of the lane on an empty freeway in the middle of the night.

Great care must be taken to prepare high-quality information materials and to disseminate them carefully. Confusion and ignorance concerning the project's rationale and equitable application will quickly be employed as weapons. The media have an uncanny proclivity for opportunities to rail against insensitive bureaucracies and their outrageous impositions on the public. And there are a few elected officials who specialize in seizing on confusion as an opening for demagoguery. It is vital to involve elected officials or their representatives early in the planning process. While demagogues may not be influenced, their statements can be offset by endorsements from officials who enjoy the public trust.

THE STRUCTURE FOR PLANNING AND IMPLEMENTATION

We have thus far identified the phenomena we feel most threaten the success of incentive-disincentive measures. These observations are based on considerable first-hand experience with planning and implementation of such measures. From this experience we have drawn up some fundamental recommendations for the structure of the entity that should plan and implement the measure.

We envision a planning team that consists not only of the orthodox agencies but also of elected officials or their representatives. Traditionally, there has been a distinct separation between administrators and elected officials. The officials often vote to proceed with the planning of projects they know little about. Then an agency will prepare the project and may well implement it without further approval. If implementation then reveals considerable controversy, the officials will frequently call for its abrupt termination. This simplistic process would doom most of the projects we have seen proposed.

Inclusion of representatives of elected officials as well as administrators of all related departments of all affected jurisdictions will bring the broader expertise needed to locate the less obvious second- and third-order effects and to assign relative values to difficult-to-quantify factors. In this respect, elected officials are highly trained in judging public sensitivities and, if they are offered constructive participation in the planning, will be able to enhance the project's feasibility.

As each facet of the project is run past the participants, second- and third-order effects emerge surprisingly quickly. Estimates of their significance will vary, of course, according to the subjective perception of the participant, often reflecting his specialization. We have been characterized as "professional worriers" in one such planning situation, but we can imagine worse labels. Experience indicates that resolution of disputes by voting would have no utility. Any participant in such planning sessions could remove his support by leaving or, worse, by remaining and keeping quiet. We have found that consensus as to the wisest course most often follows adequate discussion.

Finally, such a structure for planning will result in a highly expert group that can oversee the management of implementation during the critical first days after startup. This will provide a capability for rapid adaptation of the project if it is needed to forestall peremptory shutdowns during this sensitive period.

REFERENCE


Legal Considerations in Urban Transportation Pricing

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There have been many approaches suggested for pricing urban transportation to achieve traffic management, resource allocation, and environmental goals. These methods—tolls, taxes, supplementary licenses, fare changes—all must be evaluated by policy makers on the basis of legality as well as the political and technical feasibility and their social, environmental, and economic impact. This paper has been formulated to provide a checklist of legal issues to be considered in reviewing pricing proposals. It must be emphasized that the legal issues should not be thought of as barriers to action. Careful review of the authority to implement and precise drafting that is based on strong empiric data will overcome most legal problems. To a great extent, the success of pricing mechanisms depends more on political will than on legalities.

GENERAL LEGAL CONSIDERATIONS

Four questions pose the basic legal issues that need to be considered before taking a decision about implementing any pricing mechanism. The discussion here is limited since it is general rather than a detailed analysis of specific proposals.

Can the Pricing Technique Be Implemented as a Regulatory Measure Under the Police Power in General or Under Specific Delegation of Authority?

The powers of local government are limited to those that are granted in express words, those necessarily or fairly implied in or incident to the express powers, and
those that are essential to the objects and purposes of the municipal corporation. This means that the local government’s ability to put into effect a pricing mechanism will depend on the extent of delegation of taxing and regulatory authority by the state or the granting of specific statutory authorization.

The police power—the power to legislate for the health, safety, morals, and public welfare—is an inherent power of the states reserved by the tenth amendment to the U.S. Constitution. Municipalities have no inherent police power except that vested in them by the state through the state constitution, charters, or statutes. Whether a municipality receives its authority through a constitutional delegation or through legislative permission is important. Home-rule jurisdictions that are granted the right of local self-government by the home-rule powers in the state constitution have virtual plenary authority in exercising their police power unless it is constrained by the legislature. On the other hand, local governments whose power has been granted under legislative authority typically have less latitude in exercising their police powers.

The power to regulate the use of the streets and sidewalks or vehicles used thereon is a common exercise of the police power. But states usually make a separate grant of power in this area, and they generally retain control over state roads and forbid local governments to enact ordinances that are inconsistent with state traffic regulations. The constitution, charter, or general statutes may confer power over streets on municipalities. This delegated power may take the form of granting or prohibiting the use of the streets (§30.40). Local authority over streets includes the ability to prohibit commercial traffic on certain streets, even if exclusion impinges on interstate commerce, provided the ordinance was designed primarily for safety purposes and to avoid vehicular congestion and other hazards (Smallwood v. D.C., 57 App. D.C. 58, 17 F.2d 210 (1927)). Other examples of municipal regulation of streets deal with parking, installation and maintenance of meters, traffic control, and traffic signing.

A necessary concomitant to the examination of authority is a review of statutory prohibitions to enactment of pricing mechanisms. For example, the prohibition of commercial traffic on certain streets, even if exclusion impinges on interstate commerce, provided the regulation was designed primarily for safety purposes and to avoid vehicular congestion and other hazards (Smallwood v. D.C., 57 App. D.C. 58, 17 F.2d 210 (1927)). Other examples of municipal regulation of streets deal with parking, installation and maintenance of meters, traffic control, and traffic signing.

Presuming There Is Authority to Impose a Pricing Technique, Is It a Reasonable Exercise of the Police Power?

The police power is never absolute (Goldman v. Crowther, 147 Md. 282, 128 A. 50, 55 (1925)). However, there is a strong judicial presumption in favor of the exercise of police power by local governments (1, §24.31). Courts are reluctant to second-guess a local legislative enactment unless there is an abuse of discretion. In its review, the court will stress the study and investigation that preceded and guided the adoption of the ordinance and the opportunity provided for public hearings. (McSorley v. Fitzgerald, 350 Pa. 264, 59 A2d 142, 145 (1948)). In order to override the presumption of validity, a court would need to be convinced that the ordinance was arbitrary or unreasonable, created a "suspect category" (e.g., racial classes), or violated fundamental constitutional rights. Such a finding reverses the presumption, necessitating strict scrutiny by the courts and requiring a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest (Shapiro v. Thompson, 394 U.S. 618, 634 (1969)). In determining whether a local enactment is a reasonable exercise of the police power, the courts consider the following:

1. The ordinance must have a clear, reasonable, and substantial relation to the public health, safety, morals, or welfare and be reasonably appropriate for the objective sought (this is the fundamental test of the ordinance's validity);
2. The ordinance must be reasonably definite, clear, and certain;
3. The ordinance must not be arbitrary or discriminatory and must apply uniformly to all members of the class covered; and
4. The ordinance must conform to federal and state constitutional requirements and state law.

Two constitutional problems of construction should be considered before turning to substantive constitutional restraints. The first is that an ordinance may be unconstitutional either per se or as applied. The distinction is an important one in evaluating the viability of various precedents. If an ordinance is unconstitutional per se, it must be discarded even if its actual implementation may achieve a legitimate governmental purpose. If, however, it is merely unconstitutional as applied, then the ordinance need only be corrected by rewriting it so that the manner in which the basic concept is implemented will meet constitutional standards. The other problem in construction is that an ordinance may be unconstitutional either in whole or only in part. This is why almost all local government legislation has a "saving clause," by which a determination that part of the ordinance is unconstitutional will not invalidate its other parts.

Does the Pricing Technique Violate Any Constitutional Principles?

Due Process of Law

Among the most important constitutional restraints on state and local legislation is the due process requirement contained in the fourteenth amendment. Substantive due process will generally take four forms with regard to local regulations: a requirement of clarity, a requirement of specific guidelines for enforcement, a requirement of reasonableness, and a prohibition against taking property without just compensation. (Procedural due process, e.g., right to a hearing, notice, fair trial, and so on, is always a potential issue. However, for the purposes of the legal analysis presented here, it will be assumed not to be an obstacle.)

The requirement of reasonableness is perhaps the most important element of due process. To meet this standard an ordinance must have a clear, reasonable, and substantial relationship to the public health, safety, or welfare, and must be reasonably appropriate for the objective sought (Schmidinger v. Chicago, 226 U.S. 578, 36 S.Ct. 182 (1913)). In the abstract it is difficult to frame an exact statement of what this requires. However, since there is a strong presumption of reasonableness, courts rarely need to consider the abstract case. Rather, they concern themselves with whether the apparent unreasonableness of the ordinance, in the light of the specific factual situation, overcomes the presumption and requires judicial scrutiny (1, §19.11).

Equal Protection of the Laws

A similarly fundamental constitutional issue is that of equal protection of the laws. This forbids different requirements for those in the same class and other inequalities that have the effect of being unreasonably dis-
c. The requirement is not that the categories be completely distinct or that absolutely all inequality be excluded. Rather, the standard is one of reasonableness. It demands that there be a substantial distinction between classes, that the classification be given none to the purpose of the law, that the classes not be based solely on existing circumstances, and that, within a class, the law must apply equally to all members. If there are no suspect categories there is a presumption that the classes are valid.

Burden on Interstate Commerce

The commerce clause reserves to Congress exclusive jurisdiction "to regulate commerce... among the several states" (U.S. Constitution, Article I, section 8). It raises potential problems for implementation of pricing techniques. This authority of Congress extends to every part of interstate commerce. And when Congress validly legislates under the authority vested in it by this power, its jurisdiction cannot be denied or thwarted by the commingling of interstate and intrastate operation (1, §19.56). Thus, any state or local law that would unduly burden or restrict the free movement of goods and people is contrary to the constitutional principle. However, a long-standing doctrine (Cooley v. Board of Wardens, 12 How. 299, 13 L.Ed. 966 (1851)) holds that a state may exercise its police powers in a manner that impinges on interstate commerce if the subject of the regulation is essentially local and there is no discrimination against or undue burden on interstate commerce. To the extent that commuters crossing state lines are in interstate commerce, taxes and other restrictions on them may be burdens. The magnitude of the burden determines whether any such state or local law is valid.

Right to Travel

The right to travel was first recognized as a constitutionally protected right in Crandall v. Nevada (73 U.S. 35 (1867)), although it was first stated in the Passenger Cases (7 How. 283, 492 (1849)) that "we are all citizens of the United States and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states." The Supreme Court has called it a fundamental right, and any abridgment of travel must be justified by a compelling state interest ([Shapiro v. Thompson]. Although most of the recent right-to-travel cases have concerned state residency requirements, it is a dynamic doctrine. Any pricing proposal that may impinge on travel must be carefully examined with this constitutional right in mind.

Can the Pricing Technique Be Implemented as a Valid Exercise of the Taxing Authority?

The discussion has so far focused on implementing a pricing technique as a regulatory measure. Some of the proposed pricing techniques—tolls, surcharges—involve the use of the taxing authority, which raises other legal considerations. Taxation is an inherent state power, and local governments have no power of taxation except as it is specifically granted by the state constitution or legislature (1, §44.05). Normally, local governments may only levy taxes as specifically authorized by the legislature. However, some local governments are granted broader authority; they can establish local taxing policy subject only to prohibition by or conflict with state law.

Statutory grants of power to tax are subject to various restrictions. Most prevalent are provisions of the state constitution that require that the taxes be uniform, that property shall be taxed in proportion to its value, and that the taxes shall be levied and collected under general laws (1, §44.17a). The commerce clause limitation discussed above also applies to tax measures. This provision has been heavily litigated, which has resulted in a confusing variety of interpretations that make it hard to generalize about its applicability to a particular tax proposal.

Objections based on the right to travel might also be raised about any pricing mechanism that is used to discourage travel. As noted previously, the Supreme Court has found that the right to travel is a fundamental right and, therefore, any taxation scheme that puts a significant burden on interstate travel must be justified by a compelling state interest and by evidence that no less burdensome means would accomplish the same end ([United States v. Guest, 383 U.S. 745, 757-758 (1966)]). In this regard, the Supreme Court has upheld tolls (Hendrick v. Maryland, 235 U.S. 610 (1915)) and airport user fees ([Evanston-VanderBurg Airport District v. Delta Airlines, 405 U.S. 707 (1972)]), indicating that some financial impositions on interstate travelers have an indirect or inconsequential impact on travel and do not constitute a violation of a fundamental constitutional right.

Another important constitutional principle relevant to taxation is the privileges and immunities clause (article 4, section 2), which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The early leading case interpreting this clause (Corfield v. Coryell, 6 Fed. Cas. 546 (1828)) deemed it a protected fundamental privilege and immunity to be "[exempt] from higher taxes or impositions than are paid by the other citizens of the state." Normally, in resolving constitutional challenges to state tax measures, the Supreme Court has given wide latitude to legislative prerogatives. However, if the privileges and immunities clause is at issue, a more rigorous standard has applied. In particular, the actual effect as well as the theory behind the tax must be examined. The result has been a rule of substantial equality of treatment for the citizens of the taxing state and nonresident taxpayers. The Supreme Court has recently applied this test in Austin v. New Hampshire (95 S.Ct. 1191 (1975)), in which it struck down a New Hampshire income tax on commuters because New Hampshire residents pay no income tax or comparable levy.

The due process clause in the fourteenth amendment is also relevant. It requires that legislation be reasonable and rationally related to the problem it attempts to solve and that property not be taken without compensation. Moreover, the equal protection clause of this amendment requires that statutes and ordinances be nondiscriminatory. Thus, any classifications drawn must be rational and must affect the class as a whole.

Although federal guarantees of due process and equal protection may be important to some individual proposals, state tax cases are traditionally decided on the bases of similar state guarantees or related state prohibitions, such as those against special laws or those that require uniformity of taxation.

The most recent Supreme Court decision on local government taxing powers that is relevant to transportation pricing is Pittsburgh v. Alco Parking Corporation (417 U.S. 309 (1974)). In that case, levying a 20 percent tax on the gross receipts from parking motor vehicles was upheld as being within the power of the city and not a violation of due process. The Supreme Court repeated the principle that "the judiciary should not infer a legislative attempt to exercise a forbidden power in the form
Supreme Court acknowledged that a city could force the automobile parker to choose between using other transportation or paying the increased tax to compensate the city for the added expense caused by the automobile, e.g., air pollution cost, street repair.

EXPERIENCE IN WASHINGTON METROPOLITAN AREA: A PRACTICAL APPLICATION

The Metropolitan Washington Council of Governments (COG) staff has examined transportation controls as part of its air quality planning work. COG provided staff services for the preparation of the transportation control plan (TCP) for the National Capital Interstate Air Quality Control Region (NCIAQCR). This work was done for the Air Quality Planning Committee, a body formed under the authority of section 106 of the Clean Air Act and established by administrative agreement among the states of Maryland, and Virginia, the District of Columbia, and COG. The Clean Air Act, as amended in 1970, required each state to adopt a plan that provides for the implementation, maintenance, and enforcement of the national air quality standards promulgated by the U.S. Environmental Protection Agency (EPA). A major part of the pollution abatement was expected to come from the Federal Motor Vehicle Control Plan; however, in NCIAQCR and 26 other metropolitan areas across the country, a TCP was also needed to achieve these standards.

In December 1973, EPA promulgated a series of transportation control strategies for NCIAQCR. The TCP was largely based on the recommended control measures developed by the COG staff. The TCP proposed a 12 percent reduction in vehicle-kilometers of travel in 1977 by the implementation of transit service improvements, a car-pool locator service, a retrofitting program for buses, an inspection and maintenance program, and the introduction of a series of parking policies. The parking controls envisaged the elimination of free parking and the gradual imposition of a transit incentive surcharge on long-term parking spaces in certain areas of the NCIAQCR. The surcharge was scheduled for phased implementation between 1975 and 1977. As a result of the Energy Supply and Environmental Coordination Act of 1974, the administrator of the EPA was prohibited from requiring the parking restrictions.

Because of this elimination of parking controls (a $2.00 surcharge and elimination of free commuter parking) in the TCP, COG was funded by the U.S. Department of Transportation and EPA to study the application of parking management programs in the NCIAQCR as a strategy to reduce automobile travel sufficiently to meet air quality standards in 1977. Implementation problems were examined from legal, administrative, and institutional perspectives. Four parking programs were examined:

1. A pricing program that involved application of prevailing commercial rates for free and low-cost long-term commuter parking (6 or more hours) and a $2.00/d surcharge on such parking;
2. A pricing program that involved a substantial increase in fees for long-term parking and the application of prevailing rates to free and low-cost commuter parking (increases in parking fees would be achieved through rate regulation);
3. A supply-restraint program that involved on-

street permit parking for local residents, while other vehicles would be limited to 2 h of on-street parking, and the establishment of short-term-only parking facilities and introduction of long-term parking quotas; and
4. A combination pricing and supply program that involved the application of prevailing rates for free and low-cost long-term commuter parking, on-street parking permits for local residents, and a $1.00/d surcharge.

These programs were tested only in locations of the Washington metropolitan area that were projected to have adequate transit service in 1977 (an area was designated as having adequate transit if 86 percent of the work trips to the area were within 45 min by transit). It was determined that programs 1, 2, and 3 could obtain the necessary emission reductions by 1977. The fourth would achieve 90 percent of the required reductions. However, programs 1 and 4 were recommended because of fewer legal and administrative problems. A summary of the legal analysis undertaken for the $2.00 surcharge alternative is presented here because it is relevant to consideration of any pricing proposal for transportation management.

The surcharge was examined from two legal perspectives— as a regulatory fee and as a tax. It is inherently neither one nor the other but is subject to a number of variables, including the existing limitations on government authority, and may be enacted as either. In the Washington metropolitan area, because enabling legislation would be needed for the tax in Virginia (and perhaps Maryland), the regulatory approach was preferred.

The choice between using the police or taxing power of the local governments is important. There is a presumption of validity and constitutionality of local ordinances— as a regulatory fee and as a tax. It is inherently neither one nor the other but is subject to a number of variables, including the existing limitations on government authority, and may be enacted as either. In the Washington metropolitan area, because enabling legislation would be needed for the tax in Virginia (and perhaps Maryland), the regulatory approach was preferred.

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The surcharge could also be considered a fee because, under the police power, a local government can levy a fee for regulatory purposes. There is authority to support the proposition that, if the primary purpose of the legislative body in imposing the charge is to regulate, the charge is not a tax even if it produces revenue [Starker v. Scott, 183 Or. 10, 190 P. 2d 532 (1948)]. And as applied to the usual tests of what is a regulatory fee (1, §26.16), the surcharge could be justified as a police power measure. The purpose was to regulate an activity (automobile driving) that contributes to health problems, the authority for it could be found in specific state air pollution control laws as well as in interpretations of delegated police power, and the revenues would be applied for administrative expenses and the implementation of other transportation control measures.

A number of constitutional issues were reviewed that might be raised to challenge a parking surcharge, whether it was enacted as a regulation or as a tax. The imposition of an extra charge on those arriving at parking garages between the hours of 6:00 and 10:00 a.m. posed the question of whether a reasonable classification was created that could meet equal-protection challenges.

As stated earlier, legislation may apply to only one class and not be unconstitutional, so long as there is a constitutional basis for the classification and it is not arbitrary, capricious, unreasonable, or lacking in relationship to the object to be accomplished by the legislation. In this case, the 6:00 to 10:00 a.m. period can be justified on the basis of its relationship to the production of photooxidant smog, the reduction of which was an objective of the surcharge and other transportation control measures.

The right-to-travel and interstate commerce questions were also evaluated. The Supreme Court recently ruled in the Pittsburgh v. Alco Parking Corporation case that the city was constitutionally entitled to force the automobile parker to choose between using other transportation or paying the increased tax. In light of this, it is doubtful that the Supreme Court would object to the parking surcharge as an abridgment of the right to travel, especially if alternative means of transportation are available. This case indicates that commutation by automobile is not a "basic necessity of life" (Shapiro v. Thompson, which dealt with residency requirements in regard to welfare payments) and does not have the significance of a "fundamental political right" (Dunn v. Blumstein, 405 U.S. 330 (1972), which dealt with residency requirements and the right to vote). While it is true that the Pittsburgh v. Alco Parking Corporation case lacked a genuine interstate context and that the right to travel was not an issue in the trial, it still seems far more likely, given the Supreme Court's statements in the case, that a court would find the surcharge a permissible "financial imposition on interstate travelers [that has an] indirect or inconsequential impact—more like a toll than a barrier."

Further, a surcharge would not affect interstate commuters exclusively but all commuters (or all those parking between 6:00 and 10:00 a.m.). In this regard, Evansville-Vanderburgh Airport District v. Delta Airlines is more to the point. Here the Supreme Court upheld a use tax on interstate and intrastate airline passengers against both right-to-travel and commerce clause objections. It found that the tax neither discriminated against nor burdened interstate commerce and travel because it was used to defray the costs of airport facilities, which aided travel. It was proposed that revenues from the surcharge would be used to pay for transit improvements.

Finally, consideration should be given to Huron Portland Cement Co. v. Detroit (362 U.S. 440 (1960)]. This case involved local police power regulations over a ship licensed in interstate commerce. It indicated that a surcharge, if it is established as a regulatory fee, could withstand both right-to-travel and commerce objections. The shipowner had been charged with violating provisions of the Detroit smoke abatement code while the ship was loading and unloading in the port of Detroit. The Supreme Court affirmed the convictions, noting that

Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.... The Constitution, when conferring upon Congress the regulation of commerce,.... never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.... State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.

SUMMARY

Our experience in the Washington metropolitan area, which is probably applicable to other parts of the country, pointed out the strong interrelationship among technical, legal, and political analysis if any transportation measures are to be implemented. Although the legal authority is essential, implementation of any measure depends on having a strong empirical data base, and even a legally and technically sound proposal is meaningless without a strong political commitment to proceed. The less-than-successful attempt to obtain hard decisions about transportation controls to meet air quality standards for public health reasons portends even greater difficulty in getting pricing mechanisms adopted when the reason for them may only be the improvement of public amenities.

REFERENCES