IN THE UTAH COURT OF APPEALS

UTAH SAGE, INC. a Utah corporation dba HOBBY TRACTORS & EQUIPMENT, LARKIN TIRES, INC. a Utah corporation, GARY LARSON, an individual, FRATERNAL ORDER OF EAGLES #3372, a non-profit organization, Appellees/Cross Appellants v. PLEASANT GROVE CITY, Appellant/Cross Appellee.	**BRIEF OF APPELLANT PLEASANT GROVE CITY** Case No. 20200290-CA District Court Case No. 190300164

Appeal from the Final Judgment in Case No. 190300164, Judge Jared Eldridge Presiding

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LIST OF AND REFERENCES TO PARTIES

The caption herein lists the names of all parties to this action and their counsel of record. The Appellant/Cross Appellee is Pleasant Grove City (the "City"). Appellees/ Cross Appellants are Utah Sage, Inc. dba Hobby Tractors & Equipment, Larkin Tires, Inc., Gary Larson, and Fraternal Order Of Eagles #3372 (collectively the "Companies" herein).

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INTRODUCTION

In 2012 and early 2013 the City was faced with an intractable budget shortfall in the existing funding mechanisms traditionally utilized to construct and maintain the City's roads to at least minimum standards of functionality. This shortfall led to engineering predictions that lack of maintenance would cause the costs of roads to increase exponentially in the future, such that the shortfall would prevent the City from being able to provide well-maintained and safe streets and roads.

As the district court noted, the City and others brought the issue to the attention of the legislature, and in 2015 that body approved legislation that allowed an optional sales tax that could be used for road maintenance by counties and cities within counties. However, the tax had to be approved by a county-wide vote. Utah County voters rejected this tax in 2017, preventing the City from using that option.

Shortly thereafter, a group of City residents generated a ballot initiative to require the City to use $2.6 million from its general fund for road maintenance and construction. That option would have forced the city to prioritize road funding over the other services it provides. However, that initiative was defeated at the polls.

Ultimately, to solve the road funding problem the City followed the lead of many other Utah municipalities and established a Transportation Utility Fee ("TUF") to help bring the City's roads to acceptable standards and to spread the costs of construction and maintenance among the users of the roads. In doing so, the City carefully quantified the funds necessary to maintain the roads, calculated the TUF to only partially offset those costs and established an account separate from its general fund to hold and account for

the fees. In addition, the City made every effort to ensure that the TUF was charged in a fashion roughly proportional to the amount payors of the fee used the roads.

The Companies challenged the City's adoption and implementation of the TUF on the grounds both that the City didn't have authority to adopt the TUF, and that the TUF is actually a tax the City adopted without procedures required for imposing taxes. After briefing and argument, the district court correctly held that the City had authority to adopt such a fee pursuant to the broad grant given by Utah Code Ann. § 10-8-84.

However, although the Utah Supreme Court had previously upheld analogous fees and distinguished them from taxes in several cases, including Sandy City's imposition of a storm water utility fee in *Board of Educ. of Jordan School Dist. v. Sandy* City, 2004 UT 37, the district court concluded that the City's TUF was actually a tax, relying on its own formulation of the test first set forth in *V-1 Oil Company v. Utah State Tax Comm'n.*, 942 P.2d 906 (Utah 1997), vacated in part on other grounds, 942 P.2d 906 (Utah 1997).

As set forth more fully herein, the City's TUF meets the requirements of the *V-1 Oil* test and the district court erred in holding to the contrary, particularly on the grounds that the City's fee resulted in a general, as opposed to specific benefit only to the fee payors. The City is therefore entitled to reversal of the district court's summary judgment in favor of the Companies.

STATEMENT OF THE ISSUE

Whether the district court erred in determining as a matter of law that the City's TUF was a tax, rather than a fee as defined by applicable Utah case law, only because the fee resulted in a general, rather than specific benefit.

A. Standard of Review: "This court reviews a [district] court's entry of summary judgment for correctness and gives its conclusions of law no deference." *Ghidotti v. Waldron*, 2019 UT App 67, ¶ 8 (cleaned up, citations omitted). "Further, in reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Id.*

B. Preservation: The City raised and preserved this issue by moving for summary judgment (R119-44) and by opposing the Companies' cross-motion for summary judgment addressing that same issue. R629-40.

STATEMENT OF THE CASE

Relevant Facts and Course of Pertinent Proceedings.

1. In the mid-2000s the City commissioned an engineering study of its roads that revealed them to be in a continuously deteriorating state unless additional funding sources could be located to stop the deterioration. R166-74. The City Council discussed the analysis and findings in its meeting on March 10, 2015, in pertinent part as follows:

> Administrator Darrington stated that the discussion on roads began at the budget retreat. JUB Engineers was asked to provide an outlook on the roads situation and determine the estimated costs needed on an annual basis to get to a point where the roads aren't continually declining but are instead, gradually improving. The initial study only calculated costs out 10 years. At the retreat, the Mayor and Council advised JUB Engineers to extend their study to 20 years and address issues for residents who currently have roads that are in poor condition in front of their homes. As part of the original study, some citizens would have bad roads in front of their homes for a very long time, while the City focused on roads that were already in decent shape. The Council did not like that approach and staff was asked to recalculate. In doing so, they met with Ken Clark and Marty Beaumont from JUB Engineers.
>
> Mr. Beaumont considered roads to be a very pertinent issue to the City. He first explained that the Pavement Condition Index (PCI) is key to the discussion and is a numerical rating of pavement condition. It ranks roads from 0 to 100, with 0 being the worst possible condition and 100 being the best. As part of the initial study,

> JUB performed an inspection of City roads. Mr. Beaumont presented a bar graph representing miles of roads with different pavement conditions. He noted that 41% of the City's roads are in Fair/Poor condition, which are quickly falling into a Very Poor/Failed state. A great deal of cost can be incurred if the roads aren't properly maintained before they are in bad condition. In other words, it is less costly to repair moderately damaged roads.
>
> . . .
>
> It was mentioned at the retreat that the City has several roads that are good. However, the real focus is on the roads that are in fair/poor or worse condition. These roads that are in poor condition still need to be preserved. The main question was how to deal with them within a 10 to 20-year timeframe. A Poor Roads Improvement Timeline graph was presented and showed that in year 13, less than 1% of the roads will be in the fair/poor roads category, meaning that they have improved to good/better road categories. The statistics reflected a budget of $4 million per year for 20 years. At that level, 20% of roads would still be failing and in very poor condition. Looking at a longer period of time the peak of poor/fair roads will come at year 11.
>
> . . .
>
> Administrator Darrington added that the intention would be to tackle the failing/poor roads first. After year 20, the roads that currently have a PCI of 55 will be in the 4.2% of failing/poor roads after year 20. Essentially, the worst roads will be the first to get attention. Mr. Beaumont explained that there needs to be a process in place to address roads that are receiving less expensive treatment, versus those that are getting more expensive treatments. The City should address how to fix the roads that are failing today. While they may not be able to address all of the roads in one year, they will at least have a starting point and can then work outward based on the budget allocated to each section.

R156-63.

2. During that same meeting the City Council also discussed funding sources to provide the approximately $4 million per year necessary for road improvements, as follows:

> Administrator Darrington explained that the City currently receives Class C Road Funds, otherwise known as the gas tax. Basically, whenever someone fills up their car, they pay 24.5 cents per gallon, which goes back to the State. Of that 24.5 cents, 70% remains with the State for road projects and 30% comes back to cities and counties based on road miles and population. Currently, Pleasant Grove gets just under $1 million per year from the gas tax. Two or three years ago, the City Council wanted to put more into roads and earmarked an additional $200,000 from the General Fund and specifically designated it for roads. The City also bonded in 2008,

and completed several road projects. The City was still paying on that bond, which expires in 2018. Therefore, for the next three years, the City will not have the full $1.2 million to go toward road maintenance because there is a debt payment of $750,000. It was noted that the bond in 2008 was for $4.2 million.

In assessing ways to generate more revenue for roads, staff closely monitored the discussions taking place in the State Legislature. He agreed with a previous comment made by Council Member LeMone that this is the biggest item of concern for most cities around the State. As such, a great deal of effort has been made to work with the State Legislature because as a City they don't control gas or sales taxes and don't have the ability to increase revenue outside of property taxes. Currently, the Senate has proposed a bill that will increase the gas tax by five cents right away, and one cent per year for the next four or five years, to eventually get to an additional ten cents. Administrator Darrington explained that the issue with the gas tax is that citizens who drive vehicles that get better gas mileage, or electric and natural gas vehicles, are not paying any gas tax. They are using the roads but are not funding their maintenance. From staff's perspective, this proposal will not get them as far as they want to go. In addition, there isn't any inflationary measure included in the plan. If gas prices and the number of gallons used both decrease, there will be less revenue to the City.

The Utah League of Cities and Towns (ULCT) initially put together a proposal that included a sales tax component. Money spent anywhere in the state or the City result in a one-quarter of one cent sales tax that would specifically be earmarked for transportation. This was something the cities supported because once it is included in sales taxes, there is an inflationary adjustment. As prices increase, consumers will pay a little more in sales tax and the City will get more revenue for roads to cover inflation.

Under this one-quarter of one cent addition, the initial proposal from ULCT was for the municipalities to get all of the revenue. In going through the process, both the County and UTA have since indicated that they also want a portion. Therefore, the proposed one-quarter of one cent increase would be split between the cities, counties, and transit. This was not ideal and not what Pleasant Grove City wanted; however, this was the bill currently in place. The ULCT encouraged municipalities to support it, rather than fight the issue and risk losing the bill altogether. The one-quarter of one cent sales tax would be implemented County-wide and be a vote of the people. The State would not impose the sales tax increase and would simply give the County the right to put it on the ballot. Staff did not know how much revenue would come to the City from either proposal. Administrator Darrington agreed to provide additional updates as they are relayed to him.

Presently, the City has $1.2 million and whatever the State Legislature determines for the upcoming year. The Council needs to discuss what the gap will be and how much they are willing to budget toward roads each year. The City could impose a property tax or road fee. Provo City established a road fee that is included on utility

> bills and is based on the number of trips from the residence or business and the related impact. The road fee would cost residents an additional $3.00 to $5.00 per month, and go directly to roads. If Pleasant Grove decides to follow this model, businesses with higher traffic will pay a higher fee based on use. It would take time and money to calculate the figures and develop the formula. Should the City pursue the road fee option, they would need to incorporate a study. There is already some information available, which relates to the Traffic Impact Fee. The City would engage a consultant to calculate more accurate figures, which in turn would be presented to the Council for review.

Id.

3. In March 2015, the state legislature passed HB 362 which gave counties the option to increase sales tax by .25% if the electorate passed it in the November 2015 election. The City attempted to implement the tax increase permitted by HB 362 in the November 2015 election, but the proposition was defeated by Utah County voters. (R3, 61).

4. For the next several years the City Council held public meetings and budget retreats on December 1, 2015, January 19, 2016, February 5, 2016, March 8, 2016, April 12, 2016, June 7, 2016, June 21, 2016, January 27, 2017, and February 28, 2017. *See* R175-334. During these meetings, the City Council discussed a three-year road plan and various options for funding road improvements, including Class C revenue from the State, general fund revenue earmarked for roads, cuts in City services ranging from minimal to drastic in order to increase available general fund money, bonding, a road utility fee, and other funding options. *Id.* Citizens spoke both against and in favor of a road fee. *Id.*

5. In March 2017, citizens of the City generated a ballot initiative to require the City to take $2.6 million from the City's general fund and put that money into road maintenance and construction, in spite of the impact on other services such a requirement would impose. *See* R352, 361-62. However, in those elections voters overwhelming rejected the ballot initiative. R3, 61.

6. During this process, the City had commissioned a study by Lewis, Young, Robertson and Burningham ("LYRB") to analyze user demand on the City's roadways. R328-34, 340-41. LYRB described its study to the City Council in pertinent part as follows:

> Mr. Philpot from Lewis, Young, Robertson & Burningham (LYRB) was tasked with finding an equitable and transparent way of maintaining existing roadways, in addition to the existing funding mechanisms. As part of their research they looked at the demand on the existing roadways in terms of trip counts. With regard to the studies, Mr. Philpot noted that there are industry standards for assessing the trips. They used the parcel database for the County, as well as the City's business license database to evaluate the types of land uses that exist in the City and the roadway demands. The land uses were divided into three categories; residential, non-residential, and public use. The road studies assessed peak day adjusted trips, total square footage, address counts, and units. Fees were calculated per address on an annual basis and then broken down into smaller monthly payments.

R340.

7. In subsequent meetings in the spring and early summer of 2017, the City Council discussed the impact on City services the initiative would have. *See* R377-409. Ultimately, on June 20, 2017, the City Council determined to table its budget and road funding discussions until after the November elections that would decide the initiative. *See* R411-28.

8. In those November elections, however, voters overwhelming rejected the ballot initiative. *See* R4, 62.

9. Thereafter, a newly elected Mayor and a differently constituted City Council resumed discussions for funding City roads, now focusing on establishing a road utility fee. *See, e.g.*, R433-35.

10. The City Council addressed the road fee issue again on January 16, 2018. *See* R452-55. At that meeting, one City Council member "stated that based on his conversations with the public, most residents support the implementation of a Road Fee. He, however, felt they need

to be careful in how they implement the fee and suggested they receive public input on the matter."

R454. The City Administrator presented a proposed timeline for implementation, as follows:

> There was further deliberation on points previously stated, in addition to the scenarios presented above. The general consensus was to fully fund roads by implementing a $10 fee for residents and develop a tiered system whereby fee reductions/exemptions are granted to businesses.
>
> Administrator Darrington presented a timeline for implementing a road funding plan as follows:
>
> January through February 6, 2018
>
> > Select a couple of options for consideration to present to the public for feedback.
> >
> > Open House(s) – Have open house for public to attend to ask questions regarding the options for road funding. Send out specific notice to residents and businesses.
> > Meet with Chamber of Commerce.
>
> March 2018
>
> > Public Hearing
> >
> > Implementation

R455.

11. At the March 27, 2018, public hearing, the City Administrator introduced and summarized the road fee issues as follows:

> Administrator Darrington stated that the City needs to generate $3.8 million to cover the cost of road maintenance. Currently, the City collects roughly $1.28 million in Class C Revenue. The City had set aside $425,000 in General Fund monies for this purpose. The proposed road fee would generate $1.4 million annually. Administrator Darrington noted that the City bonded for road money about 10 years ago and that bond will expire this year. The bond payment of $750,000 had been coming out of the Class C Revenue, so that amount would soon be available for road maintenance. The road fee was broken up into three categories that included residential and two tiers of commercial. All residential homes and multi-family units would be charged a monthly fee of $8.45 on their utility bill. Commercial businesses would pay either $41.27 or $236.05 per month, based on their PM Peak Trips. Because the City was concerned about overburdening businesses, they proposed giving businesses a 45% exemption similar to the one

given to residential homes for property tax. Administrator Darrington stated that there would be an appeal process for businesses who believe they were placed in an incorrect category.

R461.

12. Thereafter, the City Attorney commented as follows:

> City Attorney, Tina Peterson, reported that the maintenance and repair of the road system is akin to any other utility provided by the City, so it makes sense to charge a user fee. The study that was done was based on equitable distribution of average peak daily trips and the fee was set based on that usage. To implement the road fee, the City Council would first have to adopt an ordinance creating the Transportation Utility for the City, which would be located in Title 8 with the other utility services. The ordinance would provide the opportunity to establish a fee for service and include the appeal process and the annual review process. In order to enact the fee, the City would need to adopt a resolution. Attorney Petersen included the draft ordinance and resolution in Dropbox for the City Council's review.

R462. The following public comments were largely in favor of the fee. R462-63.

13. When asked why the City decided on the road fee during the City's 30(b)(6) deposition, the City Administrator testified as follows:

> Q. So why a transportation utility?
>
> A. One of the things that we considered was trying to be the most fair in how we were going to have people pay for the road maintenance, and this is one of the things we looked at with the transportation utility fee having to be user based, is those people that are using the roads will be the ones paying for the road maintenance.
>
> Q. Now, I know that we don't have LYRB here; so you can only tell me what you know from them. Did they give you any kind of disclaimer in their study, like, "Look, this is what we think, but obviously we can't really say exactly how much everybody is using the roads"?
>
> A. I mean, that's the -- the study in essence lends itself to that. I mean, we're using nationwide averages. It doesn't lend itself to each individual resident or business to know exactly how much they're using the roads. It's just saying, you know, if you're in a single family residency, generally speaking according to this manual, this is how many trips you're going to make in a given day.
>
> Q. Okay.

A. So it's general in nature in that way.

Q. Okay. When you received the LYRB study -- is that what we call it?

A. Yeah.

Q. It was a study?

A. Study, yeah.

Q. And this is documentation provided by the city here, if you can just take a look at that. It looks like LYRB identifies a bunch of different classifications of persons. Is that a fair statement by looking at that?

A. Yes. This is a classification of the different types of users; so on this there's single family dwellings, there's multiunit dwellings, and then it gets into the different types of businesses. Obviously, some businesses are a little more traffic intensive than others, and so this is their general definitions that they pull from the ITE [Institute of Traffic Engineers] manual.

Q. Okay. Did LYRB, in providing you this study, make any separate recommendations to the city on how may be best to implement their study?

A. No.

. . .

Q. Okay. So from your perspective, is it a fair statement that the transportation utility was better because the citizens would pay less?

A. No. It's better because it's more fair as to the users. If we would have done this through a property tax, then the users would have been charged based on the assessed valuation of their homes and businesses. It would have nothing to do with the actual use of the roads. So we feel the transportation utility fee is more fair to the businesses and the residents because they're being charged on use as opposed to the value of their home or business.

R481, 486.

14. The City Administrator went on to describe how the City utilized the LYRB study in coming to its conclusions on allocating the fee, although it would not fully cover the projected costs:

Q. Okay. Can you walk me through how you came up with your -- I think you came up with about -- was it about three different options?

A. Well, so Lewis Young gave us -- they gave us some options. They -- because the initial study showed residential broken down into multi --multifamily housing and single family housing, and then it also had four tiers for our businesses. We asked them to flatten that a little bit to combine the residential into one unit price, and then also the business tiers into a tier one and a tier two. We asked them, and so they did the analysis to show how that would -- how that would flow.

Once we had those numbers, you know, we had the discussion with the city council on revenue generation, and then I'd take it back and I had a spreadsheet that said, Okay. If we're going to generate $500,000 in the transportation utility fee, here's the cost to a residential user and here's the cost to our two business tiers if we're going to generate [$]750,000, a million, [$]1.25, [$]1.5. So I just had what I called different scenarios. At different time we had up to ten different scenarios that the city council was looking over.

Q. Okay. Were the scenarios -- so you mentioned that you kind of looked at different revenue-generating scenarios.

A. (Nods head.)

Q. Did you also look at the city needs 3.8 million, so what is the user cost based on that amount?

A. We didn't, no, because we didn't need the full transportation utility fee to cover the full [$]3.8. Our Class C revenues at the time were about a million dollars. Our general fund transfer was, I want to say, around 400,000. So we had this nexus. I think the nexus ended up being around 2.3 million.

Q. Okay.

A. So the question really turned out being do we want to charge a fee that's going to generate 2.3 million, or is it going to be two? Is it going to be one and a half million? One? You know.

Q. If you don't do the 2.3 million, you have a shortfall.

A. Uh-huh [affirmative].

Q. What were you thinking on how to make up for that?

A. Yeah, well, I mean, this is, I think, typical of cities. We have probably $70 million in water needs right now, and our water rates don't cover the full need, and so the fully funded utility is not super common, I would say.

Q. Are you consistently incurring debt?

A. No. I would say that we're -- well, there's times that we have to turn around and bond because a project has to be done, but normally speaking, I mean, we just kind of have this master plan of things that we need to do, and then we just look at the revenues that we have available. We make changes to our -- usually to our water rates, sewer rates yearly.

Q. But you're still not able to cover the cost?

A. Well, no. We're not fully funded in those utilities.

R481-82.

15. The City Administrator also explained to what extent and why the City deviated from LYRB's payor groupings:

Q. Okay. So in this document I just showed you IT[E] classification definitions. What was your thought process in putting together the groups? For example, I think [LYRB's] got something like 25 different residents, category of residents. Why didn't you divide it up that way, per classification, rather than group it down to a few different groups?

A. So when Lewis Young put the study together, they're the ones -- they created the four different classifications. We used peak average daily trips, was the mechanism that we were going to use; so on the residential, what was their peak day trips, and what was the peak day trips for these different types of businesses.

So for the residential there wasn't 25 different options. It was just multifamily and single family. But for the business community, because there's numerous types of businesses, they just kept -- they just lumped them into categories. They said, Okay. If this business is doing less than two peak day trips, then they're going to be in the lowest category. In they're -- I think it was zero to two, two to four, four to twenty, and then twenty plus was the initial study with the four. Then we asked them to flatten that; so it went from zero to four trips was tier one, and then tier two was in essence four to -- four plus, any business that was doing more than four.

Q. Do you know if LYRB had -- in addition to the national statistics they were using, did they conduct surveys of Pleasant Grove City residents specifically as well to add into their national statistics?

A. Well, so what you're asking, because we asked the same question, is how intensive can we get on this thing, and ultimately probably the most efficient way for us to do it was to keep it general in nature in regards to using the national

standards. I mean, we have over 550 businesses, and to go into try to figure out each business and exactly how many trips each business is going to generate, we'd have to do a traffic study essentially for each business.

Q. Right.

A. So that just wasn't feasible. That's why we had to use the manual, to say, Okay. On average this is what this type of business generally does.

. . .

A. Okay. So tier one is a majority of our businesses. It's easier to explain tier two, which is ones where we have the higher intensity of use. So tier two businesses, examples of that are convenience stores, restaurants with a fast food drive-through -- or fast-food restaurant with a drive-through, businesses that just have incredible parking lots with a lot of employees.

Q. And that was -- so tier one and tier two were based on number of trips that these businesses would be -- or their customer base would be taking, right, to the business and from the business?

A. Yes.

Q. And so tier two, do you remember off the top of your head how many trips we're talking about with tier two?

A. Yeah. Tier two initially was anything four trips or more.

Q. Daily.

. . .

A. Well, the peak day.

Q. Peak day.

A. The peak day is a specific time window in which there's how many trips. It's not over the course of a full day.

Q. I see. And so churches who, I would imagine, have probably between a hundred and a couple hundred cars on a Sunday, they fell into tier one because their peak daily average was in tier one --

A. Yes.

Q. -- less than four trips peak daily average, because Monday through Saturday their peak daily average is probably less than one.

A. Yes.

. . .

Q. Whereas restaurants, drive-throughs, their peak daily average is probably going to be significantly more than four.

A. Yes.

Q. All right. Can you think of any categories of businesses that fall into tier one who should fall into tier two?

A. No.

Q. Okay. So the city essentially applied the peak daily average across the board, no exceptions?

A. No. So initially as we categorized them, that's how we did it. Where we ended up with tier two is what we called an intensity of use, and so it was more of an evaluation of those businesses that we knew were generating a lot of traffic, which was not exactly lined up with the ITE manual but within the idea of what we thought was the most fair on who to charge.

R484.

16. He went on to testify:

Q. . . . So ultimately when you look at the study that you received and then what was actually implemented as the transportation utility, tell me how you view their connection.

A. Okay. The study was the backbone of the analysis on how much we could charge and what was the most fair regarding using the traffic counts, and so that helped us put it into tiers; and once we had it into tiers, then we made at slight change on the upper tier in order to capture what we felt was the businesses that were using this service the -- or using the roads the most.

So the study that we have is really 98 percent of the basis of our numbers outside of us saying, Okay. On this tier two there were some businesses in there that just didn't feel right, that didn't feel like they were generating that much traffic; so we did our own analysis and said, Okay. Here's how we are going to change that in order to make it the most fair, as fair could be.

R487.[1]

17. The road fee first came to the City Council for a vote on April 10, 2018. *See* R518.

Introducing the proposed ordinance, the City Attorney informed the City Council as follows:

> Attorney Petersen reported that tonight was a culmination of many years of study, public input, analysis, and debate between the Council and the citizens regarding the implementation of a Transportation Utility Fee to fund the City's roads. This action item was an ordinance that would enact the transportation utility in Title 8 Chapter 10 of the Municipal Code. She noted that Title 8 contains all ordinances regarding public utility systems. In 2012, the City Council commissioned a study regarding the condition of the City's roadways. Based on the results of that study, the City Council determined to look at cost effective mechanisms for funding the transportation needs of the citizens of Pleasant Grove. Over the next few years, the City had a financial analysis done that outlined various methods of generating revenue sufficient to maintain the roads. The City Council determined through this process that the City road network was a utility service, and the Motor Fuel Tax was not sufficient to cover the cost.

R518-19.

18. She also addressed specific issues she believed the Council and residents should be aware of, as follows:

> Attorney Petersen addressed sections of the ordinance she felt the City Council and residents would want to be aware of, including the purpose of the ordinance. The ordinance specifies that a Transportation Revenue Fund will be established, and that revenue will only be used for road maintenance and some engineering fees. She noted that there was a provision that would allow Transportation Utility Funds to be transferred to other funds for services and expenses that are directly

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[1]The Administrator testified that the City had no other viable options for making the fee more fair or equitable:

> Q. Other than making every road a toll road in Pleasant Grove, can you think of any way that the transportation utility could be more fair?
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> A. Yes.
>
> Q. How?
>
> A. Just put a GPS on everybody's car, and we track exactly how many miles they travel on our roads in a given year, day, month. I mean, we talk about these -- I don't know how far away that technology is. That would be the most fair way to track how we're going to charge for road maintenance. We're just not there yet.

(R487).

> attributable to transportation utility projects. Each residence and business in the City will receive a fee based on the average peak day trips as determined by the engineering study. The fee itself would be established by resolution, which was the next item on the agenda. The ordinance also establishes that the fee would be reviewed by the City Council annually. The ordinance provided an appeal process for any business owner who feels they have been misapplied in a category. Attorney Peterson also made the residents aware that there was an abatement available for citizens who are indigent and have problems paying their utility bills. The process the City used was the property tax abatement process that Utah County utilizes. The property owner would have to provide evidence that they qualified for the exemption.

R519.

19. Thereafter, the City Council voted unanimously to adopt Ordinance 2018-10 "establishing a transportation utility service with the purpose and power of undertaking such maintenance and improvement of City streets, establishing an annual review process, and related matters; and providing for an effective date." R519.

20. Immediately thereafter, the Council voted unanimously to adopt Resolution 2018-21 to implement the Transportation Utility Fee:

> based on the average peak day adjusted trips for each type of business using the ITE manual as established by the Road Fee Analysis produced by Lewis Young Robertson and Burningham, the City's financial consultant. Residential units will be charged a fee of $8.45 per month. Businesses will be broken up into two tiers: businesses with 0-4 average daily trips will be charged $41.27 per month, and business with 4+ average daily trips will be charged a fee of $236.05 per month.

R519-20.

21. On July 17, 2018, the City Council voted unanimously to modify the ordinance and fee slightly. *See* R543. As the City Administrator explained to the Council:

> Administrator Darrington stated that a few months earlier the City Council adopted a Transportation Utility Fee to be charged to residential units and businesses based on the traffic they generate. The fee was adopted with an ordinance and a resolution. As staff had been working on implementing that fee, it became clear that they needed to make a change to create a more equitable way of charging the road fee to businesses in the community. This proposal would make one small verbiage change to the ordinance so that the fee would be based on intensity of use. For the resolution, the residential fee would remain the same, but the business fee would

be divided into two tiers. Tier 1 businesses would be charged $41.27 per month, and Tier 2 businesses would be charged $236.05 per month. Tier 2 businesses were defined to include gas station convenience stores, restaurants with drive-thru services, and users with more than 250 parking stalls. He noted that churches would be considered Tier 1 users because their high intensity of use was limited to a single day per week. Tier 1 businesses were all commercial uses that are not Tier 2 businesses.

R543.

22. The wording changes the Administrator described changed section 8-10-4A. of Ordinance 2018-10 to read:

> Each business located within the municipal boundaries of Pleasant Grove City and each residential address within the city shall be charged a transportation utility fee based upon the ~~average peak day trip ends~~ intensity of use as determined by the engineering study establishing use categories.

R558, 560.

23. The change to the Resolution was the addition of a footnote to the "Tier 2 Business Fee Per Month*" The footnote stated:

> *Tier 2 businesses include: gas station/convenience stores; restaurants with drive thru service; users with more than 250 parking stalls (churches will be considered tier 1 users because their higher intensity of use is limited to primarily a single day per week). Tier 1 businesses include all other commercial users who do not qualify as Tier 2.

R556.

24. By their express terms, both the Ordinance and Resolution require:

> The [TUF] Revenue Fund is subject to the statutory regulations of the State of Utah regarding municipal revenue funds and the funds deposited may only be used for the costs of maintenance and repair of the city street network, including engineering fees, but may not be used for general fund expenditures that do not relate to road maintenance and repair. All transportation utility charges shall be deposited in the Transportation Utility Revenue Fund and shall not be comingled with or transferred to other city funds, including but not limited to, the general fund. However, the transportation utility fund may pay other city funds for services and expenses directly attributable to the transportation utility. It shall not be required that the operations, improvement, and maintenance expenditures from the fund specifically relate to any particular property from whom the fees were collected.

R566.

25. Shortly thereafter, the Companies filed their Petition for Declaratory Judgment challenging the City Council's decision. R1-11.

26. The City answered, and stipulated to an Order consistent with the proceedings described above requiring that the City hold the funds collected in a separate account dedicated solely to road repair and reconstruction, and to not disperse or utilize the funds until further order. R97-105.

27. The City made disclosures and responded to requests for documents, and the Companies took the 30(b)(6) deposition of the City. *See generally* R108-13, 116-18, 476.

28. The parties then filed cross-motions for summary judgment. R119-44, 569-86. Neither party disputed the facts on which either motion was based. *See, e.g.,* R629, 670.

29. After briefing and argument, the district court ruled on the pending motions. R670-78. The court found in favor of the City and dismissed Plaintiffs' claim the City did not have authority to adopt the TUF (R672-75), but went on to rule that under Utah law the TUF was not a user fee, but was instead a tax enacted without following required procedures. R675-77. It did so entirely on the basis that it found the fee provided "general" benefits, rather than benefits specific to the payors of the fee. *Id.*

30. After entry of an Order on the cross-motions (R685-95), and the parties again stipulated to an Order staying the effect of the judgment and maintaining the status quo pending appeal. R696-99, 703-05.

31. The City then timely initiated this appeal. (706-08).

SUMMARY OF THE ARGUMENT

The district court correctly ruled that the City had the authority to impose a fee to address the unique challenges it faced as a unit of local government. The court erred, however, when it imposed a requirement that in order to qualify as a user fee, instead of a tax, the fee was required to "specifically benefit" the payors of the fee, as opposed to other citizens more generally.

The district court's specific benefit requirement is inconsistent with the Utah Supreme Court's articulation of the test in *V–1 Oil Co. v. State Tax Commission*, 942 P.2d 906, 911 (Utah 1996), vacated on other grounds, 942 P.2d 915, 918 (Utah 1997), and its progeny in this state.

Without this unlawful condition, the City's utility fee met the requirements of a use fee, and the district court's determination to the contrary should be reversed.

ARGUMENT

I. THE CITY HAD BROAD AUTHORITY TO ADOPT A TRANSPORTATION UTILITY TO RESOLVE INTRACTABLE ROAD FUNDING ISSUES, AND THE DISTRICT COURT ERRED IN CONCLUDING THE CITY'S TUF WAS A TAX, RATHER THAN A USER FEE UNDER UTAH LAW.

The district court correctly recognized that Utah law gives municipalities in this state broad authority to address and resolve municipal problems by imposing fees for services provided:

> The court finds that Utah Code Ann. § 10-8-84 allows the City broad authority to pass ordinances which are reasonably and appropriately related to the objectives of providing for the public safety, health, morals, and welfare. That broad authority includes authority to create a transportation utility and implement a fee or tax.

(R675).

This result is required by the Utah Supreme Court's decision in *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp*., where the Court upheld the City's authority to impose a storm drainage utility fee:

> We hold that Sandy City's decisions regarding the structure, operation, and funding of its storm sewer system are entitled to deference. We generally give latitude to local governments in creating solutions to problems, especially in meeting the challenges and needs caused by accelerated urban growth. *See Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 19, 995 P.2d 1237; *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980). Accordingly, we decline to substitute our judgment for that of the Sandy City Council in the resolution of this municipal problem.

2004 UT 37, ¶ 31.[2]

In that case, the Court also resolved the question whether Sandy's newly imposed utility fees were "service fees," and closely examined prior decisions distinguishing "service fees" from taxes or assessments, including *V–1 Oil Co. v. State Tax Commission*, 942 P.2d 906, 911 (Utah 1996), vacated on other grounds, 942 P.2d 915, 918 (Utah 1997), a seminal case. *See id.*

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[2]*See also State v. Hutchinson*, 624 P.2d 1116 (Utah 1980), where the Court held:

> These cases state the rule which we adopt in this case. When the State has granted general welfare power to local governments, *those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, i.e., providing for the public safety, health, morals, and welfare. . . .* Specific grants of authority may serve to limit the means available under the general welfare clause, for some limitation may be imposed on the exercise of power by directing the use of power in a particular manner. But specific grants should generally be construed with reasonable latitude in light of the broad language of the general welfare clause which may supplement the power found in a specific delegation.

Hutchinson, 624 P.2d at 1126 (emphasis added).

In doing so, the Court cited *Ponderosa One Limited Partnership v. Salt Lake City Suburban Sanitary District*, 738 P.2d 635, 637 (Utah 1987), where the Court held that charges imposed for use of a sewer system were service charges, not taxes or assessments, because they were "payments for services furnished" and were "'in the nature of tolls or rents paid for services furnished or available.'" *Bd. of Educ*., 2004 UT 37, ¶ 24 (cleaned up).

The Court also cited *Murray City v. Board of Education of Murray City School District*, 396 P.2d 628, 630 (1964), *Bd. of Educ*., 2004 UT 37, ¶ 24 where the Court determined that a monthly charge imposed for the use of a sewer system constituted a service fee, noting:

> An assessment . . . is imposed upon property within a limited area for an improvement to enhance all property within that area. On the other hand, the cost of a service is determined by the benefits conferred upon the occupants of the land rather than an increase in value to the land itself.

Id. quoting *Murray City*, 396 P.2d at 630 (cleaned up). As it did in the Jordan School District case, the Court in *Murray City* explicitly recognized the need for giving the City flexibility in addressing local problems because "[h]igher standards of sanitation have . . . resulted in the need for a continuing income for the operation of a sewer system and a single assessment against land served by the facility . . . no longer suffices." *Id.* ¶ 30 n. 5. *See also Bd. of Ed.*, 2004 UT 37, ¶ 31 ("We generally give latitude to local governments in creating solutions to problems, especially in meeting the challenges and needs caused by accelerated urban growth.").

Against this background in Utah case law,[3] the district court erred when it construed and applied *V–1 Oil Co. v. State Tax Commission*, and held the City's transportation utility was a tax, rather than a fee.

In *V-1* Oil, the Court noted that "[o]ur cases do not establish a bright line test for distinguishing a tax from a fee. Rather, '[h]ow such exactions should be classified depends upon their purpose.' Generally speaking, a tax raises revenue for general governmental purposes, while a fee raises revenue . . . to compensate the government for the provision of a specific service . . . ." *V-1 Oil*, 942 P.2d at 911 (quoting *Weber Basin Home Builders Ass'n v. Roy City*, 487 P.2d 866, 867 (1971) (If the money collected . . . and the proceeds therefrom are purposed mainly to service . . . such business or activity, it is regarded as a license fee. On the other hand, if the factors just stated are minimal, and the money collected is mainly for raising revenue for general municipal purposes, it is properly regarded as the imposition of a tax, and this is so regardless of the terms used to describe it.").

Thus the principle test under Utah law is whether or not the charge imposed for a City's provision of a "specific" service is reasonably related to the costs of providing that

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[3]Utah precedent is important because, as another court noted while addressing a similar issue:

> While the authorities from other jurisdictions, cited by both sides, are interesting because they deal with similar revenue collection schemes, also called transportation user fees, we find that they shed little light on this dispute. Each state is different and their systems of taxation are unique, especially in regard to the power a city has to tax. We must focus on Kansas law.

Heartland Apartment Ass'n, Inc. v. City of Mission, 352 P.3d 1073, 1077-79 (Kansas App. 2015), affd, 392 P.3d 98 (Kan. 2017).

specific service, as opposed to raising money for more general, non-specified services. *Id.* *See also* *Tooele Assocs. Ltd. P'ship v. Tooele City Corp.*, 2011 UT 04, ¶ 31 ("In other words, the challenger must demonstrate that the fee is being used to raise revenue for general governmental purposes.").

Here, providing safe and serviceable local roads is the provision of an undeniably "specific" service. *See* Merriam–Webster Online, http://www.merriamwebster.com/dictionary/specific (last visited August 24, 2020) (first definition: "constituting or falling into a specifiable category"). And as the district court acknowledged, the undisputed facts are that "the City has undertaken impressive measures to make sure they are not collecting an excessive amount of money and the money that is collected can only be spent to maintain the local road system." (R676-77).

Because the TUF is charged to provide a "specific" service, upkeep of local roads, and does not raise revenue for "general," *i.e.*, unlimited, unconfined or un*specified* governmental purposes, it is a fee under *V-1 Oil* and its progeny in this state.

The district court erred, however, in going on to graft another requirement onto the test: Instead of focusing on the purpose of the fee – provision of a specific, rather than general governmental service – it inquired who might benefit from the charge, finding that because the TUF provided a "general benefit" to persons who might use the City's local roads, even though they did not pay the fee, the TUF was a tax under the *V-1 Oil* test:

> However, no matter how you look at the purpose of those funds, the benefit of an improved road systems is a general benefit rather than a specific benefit to those who pay the fees. The benefit not only accrues to the

> individual property owners in the City but also to anybody who happens to use the City's road system whether they are a city resident or not. Given the nature of the benefit, the Court cannot conclude there is a "specific benefit" that returns to those who pay the fee, rather the benefit is general in nature benefiting the public at large.

(R676).

Although the Court in *V-1 Oil* did mention "specific benefit" when generally describing the two types of fee – "there are at least two broad types of fees: (i) a fee for service, i.e., a specific charge in return for a specific benefit to the one paying the fee, and (ii) a regulatory fee, i.e., a specific charge which defrays the government's cost of regulating and monitoring the class of entities paying the fee" – specificity of benefits is nowhere part of the test applied in that case. Rather, "[t]o be a legitimate fee for service, the amount charged must bear a reasonable relationship to the services provided, the benefits received, or a need created by those who must actually pay the fee. This requirement is intended to prevent a fee from being used to generate excessive revenues and becoming indistinguishable from a tax." 942 P.2d at 911. *See also id.* ("More specifically, for a fee for service to be reasonable, the total cost of the service so financed must fall equitably upon those who are similarly situated and in a just proportion to the benefits conferred.").

Here, the Companies never challenged the reasonableness of the fee, its relationship to the services provided or need created by the fee payors. (R670) ("There are no material issues of fact. Both parties agree the only questions remaining are legal and as such this matter can be resolved one way or the other by the Court determining the

applicable law and applying it to the undisputed facts." And the district court's imposition of a "specific benefit" test is inconsistent with *V-1 Oil* and its progeny.

Indeed, fees charged to service a sanitary sewer utility provide general benefits. Any person who spends any time in Salt Lake City, whether a resident, tourist or business visitor, benefits from the City sanitary sewer system, although only residents pay the fee. But the sewer utility charge is held to be a service fee. *See Ponderosa One Ltd.*, 738 P.2d at 637 (charges imposed for use of a sewer system were service charges, not taxes or assessments, because they were "payments for services furnished" and were "in the nature of tolls or rents paid for services furnished or available.").

By the same token, charges to support a storm water utility are charged to particular properties, but provide benefits to all members of the community by generally preventing damage to property from excessive accumulations of water and from flooding. *See Bd. of Ed.*, 2004 UT 37, ¶ 26 (citing *City of Littleton v. State*, 855 P.2d 448, 452–53 (Colo.1993) (noting benefits provided by storm sewer drainage systems and ruling that storm sewer charges constituted service fees rather than special assessments)). But charges to support a storm water utility are properly characterized as service or user fees. *Id.* at ¶ 23.

Consistent with Utah case law, this Court should grant the City deference in meeting the challenges and needs caused by accelerated urban growth, and reject the narrow "specific benefit" formulation the district court imposed on the seminal *V-1 Oil* test. The district court's formulation is inconsistent both with the *V-1 Oil* opinion itself,

and the Utah Supreme Court's subsequent applications. The City's TUF is an appropriate fee for service under Utah law.

CONCLUSION

For the reasons stated above, the City respectfully requests this Court's order and judgment reversing the district court's decision misapplying Utah law, and remanding the case with directions that the City's TUF is a fee for service, not a tax.

RESPECTFULLY submitted, this 11th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 26(f)(1)(c), Utah Rules of Appellate Procedure, I hereby certify that this **BRIEF OF APPELLANT PLEASANT GROVE CITY** complies with the type-volume limitation provided by Rule 26(f)(1)(a) of the Utah Rules of Appellate Procedure. The undersigned relied on Microsoft Word to determine that this brief contains 9,515 words, including headings, quotations, footnotes and certificates, and inclusive of the Table of Contents and Table of Authorities.

Dated this 11th day of September, 2020.

SNOW CHRISTENSEN & MARTINEAU

/s/ Robert C. Keller
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Attorneys for Appellant Pleasant Grove City

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(a)(11)(B), Utah Rules of Appellate Procedure, I hereby certify that this **BRIEF OF APPELLANT PLEASANT GROVE CITY** complies with Rule 21(h) in that it contains no non-public information classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law.

Dated this 15th day of September, 2020.

SNOW CHRISTENSEN & MARTINEAU

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2020, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT PLEASANT GROVE CITY** and a courtesy copy of the brief e-mailed in place of a CD in searchable PDF format were e-mailed and sent U.S. Mail to the following:

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