Right of Way Ordinance

JANUARY 8, 2024

Where have we been?

- December 2021 – Council held a work session on the merits of using a franchise model versus a code model. After deliberation the council directed staff to move forward with drafting a code model.
- June 21, 2022 – Council unanimously voted to authorize a sole-source procurement contract with Right-of-Way Consultants LLC to Draft a Right-of-Way Ordinance and managing the usage of a Right-of-Way Ordinance.

Where have we been?

- January 2023 – New Council Members
- April 17, 2023 – Draft Ordinance and fee schedule was presented to the City Council and failed.
- Council was asked if they would like to review it again and nearly all said they do want to revisit the issue.

What Makes Good Tax Policy

User Benefit Principal

User Benefit	Redistribute Cost
Those who use – pay	Cost is not tied to use
Pay according to usage	Shared Cost

Arguably, the most fair tax is one that is based on the amount the good is used by an individual.

KEIZER SINCE 1982

Why should utilities pay to use the public's right-of-way?

Inconvenience

Reliance on Public Space

Wear and Tear

Why should utilities pay to use the public's right-of-way

https://vimeo.com/70434712

Right-of-Way vs Franchise

Two methods for regulating use of the publics right-of-way

Franchise

An authorization granted by a government or company to an individual or group enabling them to carry out specified commercial activities in a contractual format.

Ordinance

A piece of legislation enacted by a municipal authority that applies to all providers in a uniform license system that requires utilities to follow the city-established requirements for use of the ROW.

"A Utility Rights-of-way Ordinance is a tool used by an increasing number of cities to manage the use of public rights of way ("ROW") by cable, telecom, and other utility providers."

"It is designed to replace individually-negotiated franchise agreements with a uniform license system that requires utilities to follow the City-established requirement for use of the ROW."

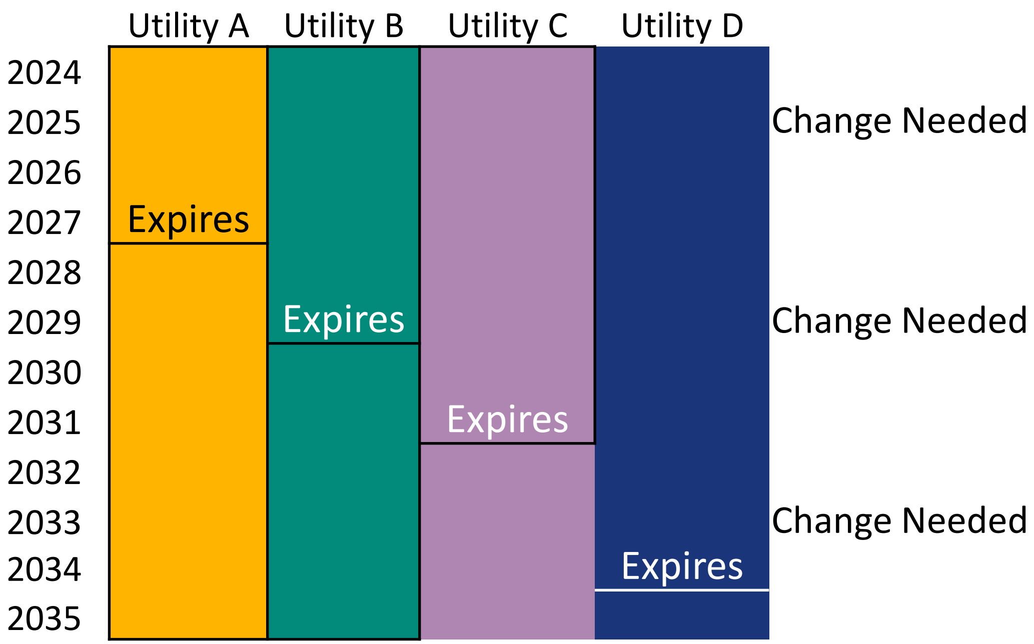
Spencer Parsons, Special Telecom Counsel with Beery Elsner & Hammond LLP

Franchise Limitations

- Franchises typically limit the franchising authority's ability to update its ROW regulations in a manner that is effective during the franchise term.
- Changes have to be mutually agreed-upon amendments.

Franchise Limitations

- Because of franchise expirations, differences in requirements become offset between each provider.
- Compensation cannot change until renewal



Discrimination Between Telecom

Paying - Franchised	Not Paying – Non-Franchised
Gas	Telecom
Electric	Competitive Cable Providers
Comcast	Competitive Electric suppliers - Providers using transmission of franchisees but purchasing energy on the open market
Century Link	
Water	
Sewer	

Discrimination Between Telecom

Paying - Franchised

- Competitive Disadvantage

Not Paying – Non-Franchised

- Competitive Advantage

"Applying different franchise fees for access to its ROW"… is …"explicitly prohibited by federal law."

Spencer Parsons, Special Telecom Counsel with Beery Elsner & Hammond LLP

Conformity Through Ordinance

- Permitting
- Restoration and relocation requirements
- Minimum insurance
- Bonding and indemnification
- Payment of privilege tax

Other Advantages of ROW Ordinance

- Secures compensation
- Eliminates staff and contract staff time and costs to negotiate
- Levels the playing field for all businesses use of the ROW versus the free riders

Commonly-Argued Disadvantages of Right-of-Way Ordinances

- Perception of being a new tax
  - For existing franchisees – it would not change anything
  - For non-licensed providers it would be new, because they are not currently paying

Commonly-Argued Disadvantages of Right-of-Way Ordinances

"It does not allow for a defense against legal challenges to the authority to implement the regulations that the regulations derived from the mutually negotiated and agreed-upon franchise."

Spencer Parsons, Special Telecom Counsel with Beery Elsner & Hammond LLP

Commonly-Argued Disadvantages of Right-of-Way Ordinances

"The City would be giving up certain breach of contract remedies if the license is not considered an agreement."

Spencer Parsons, Special Telecom Counsel with Beery Elsner & Hammond LLP

The city would be limited to the enforcement remedies in the ROW ordinance itself.

Commonly-Argued Disadvantages of Right-of-Way Ordinances

Cable operators are governed by federal law, which requires franchises, and cities must comply.

"General ROW use requirements in an ordinance could be (and should be) incorporated by reference."
Spencer Parsons, Special Telecom Counsel with Beery Elsner & Hammond LLP

Commonly-Argued Disadvantages of Right-of-Way Ordinances

Creation takes time up front, and opposition is expected.

"Some utilities will likely oppose ROW ordinance adoption, no matter what it looks like, because they will want to be able to continue negotiating their own terms in a franchise, rather than a uniform set of rules."
Spencer Parsons, Special Telecom Counsel with Beery Elsner & Hammond LLP

Commonly-Argued Disadvantages of Right-of-Way Ordinances

- Franchisees like certainty
  - They understand their obligations for the term of the franchise and can make plans based on that term for their customers
  - Ensures that any procedural requirements won't change without their mutual consent.

Driving and Restraining Forces Analysis

Driving Forces	Restraining Forces
Uniformity	Perception
Changes must wait until term ends	Mutually agreed upon authority
Varying contract termination dates	Giving up breach of contract remedies
Level Playing Field	Cable providers must still have franchises
Reduces long-term negotiating costs	Time investment up front
Ensures compensation for all ROW use	Franchisees want long-term certainty

Special Counsel Recommendation

"On Balance this office generally recommends adoption of a ROW ordinance as a more effective and efficient tool to ensure fair and equal access to and use of the ROW, as well as ensuring the City receives reasonable compensation for such use from all users."

Spencer Parsons, Special Telecom Counsel with Beery Elsner & Hammond LLP

Wrap Up

We have been looking at it as one side or the other. It is possible for us to pursue an AND route where we have franchises with some and a ROW ordinance to encompass all others.

Where We Ended

- The draft of the ordinance took a long time to write
- Our franchisees did not feel there was adequate back and forth between the City and our their organizations.
- This policy issue crossed council's (elections) which means that the issue was new to almost half the council.
- An AND course may be the best option

Recommendation

- Explore the AND model of having some right-of-way franchises and an ordinance that catches all.
- Spend more time working with users of the right-of-way to collect more feedback.

Keizer
Work after Retirement Policy Work Session

January 8, 2024

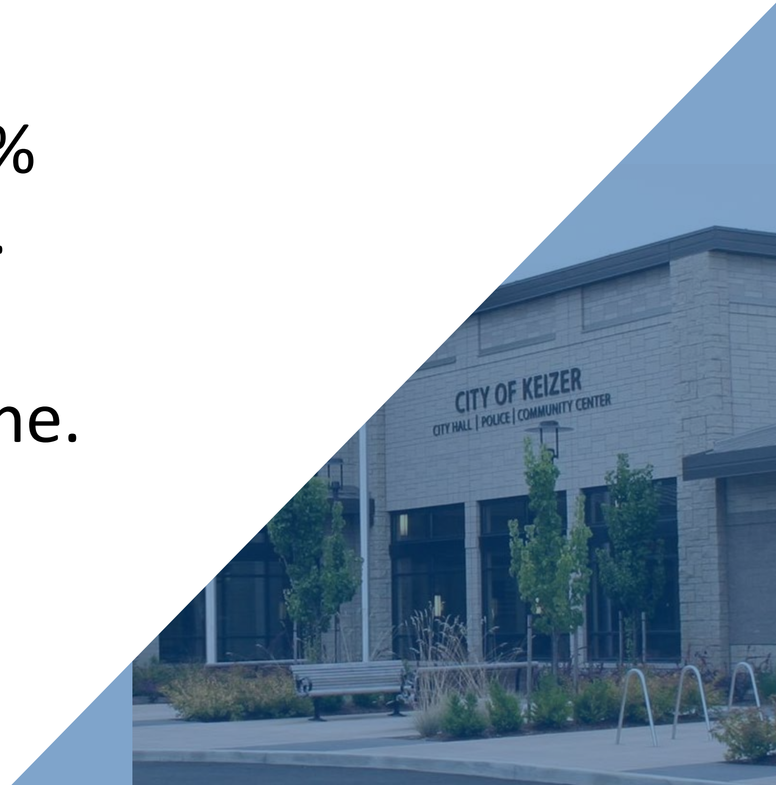
Existing Work After Retirement Policy

- Pursuant to Oregon Senate Bill 1049 the City Council adopted a policy effective July 6, 2021 that allows employees who attain "normal retirement age" under PERS to retire and request to be rehired in a "limited duration" position.
- Rehired employees are not subject to the hours worked limitations that if exceeded could impact their retirement benefits.
- Employers are not required to remit the employee 6% PERS contribution (paid by the City).
- The employer PERS contribution is used to pay down the City's overall obligation.

Existing Work After Retirement Policy - Results

As of January 4, 2024:

- 7 out of 18 eligible employees have elected to retire and rehire under the City's policy.
- The City has **saved $99,819** by not remitting the 6% employee PERS contribution paid by the employer.
- The City has paid **$418,970 towards** the overall employer pension obligation due to this policy alone.



Work After Retirement Policy - Timeline

- House Bill 2296 extends the provisions of Senate Bill 1049 by 10 years or until December 31, 2034.
- Currently the City's Work After Retirement policy ends December 31, 2024 regardless of any extension by the State.
- The Keizer Police Association Memorandum of Understanding (MOU), 2021-23 #2 which addresses this issue ends December 31, 2024.
- It's up to the City Council to decide whether to extend the retire/rehire policy and if so, what the details of the policy should be.

Work After Retirement Policy Update – How does it save The City Money?

Rehire	Salary	6% employee Contribution (paid by the City)	Employer Contribution
Before Retirement	✓	✓	✓
Retirement (Benefit set, it does not increase)			
Rehire	✓		✓*

* The employer contribution goes towards the unfunded accrued liability

Replacement (New Employee)	Salary	6% employee Contribution (paid by the City)	Employer Contribution
Before Retirement	✓	✓	✓
Retirement (Benefit set, it does not increase)			
New Employee Hired	✓**	✓	✓

** New Employee would come in near the bottom of the pay level versus at the top of the pay

Work After Retirement Policy - Pros/Cons

Pros:

- Retain experienced staff
- 6% cost savings from not remitting the employee PERS contribution
- Employer PERS contribution used to pay down PERS liability

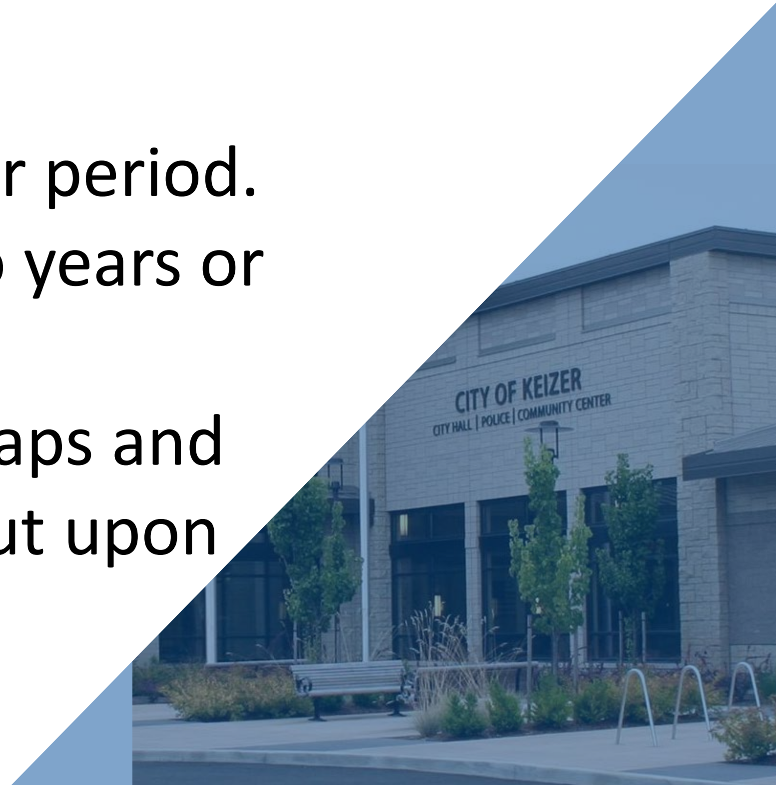
Cons:

- Retain more expensive staff
- Additional accrual payouts upon final retirement
- Public perception
- Delays promotional/special duty opportunities

Work After Retirement Policy - Options

Potential policy options to consider:

- Take no action and let the existing Work After Retirement Policy end December 31, 2024.
- Modify the policy duration or terms, such as:
  - Extending the policy for 2, 5 or the full ten year period.
  - Limit rehires to a limited duration, such as two years or less.
  - Adjust rehire provisions such as limit accrual caps and what unused paid time off benefits are paid out upon subsequent retirement.



Work After Retirement Policy - Recommendation

The Executive Leadership Team is recommending the following as a reasonable extension of the policy:

- Extend it for five years and then revisit the policy.
- Limit the rehire period to a maximum of two years.
- Limit accrual caps and paid time off benefits to limit large lump sum payments at the end of the two year rehire period.

Work After Retirement Policy - Next Steps

Next Steps to consider:

- Take time to consider the policy,
- Understand that the optics may not be popular with the public or internally with city staff,
- Ask any follow up questions, and
- Obtain feedback and revisit in a month.