Cite as Det. No. 18-0016, 37 WTD 231 (2018)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 18-0016
. . .	)	Registration No. . . .

[1] RCW 82.29A.020; RCW 82.29A.030; WAC 458-29A-100 – LEASEHOLD EXCISE TAX – OWNERSHIP OF STREET: An easement interest in a public street held by a municipal corporation is publically owned real property for the purposes of leasehold excise tax.

[2] RCW 28.29A.020 – LEASEHOLD EXCISE TAX – LABELING OF REVENUE – The fact that publically owned real property is not leased under a traditional lease does not prohibit the imposition of leasehold excise tax.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Fisher, T.R.O. – A municipal corporation protests the imposition of leasehold excise tax on street obstruction permits issued to persons needing to obstruct the public's right of way during construction projects. Because the municipal corporation has a real property interest in the public's right of way, and because the permits allow the permit holder to exercise dominion and control over a specific location, the street obstruction permits create a taxable leasehold interest. The petition is denied.[1]

ISSUE

Under RCW 82.29A.020 and .030, are fees paid to receive street obstruction permits subject to leasehold excise tax where permit holders may exercise dominion and control over real property interest owned by a municipal corporation?

FINDINGS OF FACT

. . . ("Taxpayer") is a municipal corporation located in Washington. The Legislature authorized Taxpayer to regulate the use of streets within Taxpayer's jurisdiction, and to prescribe the terms and conditions upon which those streets may be used. RCW 35.22.280.

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

In accordance with this authority, Taxpayer has promulgated a series of ordinances to regulate the use of its public streets. *See, e.g.*, . . . Municipal Code . . . *et. seq.* [Municipal Code] prohibits obstruction of the public right of way without a street obstruction permit. [Municipal Code] authorizes street obstruction permits and requires applicants to, show by plat or map the exact location of the work, structure, material, or activity that will obstruct the public right of way, when required by the city engineer; describe in detail the activity, extent, and duration of the obstruction, and the precautions to be taken to protect the public; pay the permit fee; and demonstrate an appropriate license or registration, in the case of contracting work, and post a bond.

Taxpayer has posted an application for the street obstruction permit on its website. . . . (last accessed January 12, 2018) (hereafter, "Application Form"). Consistent with the requirements set forth in [Municipal Code], the Application Form requires the applicant to include a description of the work to be done, the portion of the right of way to be closed, and a map or drawing of the proposed work area. *Id.* The Application Form requires the map or drawing to include [specified features] and to specify how much of the public right of way will be interrupted. *Id.*

The Department of Revenue's ("Department") Special Programs Division ("Special Programs") examined Taxpayer's records to determine whether the proper leasehold excise tax was collected and remitted to the State from January 1, 2012, through December 31, 2015 (the "Audit Period"). After examining Taxpayer's records, Special Programs assessed $ . . . in leasehold excise tax and $ . . . in interest, on revenue received from street obstruction permits, a golf course, and the fair market value of a piece of property rented to the . . . Convention & Visitor's Bureau.

Taxpayer timely sought administrative review of the assessment of leasehold excise tax with respect to revenue from the street obstruction permits. In its petition, Taxpayer asserts that it does not own the streets it issues street obstruction permits for, so leasehold excise tax cannot apply. Taxpayer contends that it merely has an easement in the streets.[2] Taxpayer further argues that revenue received from street obstruction permits is a regulation of use, not a rental of the streets.

ANALYSIS

RCW 82.29A.030(1)(a) imposes a leasehold excise tax on the act or privilege of occupying or using publicly owned real or personal property through a leasehold interest. The tax is measured by the "taxable rent," as defined in RCW 82.29A.020(2). "Leasehold interest" is defined as:

> . . . an interest in publicly owned real or personal property which exists by virtue of any lease, **permit**, license, or any other agreement, written or verbal, between the public owner of the property and the person who would not be exempt from property taxes if that person owned the property in fee, granting possession and use, to a degree less than fee simple ownership.

[2] Taxpayer has not provided any documentation to support this assertion. As explained in *Kiely v. Graves*, 173 Wn.2d 926, 930-3, 271 P.3d 226 (2012), a city may have an easement in the streets if the street was created via a common law dedication or a city may have a more significant ownership in fee by way of a statutory dedication. It is unclear whether Taxpayer's streets were dedicated by common law or statute. However, as explained *infra*, for the purposes of analysis of leasehold excise tax the distinction is irrelevant. Accordingly, for the purpose of this determination, we accept Taxpayer's assertion that it merely has an easement in the streets.

RCW 82.29A.020(1)(a)[3] (emphasis added).

WAC 458-29A-100(2)(g) provides further guidance on the definition of "leasehold interest":

> "Leasehold interest" means an interest granting the right to possession and use of publicly owned real or personal property or real or personal property of a community center which is exempt from property tax as a result of any form of agreement, written or oral, without regard to whether the agreement is labeled a lease, license, or permit.
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> (i) Regardless of what term is used to label an agreement providing for the use and possession of public property or property of a community center which is exempt from property tax by a private party, it is necessary to look to the actual substantive arrangement between the parties in order to determine whether a leasehold interest has been created.
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> (ii) Both possession and use are required to create a leasehold interest, and the lessee must have some identifiable dominion and control over a defined area to satisfy the possession element. The defined area does not have to be specified in the agreement but can be determined by the practice of the parties. This requirement distinguishes a taxable leasehold interest from a mere franchise, license, or permit.
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> For example, Sam sells hot dogs from his own trailer at varying sites within a county fairgrounds during events. Sam is not assigned a particular place to set up his trailer nor does he store his trailer on the fairground between events. Sam's right to sell and his use of the property is considered a franchise and not a leasehold interest. The necessary element of possession, involving a greater degree of dominion and control over a more defined area, is lacking.

. . . [Thus, the leasehold excise tax applies when a person obtains the right to possess and use publically owned real or personal property (or personal property of a community center) which is exempt from property tax, regardless of the form of the agreement.] RCW 82.29A.030(1)(a); RCW 82.29A.020(1)(a); WAC 458-29A-100(2)(g).WAC 458-29A-100(2)(g) makes clear that for a leasehold interest to be created, the lessee must have some identifiable dominion and control over a defined area to satisfy the "possession and use" element. *See also* Det. No. 00-196, 20 WTD 279, 311 (2001) (". . . for a leasehold interest to be found, a degree of dominion and control over a defined area must be present to satisfy the possession element.").

Here, the "possession and use" element is met. The street obstruction permits grant the right to possess and use a defined portion of the public right of way. The Application Form and [Municipal Code] require applicants to specify exactly on a map or diagram where the applicant will interrupt the public's right of way on the street. Because the public's right of way is interrupted, a street obstruction permit holder may exclude others from the area by virtue of the permit. Unlike the example in WAC 458-20-100(2)(g), the street obstruction permit is for a defined area and allows

[3] [The City is responsible for collecting leasehold excise tax from the person receiving the leasehold interest and is liable to the Department for any unremitted tax. RCW 82.29A.050(2).]

the permit holder to exclude the public. *See also* 20 WTD at 311. Accordingly, the street obstruction permit grants the right to possess and use within the meaning of a leasehold interest.

The second element requires the possession and use to be of publically owned real or personal property. Taxpayer asserts it does not own the roads, but merely has an easement in the roads. In Washington, an easement is an ownership interest in real property. *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995) (transfer of ownership of an easement, like all transfers of property, must be in writing to satisfy statute of frauds); *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wn.2d 716, 719, 388 P.2d 949 (1964) (same); *Bakke v. Columbia Valley Lumber Company*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956) (an easement gives grantee ownership of right to use the subservient land for a specific purpose); *Jones v. Berg*, 105 Wash. 69, 77, 177 P. 712 (1919) (an easement is a tenement, or estate in land); *Humphrey v. Krutz*, 77 Wash. 152, 157, 137 P. 806 (1913) (ownership of easements may be settled through a quiet title claim); *Kirk v. Tomulty*, 66 Wn. App. 231, 236, 831 P.2d 792 (1992) (transfer of ownership of easement interest must be in writing to satisfy statute of frauds, with certain exceptions); *see also* Black's Law Dictionary, 622 (10th ed. 2014) (an "easement" is "an interest in land **owned** by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose." (emphasis added)). The second element is met.

Finally, the "agreement" element is met. The agreement is the street obstruction permit itself. Both RCW 82.29A.020(1)(A) and WAC 458-29A-100(2)(g) recognize that an agreement to convey a right to possess and use publicly owned real or personal property may be a permit.

Having found the street obstruction permits meet all three elements of a leasehold interest, we conclude Special Programs properly assessed leasehold excise tax on revenues received in exchange for fees paid for the street obstruction permits.[4]

We are unpersuaded by Taxpayer's argument that its easement interest is not "ownership" of real property and its citations to *Jones*, 105 Wash. at 77, and the Washington Real Property Deskbook 3rd Edition, Section 10.2(1), in support of this contention. We note that Taxpayer has not provided evidence that it only owns an easement in the streets at issue. However, even if we assume for argument's sake that Taxpayer merely holds an easement in those streets, it has not persuaded us that an easement is not a form of ownership in the streets.

The *Jones* Court quote provided by Taxpayer omits important language. The quote, in full, provides:

> An 'easement' has been defined as a liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil. It is a right which one person has to use the land of another for a specific purpose. **As more fully defined, it is a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something**

[4] [Thus, the leasehold excise tax applies when a person obtains the right to possess and use publically owned real or personal property (or personal property of a community center) which is exempt from property tax, regardless of the form of the agreement.]

> **on his own tenement for the advantage of the former, a charge or burden upon one estate (the servient) for the benefit of another (the dominant).**

105 Wash. at 77 (emphasis on omitted language). The *Jones* Court defines an easement as a "tenement," which is a property interest. Black's Law Dictionary, 1697 (10th ed. 2014) (a "tenement" is defined as "[p]roperty (esp. land) held by freehold; an estate or holding of land."). The Jones Court notes that an easement is an estate in land, which is ownership. 105 Wash. at 77. By indicating an easement is distinct from ownership of the soil, the *Jones* Court does not find that an easement is not an ownership interest at all; instead, the *Jones* Court draws a distinction between an easement and owning land in fee.

Taxpayer also relies on the following quote from Washington Real Property Deskbook (3rd Edition, Section 10.2(1)):

> An easement is the privilege to use the land of another. *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 156 P.2d 667 (1945). It is an interest in land, but not an estate in land. *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 298 P.2d 849 (1956). An easement is merely a use interest, not an ownership interest. *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 351 P.2d 520.

In *Bakke*, the Washington Supreme Court wrote:

> An easement, although an incorporeal right, is an interest in land. . . . A license, on the other hand, authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass. . . . A license differs from an easement in that it is revocable and nonassignable, and does not exclude possession, either wholly or partially by the owner of the servient tenement. . . . if a license is intended to be irrevocable, it is intended as an easement, as it gives an interest of a permanent or quasi permanent nature.

49 Wn.2d at 170. The *Bakke* Court wrote that a license, not an easement, was not an estate in land because a license is revocable by the owner of the underlying land while an easement is irrevocable by the owner of the underlying land. *Id. Bakke* does not stand for the proposition that easements are not an estate in land.

In *Coast Storage*, the Court of Appeals wrote "[a]n easement is a use interest, and to exist as an appurtenance to land, must serve some beneficial use." 55 Wn.2d at 853. Nowhere in the opinion did the *Coast Storage* Court state that an easement is not an ownership interest. The *Coast Storage* Court was dealing with an easement that was created for a specific use, and noted that when that the person who owned the easement took title to the land the easement encumbered, the easement terminated by operation of law because the easement no longer had any use. *Id.* ("One cannot have an easement in his own property. . . . The strip now ends in the middle of plaintiffs' property. It does not lead anywhere, truly a dead-end roadway."). Accordingly, *Coast Storage* does not support the proposition that an easement is not an ownership interest.

Finally, Taxpayer argues that the money it receives from applicants for street obstruction permits is not rent, but simply a regulatory fee. Taxpayer cites *Baxter-Wyckoff Co. v. City of Seattle*, 67 Wn.2d 555, 563, 408 P.2d 1012 (1965) for the proposition that charging citizens according to the square footage of the street area they are using is a regulation of streets, and not a rental of the streets.

As we noted in Det. No. 16-0190, 36 WTD 42, 46-7 (2017):

> [RCW 82.29A.020(1)(a)'s definition of a leasehold interest] for [leasehold excise tax] differs from the legal definition of a lease and license in other contexts. . . . , the term "leasehold interest" as used in the [Chapter 82.29A RCW] has "a meaning not ordinarily contemplated by the term." *Mac Amusement Company v. Dep't of Revenue,* 95 Wn. 2d. 963, 971, 633 P.2d 68 (1981). As we stated in Det. No. 92-316, 12 WTD 477 (1992), "it is clear that the law intends 'possession and use' to have a broader meaning than the kind of exclusive dominion and control exercised by a lessee under a traditional lease, since the legislature expressly included other types of rights and other types of agreements within its reach."

The Legislature created specific definitions for the leasehold excise tax in Chapter 82.29A RCW; those definitions control to determine whether or not Taxpayer is subject to leasehold excise tax. The Legislature's definition of a leasehold interest subject to leasehold excise tax specifically includes interests created by permits. RCW 82.29A.020(1). While the leasehold excise tax is [measured by] "taxable rent" as defined in RCW 82.29A.020(2), the fact that there is not a traditional lease does not bar the imposition of leasehold excise tax.

As explained above, the street obstruction permits meet the elements required for imposition of the leasehold excise tax. While Taxpayer is authorized to regulate the use of streets within its jurisdiction, doing so via the street obstruction permits [obligates Taxpayer to collect and remit] leasehold excise tax.[5]

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 18th day of January 2018.

[5] [The Legislature has enacted certain exemptions to the leasehold excise tax, including an exemption for any leasehold interest 'which give use or possession of the leased property for a continuous period of less than thirty days.' RCW 82.29A.130(9). The Taxpayer has not asserted that the permits at issue here are exempt from the leasehold excise tax.]