

HOUSE BILL REPORT

SHB 1512

As Passed House:
March 4, 2013

Title: An act relating to fire suppression water facilities and services provided by municipal and other water purveyors.

Brief Description: Concerning fire suppression water facilities and services provided by municipal and other water purveyors.

Sponsors: House Committee on Local Government (originally sponsored by Representatives Takko, Kochmar, Fitzgibbon, Buys, Sullivan, Magendanz, Springer, Van De Wege and Ryu).

Brief History:

Committee Activity:

Local Government: 2/8/13, 2/12/13 [DPS].

Floor Activity:

Passed House: 3/4/13, 97-0.

Brief Summary of Substitute Bill

- Establishes and clarifies the authority of water purveyors to supply fire suppression water facilities and services for cities, towns, and counties, and to recover the costs of providing those facilities and services.
- Provides liability protections for purveyors supplying fire suppression water facilities and services.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Takko, Chair; Fitzgibbon, Vice Chair; Taylor, Ranking Minority Member; Kochmar, Assistant Ranking Minority Member; Buys, Crouse, Lias, Springer and Upthegrove.

Staff: Michaela Murdock (786-7289).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Over 17,000 public water systems exist in this state. Public water systems may be owned by public, private nonprofit, or investor-owned utilities. Many publicly owned public water systems are owned and operated by cities, towns, and water-sewer districts. Irrigation districts, public utility districts, and counties may also own and operate public water systems.

Water-sewer districts (districts) may purchase, construct, maintain, and supply waterworks to furnish water to inhabitants within and outside of the district, and may develop and operate systems of sewers and drainage. Districts may also create facilities, systems, and programs for the collection, interception, treatment, and disposal of wastewater, and for the control of pollution from the wastewater. Districts are authorized to establish rates and charges for providing water and sewer services.

Cities and towns may provide for the sewerage, drainage, and water supply of the city or town, and may establish, construct, and maintain water supply systems and systems of sewers and drains within or without their corporate limits. Cities and towns are also authorized to establish rates and charges for providing water and sewer services. In 2002 the Legislature passed House Bill 2902, which expressly authorizes cities and towns operating water supply systems to include fire hydrants as an integral utility service incorporated within general rates.

Counties may purchase, construct, and maintain a system or systems of water supply within the county. Counties may control, regulate, operate, and manage such systems and provide funds by general obligation bonds, revenue bonds, and local improvement district bonds or assessments.

Public Water Systems.

A public water system is any system providing water intended for, or used for, human consumption or other domestic uses. It includes water source, purifying treatment, storage, transmission, pumping, and distribution facilities where water is furnished to a community, individuals, or is made available to the public for human consumption or domestic use. It does not include water systems serving one single-family residence. A "purveyor" means any agency or subdivision of the state, or any municipal corporation, firm, company, mutual or cooperative association, institution, partnership, or person or any other entity, that owns or operates for wholesale or retail service a public water system. It also means the authorized agents of any such entities.

Under the Public Water System Coordination Act of 1977, the Secretary of the Department of Health must adopt performance standards relating to fire protection to be incorporated into the design and construction of new and expanding public water systems. The standards must be consistent with applicable national standards.

Case Law Relating to Local Government Funding of Fire Hydrants.

Case law provides that a local government does not have power to impose taxes without statutory or constitutional authority. Local governments may impose a fee, however, pursuant to their general police power under the Washington Constitution.

In *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008) (*Lane*), the Washington Supreme Court held that providing fire hydrants is a government responsibility, not a

proprietary one, for which the government must pay out of its General Fund. In reaching its holding, the court also found that a monthly fire hydrant charge paid by water utility ratepayers to a public utility was a tax and not a fee for three reasons: (1) the purpose of the charge was to increase revenue and not to regulate fire hydrants or water usage; (2) ratepayers paid the same fixed charge whether they used the hydrants or not; and (3) all persons benefitted from the hydrants, not just ratepayers.

Under the Washington Constitution: "No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied." The court in *Lane* held that the monthly fire hydrant fee, which was in actuality a tax, was an unlawful tax that violated the constitution, because it neither explicitly stated the imposition of a tax, nor stated the object of the tax. In contrast, a tax on public utilities (rather than a fee charged to ratepayers) to make up the cost of fire hydrants is lawful, even though the tax increase results in the public utility increasing its rates for ratepayers.

In *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012) (*Bonney Lake*), the Washington Supreme Court considered issues similar to those considered in *Lane*.

Tacoma and Tacoma Public Utilities had franchise agreements with Pierce County, Fircrest, University Place, and Federal Way to provide water services. Prior to *Lane*, Tacoma paid for fire hydrants in its jurisdiction and the other jurisdictions by charging ratepayers a hydrant fee. Following *Lane*, Tacoma and Tacoma Public Utility ceased charging Tacoma ratepayers and sent bills to the other jurisdictions for hydrant costs. The jurisdictions refused to pay the costs.

Ultimately, the court in *Bonney Lake* held that Tacoma, acting in a proprietary capacity in entering into the franchise agreements, was contractually obligated by the agreements to provide hydrant services and to bear the costs of those services. It noted that Tacoma and Tacoma Public Utilities could have negotiated for the cost of the hydrants to be borne by the other jurisdictions, but it had not. The court also declined to find that a charge for hydrants always results in a tax, and held that whether a charge is a tax or a fee depends on how the charge is levied.

Summary of Substitute Bill:

Intent. In enacting the bill, the Legislature specifically responds to the Washington Supreme Court cases of *Lane* and *Bonney Lake*. It finds that governmental and nongovernmental water purveyors play a key public service role in providing water for fire protection, and there is currently uncertainty and confusion as to a water purveyor's role, responsibilities, cost allocation, and recovery authority related to those services. The Legislature intends to address that uncertainty and confusion.

Definitions. Frequently used terms are defined, including:

- "fire suppression water facilities," which means water supply transmission and distribution facilities, interties, pipes, valves, control systems, lines, storage, pumps, fire hydrants, and other facilities, or any part thereof, used or usable for the delivery of water for fire suppression purposes; and

- "fire suppression water services," which means operation and maintenance of fire suppression water facilities and the delivery of water for fire suppression purposes.

Cost Allocation and Recovery. A purveyor may allocate and recover the costs of fire suppression water facilities and services: (1) from all customers as costs of complying with state law and regulations; (2) from customers based on service, benefits, burdens, and impacts; or (3) both.

Contracts for Facilities and Services. A city, town, or county may contract with purveyors for the provision of fire suppression water facilities, services, or both.

Payment by Counties. A county is not required to pay for fire suppression water facilities or services unless it is a customer, acting as a purveyor, or has agreed to do so consistent with applicable law.

Liability. Municipal and nonmunicipal purveyors are not liable for any damages that arise out of a fire event, relating to the operation, maintenance, and provision of fire suppression water facilities and services, under certain circumstances.

Consistent with applicable statute, agreements or franchises may include indemnification, hold harmless, or other risk management provisions under which purveyors may indemnify and hold harmless cities, towns, and counties against damages arising from fire suppression activities.

Other provisions. The statutory provisions are to be liberally construed, confer powers that are supplemental to powers conferred by other law, and do not affect or impair any ordinance, resolution, or contract lawfully entered into prior to the bill's effective date.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The Washington Supreme Court cases of *Lane* and *Bonney Lake* specifically referenced fire hydrants; however, maintaining fire hydrants is only one minor cost of the total cost of maintaining fire protection infrastructure for communities. The cost of this infrastructure is not insignificant.

Historically, the cost has been recovered through charges to ratepayers in their water bills, but the holdings of *Lane* and *Bonney Lake* have taken away this option. Governments cannot charge ratepayers for these costs, but rather must tax taxpayers. As a result, cities, counties, and utilities have been left struggling to figure out how to fund fire suppression facilities and services. They need questions answered: How can they charge for these costs? What portion of the water system can they charge for (given that only part of the system is used for

fire suppression)? And what is the status of existing franchise agreements? The bill will resolve these questions.

As a result of turmoil in the law, fire districts have been locked out of their fire hydrants for a number of years. Cities have incurred costs of hundreds of thousands of dollars, because they do not know how to allocate and recover the costs. Special purpose districts, which do not have taxing authority and have been told they cannot charge fees for such costs, have sent bills to cities and counties that remain unpaid. Cities, counties, and utilities do not know how to lawfully, effectively, and efficiently charge for and recover these costs. If the Legislature does not clarify the law, cities, counties, and utilities are not sure how they will raise the money to fund these facilities and services.

The bill is the result of collaborative effort and support from cities, counties, and utilities.

The fundamental thrust of the bill is to allow cities, counties, and utilities to do what has been working for them for the past 100 years. Charging ratepayers was a mode of doing business that everyone was comfortable with and it worked well for everyone.

The liability provisions of the bill will help address the current problem of nonmunicipal water purveyors not maintaining their fire suppression systems. These purveyors will be required to put into effect a hydrant maintenance plan, which will help ensure that firefighters can actually use the facilities in a fire event. The liability provisions will also help ensure that water purveyors continue to provide fire suppression services. Given the uncertainty regarding liability, some purveyors have said that they will no longer provide hydrant service. This bill will bring some certainty back to the process, and will encourage investment in fire suppression facilities and services.

The bill is consistent with existing case law, but resolves the confusion created by *Lane* and *Bonney Lake*.

The difference between a ratepayer and a taxpayer is very small, and the shift in cost will be minimal.

(Opposed) None.

Persons Testifying: Representative Takko, prime sponsor; Lloyd Warren, Cascade Water Alliance; Beau Bakken, Washington Fire Chiefs Association; Blair Burroughs, Washington Association of Sewer and Water Districts; Al Rose, Pierce County; Tom Brubaker, City of Kent; Adam Gravley, Van Ness Feldman GordonDerr; and Steve Lindstrom, Sno-King Water District Coalition.

Persons Signed In To Testify But Not Testifying: None.