new "tax." Unfortunately, although the policy was formulated for the builders, it now extends to all regulatory activities including independent utility placement in the public right-of-way.

Try to get the fee subsidy to be phased out after so many years. For instance, it could be 60/40 the first year, then 70/30 the next and so on. This will minimize the shock to the regulatees and increase your revenues, thereby decreasing the subsidy without having to return to the elected policy makers again and again.

As a general note, the general fund subsidy program should be evaluated on a regular basis, yearly or at least at every new election or significant change in political makeup of your governing body.

If others supported the elected officials with minimal influence from the development community, then head to the direct user fee aspect of the program. Identify how much the program is going to cost and who is going to pay.

With direct user fee funding, the issue of franchise fee payments, their accountability and internal city utility (water, sewer, stormwater departments) general fund contributions becomes an issue.

Most municipalities have a system to collect from utilities for their occupation of the right-of-way. In some cases, it is paid directly to the city, like with the cable company. In other cases, the fee may be paid directly to the state and then allocated back to the locals through a revenue sharing agreement. Check to make sure that your state has restrictions in place dictating what they can do with this money or you may find out that the state can withhold money to balance their budget leaving locals without funds.
When the franchise fees *do* come back to the city, find out how the budget department accounts for this revenue. Even though the general fund is this big pot of money, some accountability for money in and out should be in place. If not, the program may get defunded.

Franchise fees are considered by many to be a license fee for *their* use of the public right-of-way. This fee is used to "compensate" the municipality for a number of costs. These include increased paving costs, increased costs of installing and maintaining the city's utilities with the other stuff in the way and congestion during maintenance, and service connections to the utility that is in the right-of-way.

During this franchise fee debate, consider what, if any, fees are charged to internal city enterprise funds. These funds account for those activities of the city, which are financed and operated in a manner similar to private business enterprises where costs and expenses, including depreciation, are recovered principally through user charges. They are usually the city's utilities and may include water, sewer, storm, and sometimes power and telecommunication systems. The enterprise fund is supported by the rates that it charges to their customers. Most of the funds are run by municipal officials and staffed by municipal employees.

Since they are not completely separated from the city, they usually rely on the general fund to provide some support for such things as payroll, human resources, legal counsel and other administrative functions. The general fund is then usually compensated for this level of assistance through the use of an intra-fund transfer that shows up as a general fund contribution or overhead as a line item in the budget.

Much like the accountability of the incoming franchise fees, this general fund contribution may not be detailed. If that's the case, a franchise-like fee on your water department for their use of the right-of-way may not occur. However, if there is a measure of accountability and right-of-way management is necessary for continued monitoring of their activities within the public right-of-way, these funds may contribute. Again, if there has not been a history of these funds paying for their use of the right-of-way, support from management and the elected officials is necessary.

In a troubled economy, there are usually just two alternatives to increase revenues without cutting the budget. Either raise property taxes or raise fees for services. It's the raising of fees that usually goes under the radar screen of most public scrutiny and not perceived by the
general public to be a tax hike. Although the average property owner will see an increase in his combined tax and utility bill, they usually don't make that connection.

To sell the idea of raising fees to management, you need to convince them that the populations served by the utility and the population of the city are usually two different groups. Not all utility payers are property taxpayers as in the case of a city water system providing service outside of the city limits. The reverse is sometimes true also, where a property taxpayer is not a utility ratepayer as in the case of a city homeowner on well or septic. Defining the details of this union is key in getting the idea of a franchise fee across.

So there you have it, a quick overview into the world of right-of-way management, fees and politics. These are the basics of funding a proactive program and the differences in city versus private funding. Do your research, build consensus, then sell the heck out of it until an institutional structure is in place to perpetuate the program.

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The publication Excavation in the Right-of-Way reviews the need for coordinating and regulating activities within the public right-of-way and recommends guidelines for establishing the needed implementation mechanisms; through a research effort sponsored by public works agencies and utilities, the publication Managing Utility Cuts identifies various practices to better manage utility cuts. Each can be ordered online at www.apwa.net/bookstore or call the Member Services Hotline at (800) 848-APWA, ext. 3560.