ORIGINAL

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.	**CROSS APPELLANTS' BRIEF** Appellate Case No. 20200290

Appeal from the Order on Cross Motions for Summary Judgment in Case No. 190300164, of the Fourth Judicial District Court, Utah County, Judge Jared Eldridge Presiding

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A LIST OF CURRENT AND FORMER PARTIES

The caption of this case includes the entirety of all parties, both current and former. Appellants/Cross Appellee: PLEASANT GROVE CITY; Appellees/Cross Appellants: 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE ISSUE 2

STATEMENT OF THE CASE 3

I. FACTS 3
II. PROCEDURAL HISTORY 5
III. FOURTH DISTRICT COURT'S DISPOSITION 6

SUMMARY OF THE ARGUMENT 6

ARGUMENT 6

I. THE TRIAL COURT CORRECTLY FOUND THAT THE TUF IS A TAX 6
II. THE TRIAL COURT ERRED IN FINDING THAT THE CITY HAD AUTHORITY TO IMPLEMENT THE TUF 11

CONCLUSION 14

CERTIFICATE OF COMPLIANCE 15

ADDENDUM 16

TABLE OF AUTHORITIES

Cases

Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp., 94 P.3d 234 (Utah 2004) 8

Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989) 10

Brewster v. City of Pocatello, 768 P.2d 765 (Idaho 1988) 10

Covell v. City of Seattle, 905 P.2d 324 (Wash. 1995) 10

Dairy Product Services, Inc. v. City of Wellsville, 2000 UT 81 3

Heartland Apartment Association, Inc. v. City of Mission, 392 P.3d 98, 108 (Kan. 2017) 9, 10

National Cable Television Assn., Inc. v. United States, 415 U.S. 336, 341 (1974) 7

State v. City of Port Orange, 650 So.2d 1, 2-4 (Fla. 1994) 10

Tooele Assocs. Ltd. P'ship v. Tooele City Corp., 2011 UT 04 7

Utah Code 10-8-14 12

V-1 Oil Co. v. Utah State Tax Comm'n, 942 P.2d 906 (Utah 1996) 1, 6, 9

Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866 (1971) 7

Statutes

Utah Code 10-6-101 13

Utah Code 10-6-106(24) 12

Utah Code 10-6-133.4 13

Utah Code 10-8-10 12

Utah Code 10-8-24 12

Utah Code 10-8-25 12

Utah Code 54-2-1(22) 12

Utah Code 59-13-201 13

Utah Code 59-2-101 13

Utah Code 59-2-102(32) 12

Utah Code 72-2-102(2) 14

INTRODUCTION

Pleasant Grove City ("the City") has needed additional funds to establish, maintain, and repair its road system for many years. To this end, its city council began searching for a creative solution that would raise the necessary revenues without increasing taxes, understanding that raising taxes was too distasteful of an option to its residents and businesses. Some residents and businesses in the City sought to divert additional monies from the City's general fund to road maintenance through a citizen driven initiative in 2017, but that failed.

At that point, the City opted for the clever work-around of raising taxes by creating a "transportation utility" to be financed by a "transportation utility fee" ("TUF"). Certain residents and businesses of the City ("Cross Appellants") refused to accept the *Newspeak* nomenclature assigned to this new tax and challenged it as exactly that – a disguised tax.

Cross Appellants maintain that the TUF is a tax under Utah law, specifically *V-1 Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906 (Utah 1996), because the TUF is a general revenue raising measure that lacks a specific benefit to those who actually pay it. The TUF is unlike traditional utilities that provide a service and are based on contract such as electricity, sewage, waterworks, and garbage removal, all of which provide a very specific benefit to the users of such utilities that can be quantified and qualified to each individual user. The TUF, on the other hand, benefits society generally, and there is no

specific benefit to the payor that does not also fall under the umbrella of a general benefit to all. The district court was correct in finding the TUF to be a tax for this reason.

But the question of whether the TUF is a tax falls secondary to the more important question of whether the City had the authority to impose such a burden on its residents and businesses in the first place. The district court erred when finding that such a power is premised on the catch-all general welfare provision found in Utah Code 10-8-84. Although recognized as an independent power, such independence is limited by the Legislature's specific grants of authority to municipalities. *See State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980). The Utah Legislature has, in no uncertain terms, defined what utilities a municipality may create and operate, and a "transportation utility" is not one of them. In specifically granting municipalities the power to create and maintain certain utilities the Legislature has limited the City's power to create and maintain others, including the transportation utility. The district court's decision on this issue should be reversed.

STATEMENT OF THE ISSUE

Issue: Whether the district court erred in finding that the City had authority to implement the TUF under the general welfare clause of Utah Code 10-8-84.

Standard of Review: "In reviewing the trial court's decision to grant summary judgment, we give the court's legal decisions no deference, reviewing for correctness, while reviewing the facts and inference to be drawn therefrom in the light most favorable

to the nonmoving party." *Dairy Product Services, Inc. v. City of Wellsville*, 2000 UT 81 ¶ 15.

Preservation: This issue was preserved through its motion for summary judgment, Appellants' opposition thereto, and the court's final judgment on the issue. R569-648, R970-679.

STATEMENT OF THE CASE

I. FACTS

1. In approximately 2015, Pleasant Grove began mulling over the idea of adopting a transportation utility and imposing a transportation utility fee, after getting the idea from Provo City which had done something similar the year before to help fund its road system. R593-594.

2. Thereafter, the City hired Lewis Young Robertson & Burningham to assist the City in determining residential and business use of the City road system. R594-595.

3. In examining its needs to fund its road system, the City sought to generate $1 million annually through a TUF, which would go toward the $3.8 million annually needed for the City's road system maintenance. Other sources of the City's road funding would derive from Class B and C road funds, which come from the state gas tax, and the City's general fund, the deposits of which primarily come from the property tax and sales tax. R596-597.

4. Each year the county assessor provides the City with an assessed valuation of the properties within the City limits and then the City sets it property tax rates based

on those valuations. If the City wishes to capture more revenue, it need only increase its property tax. If it wishes to raise its property tax rate, however, it must go through the truth in taxation process, but ultimately it can raise the property tax rate to any level it wishes. R595-600.

5. In November 2017, residents of Pleasant Grove City voted against a citizen driven initiative – Proposition 3 – to allocate monies from the City's general fund to use specifically for road maintenance. R483

6. On April 10, 2018, the City Council passed Ordinance No. 2018-10 with Resolution No. 2018-021 which established a transportation utility, TUF, and a special fund in which all proceeds from the TUF would be deposited and used solely for transportation utility purposes. R611-617.

7. The April 10, 2018 Ordinance and Resolution were replaced by the July 17, 2018 Ordinance No. 2018-19 and Resolution 2018-045 with an effective date of August 1, 2018 ("the Ordinance"). R619-626. This is the current law and the law which is at issue in this appeal.

8. The Ordinance imposes a TUF on three different classifications of users and in the following manner:

a. Residential – this is a standard fixed fee applied to any residential unit, regardless of how many people live there or how many vehicles they own or how many drivers live in the unit and making no differentiation between a single-family home, apartment, condo, or vacation home. Each residential unit pays $8.45/month. R625.

b. Tier 1 Business – this includes every business that is not a gas station/convenience store, restaurants with drive-thru service, and businesses with more than 250 parking stalls (except for churches). Each Tier 1 Business pays $41.27/month. R625.

c. Tier 2 Business – this includes gas station/convenience store, restaurants with drive-thru service, and businesses with more than 250 parking stalls (except for churches). *Id.* Each Tier 2 Business pays $236.05/month. R625.

d. There are no exemptions for non-profit organizations or any other business entity or individual. R 625. Every resident, business, or other incorporated entity must pay the TUF, no exceptions. R483.

9. The Ordinance rejects any requirement "that the operations, improvement, and maintenance expenditures from the fund specifically relate to any particular property from whom the fees were collected." R621.

On August 1, 2018 the TUF went into effect. R626.

II. PROCEDURAL HISTORY

Appellants and Cross Appellants filed competing motions for summary judgement in June and July of 2019. They also filed their respective oppositions and reply briefs with the trial court. The trial court heard oral argument on the competing motions on October 10, 2019. A final judgment on the matter was issued by the trial court on February 12, 2020. These cross appeals follow.

III. FOURTH DISTRICT COURT'S DISPOSITION

Judge Jared Eldridge denied Cross Appellants' motion for summary judgment on the issue of whether the City had authority to implement a TUF, finding that the City did have such authority. Judge Eldridge granted Cross Appellants' motion for summary judgment on the issue of whether the TUF constitutes a tax, finding that it was a tax.

SUMMARY OF THE ARGUMENT

The district court correctly found that the City's TUF was a disguised tax under the analysis found in *V-1 Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906 (Utah 1996) because it was a general revenue raising measure that did not specifically benefit those who were paying the fee.

But the district court never should have reached the question of whether the TUF constituted a tax or fee because the City did not have the power to implement the TUF, and the district court erred in finding that the City had such authority under the general welfare clause found in Utah Code 10-8-84.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT THE TUF IS A TAX

The district court correctly applied *V-1 Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906 (Utah 1996), which as noted by the district court, is the "seminal case" in Utah for distinguishing between a service fee or a tax. While recognizing the Utah Supreme Court's disclaimer in *V-1 Oil* that there is no bright line test for distinguishing a tax from

a fee the district court relied on that court's definition of a fee for service[1] in finding that the TUF is a tax: "[A] fee [for service] raises revenue either to compensate the government for the provision of a specific service or benefit to the one paying the fee..." R676 citing *V-1 Oil*, 942 P.2d at 911; "[A] fee for service, i.e., a specific charge in return for a specific benefit to the one paying the fee." *Id.*

A service fee, therefore, can be said to be premised on a *specific-charge-for-specific-benefit* requirement. *See also National Cable Television Assn., Inc. v. United States*, 415 U.S. 336, 341 (1974) ("A fee...is incident to a voluntary act" and derives from a service provided by a governmental entity which "may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.").

The specific-charge-for-specific-benefit requirement is further supported by the authorities on which the City's Brief relies. For example, although decided prior to *V-1 Oil*, both *Ponderosa One Limited Partnership v. Salt Lake City Suburban Sanitary District*, 738 P.2d 635 (Utah 1987) and *Murray City v. Board of Education of Murray City School District*, 396 P.2d 628 (1964), involved the specific charge to the occupants of real property for the specific benefit of removing sewage waste from their land. In distinguishing between an assessment and "the cost of a service" the Supreme Court of Utah in *Murray City* noted that an assessment "enhances all property within" an area

[1] The City makes no claim that the TUF is a regulatory fee. Thus, the law surrounding regulatory fees is not at issue. It also makes the City's citations to *Weber Basin Home Builders Ass'n v. Roy City*, 487 P.2d 866 (1971) on page 22 of its brief and *Tooele Assocs. Ltd. P'ship v. Tooele City Corp.*, 2011 UT 04, ¶ 31 on page 23 irrelevant.

"[b]ut the benefits" of water works and sewage services "expend themselves upon the users thereof and cannot be attached to the value of the land beyond permanent installation of pipes." Thus, while there are general benefits associated with public sewage services (as pointed out in the City's Brief pg. 25), *Murray City* cited only the specific nature of the benefits in determining that the sewer charges were service fees.

Similarly, the court did not allude to any general benefits in *Ponderosa One*. In fact, quite the opposite. In that case, the Supreme Court of Utah described the sewage service charges at issue as "tolls or rents paid for services furnished or available." *Id.* at 637. Better words such as "tolls" and "rents" cannot be found to describe the specific-charge-for-specific-benefit requirement.

Likewise, *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp.*, 94 P.3d 234 (Utah 2004) involved the specific charge to a school district for the specific benefit the city provided for the removal of storm water runoff from the district's property. In addition to relying on both *Murray City* and *Ponderosa* the Supreme Court of Utah cited *V-1 Oil* stating that a service fee is "a specific charge in return for a specific benefit to the one paying the fee" (*Id.* at 240) and went on to conclude that the storm water removal fee was a service fee because "the removal of something" unwanted can be "as valuable as the delivery of something" wanted. *Id.* at 240. Further, the court found that the storm water services are akin to being charged for water, lighting, and sewer charges. *Id.* Although all such services are accompanied by general benefits to the public, such benefits are irrelevant for determining whether the monetary charges associated with such services are service fees.

The district court correctly found that the TUF violates the specific-charge-for-specific-benefit requirement. Under the TUF, the City does not deliver anything to the residents and businesses being charged for the "service" such as it does with electricity and water, and it does not remove anything from their property such as it does with garbage collection, sewage, or storm water, all of which are services that can be specifically quantified to the specific user and "based on contract."[2] *See Ponderosa One*, 738 P.2d at 637 citing *City of Stanfield v. Burnett*, 353 P.2d 242 (Or. 1960); *see also Heartland Apartment Association, Inc. v. City of Mission*, 392 P.3d 98, 108 (Kan. 2017) (distinguishing a TUF from stormwater and sewer utility fees because the TUF was not assessed against those who were "*actually using* the road. It is not a payment from motorists, which could properly be characterized as a fee.").

The specific-charge-for-specific-benefit requirement, however, is only the first part of *V-1 Oil*'s service fee analysis. Once the specific-charge-for-specific-benefit requirement is met, the court must next consider whether the service fee is legitimate/reasonable. *V-1 Oil* suggests that there are two ways a service fee will be found illegitimate and unreasonable: (1) "[i]f the fee bears no reasonable relationship to some need created by the one paying the fee" and (2) "if the services provided through the fee are not of 'demonstrable benefit' to the one paying the fee then the fee is likely to be unreasonable and, hence, illegitimate." *V-1 Oil*, 942 P.2d at 912.

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[2] Toll roads are based on contract and provide a specific charge for a specific benefit, but the City chose not to raise revenue for its road maintenance in this manner. R495.

Contrary to the City's representation on page 24 of its brief, Cross Appellants challenged the legitimacy/reasonableness of the TUF (R580-581), but in finding that the TUF violated the specific-charge-for-specific-benefit requirement, the district court did not, and in fact had no reason, to address the legitimacy/reasonableness test.[3]

While *V-1 Oil* is the controlling law on the issue at hand, it is important to note that all other jurisdictions that have considered the issue of a TUF, except Colorado,[4] have found that a TUF is in fact a disguised tax. *See State v. City of Port Orange*, 650 So.2d 1, 2-4 (Fla. 1994) (Defining a "user fee" (service fee) as a "...charge[] in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society" and finding that the TUF did not fall under such definition, but was instead a tax.); *Brewster v. City of Pocatello*, 768 P.2d 765 (Idaho 1988) ("In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs."); *Covell v. City of Seattle*, 905 P.2d 324 (Wash. 1995) ("There is no way to conclude that the street utility charges are 'akin to charges for services rendered.' They are not individually determined and cannot be avoided."); *Heartland Apartment Association, Inc., supra*, 392 P.3d 98 (Kan. 2017) (citing the fact that the benefit of the TUF was "of a general nature and shared with the public at large" as one of the reasons for finding the TUF was a tax).

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[3] Should this court find that the TUF constitutes a service fee rather than a tax, it should remand the case to the district court to determine whether the TUF satisfies the legitimacy/reasonableness test.

[4] *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989)

V-1 Oil's analysis is consistent with these other jurisdictions that have considered whether a TUF is a service fee or tax. Given the general benefit and revenue generating nature of the City's TUF, the district court correctly found it to be a disguised tax.

II. THE TRIAL COURT ERRED IN FINDING THAT THE CITY HAD AUTHORITY TO IMPLEMENT THE TUF

This district court erroneously relied on Utah Code 10-8-84,[5] the general welfare statute, in support of its finding that the City had authority to implement the TUF. Although Utah divorced from *Dillon*'s rule forty years ago in *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980), that case did not expand the powers of municipal governments to allow them to pass any ordinance so long as it can fall under the rather large umbrella of Section 84. Instead, the Utah Supreme Court very clearly recognized the limitation that the Utah Legislature's specific grants of authority to municipalities invoke on those local governments. "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." *Hutchinson*, 624 P.2d at 1126.

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[5] Utah Code 10-8-84 reads as follows:

> (1) The municipal legislative body may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city.
> (2) The municipal legislative body may enforce obedience to the ordinances with fines or penalties in accordance with Section 10-3-703.

It was with this principle in mind that the Utah Supreme Court invalidated a local statute in *Harding v. Alpine City*, 656 P.2d 985 (Utah 1982), only two years after releasing its *Hutchinson* decision. In that case a state statute permitted cities to force the owners of all buildings within 300 feet of a city sewer line to connect to that line. Alpine City required any building within 500 feet to connect but the court found the city ordinance illegal. "[I]f the City were permitted to reach beyond 300 feet the words '300 feet' in the statute would have no meaning." *Id.* at 986.

Similarly, the Utah State Legislature has specifically granted to cities the ability to create certain utilities including "waterworks, sewer collection, sewer treatment systems, gas works, electric light works, telecommunications lines, cable television lines, public transportation systems, or public telecommunications service facilities." Utah Code 10-8-14. A TUF is nowhere mentioned within the definition of "Utility" (*see* Utah Code 10-6-106(24)) or "Public Utility" (*see* Utah Code 54-2-1(22), Utah Code 59-2-102(32)) in the Utah Code.

Either the term "utility" is limited by the meaning given to it by the Legislature or it has no meaning at all. Today a municipality may create a transportation utility in the name of financing the maintenance of its road system, tomorrow it may be a "crosswalks, curbs, and gutters utility" for the maintenance and upkeep of such fixtures (*see* Utah Code 10-8-25), a "tree utility" for the continued planting of trees throughout the city (*see* Utah Code 10-8-10), or a "litter utility" to help finance the costs of keeping up with removing litter from city streets and public grounds (*see* Utah Code 10-8-24). The list can go on, as municipalities are granted with numerous powers, all of which require financing

to be carried out. The makeshift creation of a "utility" is a clever way of avoiding taxation all together – which is certainly a more politically palatable way to finance a municipality's operations. City councilmen could bypass the imposition and collection of taxes altogether if the general welfare clause is read to permit a municipality to finance its operations through feigned "fees."

What is more, the Utah Legislature has already provided municipalities with the authority to levy special taxes for specific purposes. *See* Utah Code 10-6-133.4. Thus, any city that is experiencing a budget shortfall for road maintenance can pass a special tax to raise revenue for the specific purpose of maintaining and repairing its road system. The monies collected from such a tax must be placed in a special "road maintenance" fund and can be used only for that purpose. The obvious problem with this solution is that it forces the municipal governing body to tax its residents and businesses, and nobody likes a tax hike. Moreover, by levying a special tax a city then becomes liable to abide by Utah's Truth in Taxation laws (*see e.g.*, Utah Code 10-6-101 *et seq.*) and the Property Tax Act (Utah Code 59-2-101 *et seq.*). Classifying taxes as fees helps municipalities escape those burdensome laws.

That the Utah Legislature intended municipalities to utilize this "special tax" as a possible solution for the very problem the City is facing with its budget shortfall for road maintenance is evident from the fact that Utah itself has passed such a tax. The Motor Fuel Tax imposes a special tax on each gallon of gasoline (*see* Utah Code 59-13-201 *et seq.*) sold to consumers in the state, the entirety of the proceeds from which are deposited into the state Transportation Fund (*Id.*), and "Transportation Fund money shall be used

exclusively for highway purposes as provided in this title." Utah Code 72-2-102(2). Thus, the State Legislature itself classifies as a tax the very revenue raising measure for which the City is wrongly using a TUF.

CONCLUSION

This court should affirm the district court's finding that the City's TUF is a tax; however, it should reverse the district court's finding that the City had the authority to implement the TUF under Utah's general welfare clause found in Utah Code 10-8-84. In the event the court reverses the district court's finding that the TUF was a tax, it should then remand the case to the district court to determine if the TUF is reasonable and legitimate.

DATED this 10th day of November, 2020.

SALCIDO LAW FIRM, PLLC

Gerald M. Salcido
Attorney for Cross Appellants/Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 24(11), counsel certifies this brief complies with Utah R. App. P. 24(g) page limitations. It also complies with Utah R. App. P. 21 record restrictions.

DATED this 10th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2020, two true and correct copies of the foregoing **CROSS APPELLANTS' BRIEF**, were mailed, postage prepaid, to the following:

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ADDENDUM

1. Order on Cross Motions for Summary Judgment

The Order of the Court is stated below:
Dated: February 27, 2020 06:08:17 PM
/s/ JARED ELDRIDGE
District Court Judge

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN UTAH COUNTY, STATE OF UTAH

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, Plaintiffs, v. PLEASANT GROVE CITY, Defendant.	**ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT** Civil No. 180100165 Judge Jared Eldgridge

This case comes before the court on competing motions for Summary Judgment filed by both Plaintiffs and Defendant. 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.

I. SUMMARY

In recent years, like many cities and counties in the State of Utah, Pleasant Grove City found itself facing a budget shortfall making it almost impossible for the City to maintain roads at an acceptable level unless additional funding was found. As a result, the City projected an increasing number of roads would deteriorate to an unacceptable level unless funding could be increased to cover additional maintenance expenses.

Pleasant Grove and other cities and counties brought their plight to the attention of the Utah State Legislature, hoping for some adjustment in the State gas tax that would help alleviate the increasingly ominous problem of a lack of funds to maintain local roads at an acceptable level. In a compromise, the 2015 Legislature approved H.B. 362 that allowed for, among other things, a county option sales tax that could be used for various purposes including road maintenance by counties and cities within the county. However, before the tax could be imposed it had to be approved by the voters within the county that sought to impose the tax. The question was in fact placed on the ballot for Utah County citizens to consider in November 2017 but ultimately rejected, thus extinguishing Pleasant Grove's hopes of a new funding source to help with the budget shortfall of maintaining local roads.

After the county option sales tax proposition failed, the City Council went back to the drawing board and began to consider other ways to solve the problem of the deteriorating road system. Along the way a citizen generated ballot initiative that would have required the City to take $2.6 million from the City's general fund for road maintenance and construction was placed on the ballot in 2017. The City decided to table discussions about road funding until the ballot initiative was decided so they could take into account the potential impacts of the

initiative if it passed. Ultimately, the ballot initiative failed.

In January 2018 a newly elected Mayor and City Council resumed discussions of funding road maintenance and construction and ultimately settled on a road utility fee. The City went through a public process of hearings and discussions which resulted in the City adopting 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."[1] and Ordinance 2018-21, to implement the Transportation Utility Fee on April 10, 2018. A short time later the City Council amended the Ordinance and the resulting fee on July 17, 2018 at City Council Meeting.

The Plaintiffs have now challenged whether or not Pleasant Grove City had authority to implement a Transportation Utility Fee or TUF and also if they did have authority whether or not the fee is actually a disguised tax that should be subject to the public processes before being implemented. Both parties have moved for summary judgment.

II. AUTHORITY TO IMPLEMENT A TRANSPORTATION UTILITY FEE OR TUF.

Utah cities are given broad authority to address municipal problems like funding for deteriorating infrastructure:

> The municipal legislative body may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city.

Utah Code Ann. § 10-8-84. *See also Rupp v. Grantsville City*, 610 P.2d 338, 339-40 (Utah 1980) ("In Utah, municipalities are granted broad powers for the protection of the health and welfare of

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1April 10, 2018, Meeting Minutes, App. Ex. 11, p. 4-5.

their residents. Among these powers is the statutory authority to establish and maintain public utilities for the benefit of those residents. Inherent in the power to preserve and protect the health and welfare of municipal residents is the authority to adopt ordinances directed at the effectuation of that protection.").

In *State v. Hutchinson*, the Utah Supreme Court described the deference courts should grant a city when reviewing their decisions to implement those broad powers, as follows:

> In short, we simply do not accept the proposition that local governments are not to be trusted with the full scope of legislatively granted powers to meet the needs of their local constituents. On the contrary, the history of our political institutions is founded in large measure on the concept at least in theory if not in practice that the more local the unit of government is that can deal with a political problem, the more effective and efficient the exercise of power is likely to be.
>
> . . .
>
> 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. And the courts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitution of this State or of the United States. 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.

State v. Hutchinson, 624 P.2d 1116, 1126 (Utah 1980).

The Court applied these principles more recently in examining whether Sandy City had appropriately charged a storm drain 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.

Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp., 2004 UT 37, ¶ 31.

All of this argues in favor of the proposition that the City does have broad authority granted by the Legislature to impose a TUF. Adding further strength to the argument is the fact the Legislature adopted Utah Code Ann. § 11-26-301in 2018. This statute purports to define certain terms and place a limit on the imposition of a transportation utility fee. The statute states in its entirety:

1) As used in this section:

   (a)(i) "Legal subdivision" means a local government that is recognized by Utah Constitution, Article XI.

   (ii) "Legal subdivision" does not include a local government that Utah

   (ii) "Legal subdivision" does not include a local government that Utah Constitution, Article XI, only authorizes the Legislature to create.

   (b) "Municipality" means the same as that term is defined in Section 10-1-104.

   (c) "Transportation utility fee" means an ongoing, regular fee or tax imposed:

   (i) by a municipality for the purpose of maintaining public roads; and

   (ii) on utility customers within the municipality.

2) A municipality may not impose a transportation utility fee on a legal subdivision.

3) This section does not grant to a municipality any authority not otherwise provided for by law to impose a transportation utility fee.

In exercises of statutory interpretation, the Utah Supreme Court has directed that "[w]hen

interpreting statute, "our primary goal is to evince the true intent and purpose" of the legislative body." *In Matter of Adoption of B.B.*, 2017 UT 59, ¶ 39, 417 P.3d 1 (2017) (quoting *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863). "The best evidence of legislative intent is "the plain and ordinary meaning of the statute's terms." *Id.* (citing *Rent-a-Center W, Inc. v. Utah State Tax Comm'n*, 2016 UT 1, ¶ 13, 367 P.3d 989).

The statute bears the title "Definitions – Limitation on imposition of transportation utility fed." The statute's terms define a TUF as "an ongoing, regular fee or tax imposed: (i) by a municipality for the purpose of maintaining public roads; and (ii) on utility customers within the municipality." Utah Code § 11-26-301(1)(c). Section 11-26-301(3) contains a disclaimer clause that "[t]his section does not grant to a municipality any authority not otherwise provided for by law to impose a transportation utility fee." The statute also defines local government entities subject to the limitation. Plainly, Section 11-26-301 is a limitation on a municipality's ability to levy a fee or tax on any other entity or person than those within its jurisdiction. It also demonstrates the State Legislature's awareness that a municipality could impose a TUF, despite the disclaimer clause that Section 11-26-301 grants no authority for a city to create one not otherwise specified. The most likely repository of that authority is Utah Code Ann. § 10-8-84 as discussed above.

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. Since the City had authority to adopt a TUF to raise funds, the Court will not interfere with the legislative choice of the City unless it is arbitrary

or directly prohibited by, or inconsistent with the policy of state or federal laws or the constitutions of the State or the United States. *See Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980). In this case there is no evidence the ordinances at issue were adopted arbitrarily or that they are directly prohibited or that they conflict with state or federal laws or constitutions. Therefore the Court declines to invalidate the TUF the City adopted based on the argument the City did not have authority to implement such a fee or tax.

III. IS THE TUF ADOPTED IN THIS CASE A FEE OR A TAX?

By its plain terms, Utah Code § 11-26-301 defines a TUF as a "fee or a tax". The question in this case becomes, which is it, a fee or tax? If it is a fee then, as long as it is reasonably related to the services provided, benefits received or the need created by those who pay the fee, it could be upheld by the Court. *See V-1 Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906, 911 (Utah 1996), *vacated in part on reh'g*, 942 P.2d 906 (Utah, Aug. 5, 1997). However, if it is a tax, then the City would need to go through the additional procedures required by Utah law before a tax increase can be implemented.

The seminal case that address the distinction between a fee or a tax and was cited to the Court by both parties is, *V-/ Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906, 911 (Utah 1996), *vacated in part on reh'g*, 942 P.2d 906 (Utah, Aug. 5, 1997). In *V-1 Oil*, the State Supreme Court said, "Our 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 either to compensate the government for the provision of a specific service or benefit to the one paying the fee or to defray the government's costs of regulating and policing a business or activity

engaged in by the one paying the fee." *Id.* at 911 (internal citations omitted).

While there is no bright line test, the Court did suggest, "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." *Id.* In this case there is no argument the TUF is a regulatory fee but rather that it falls into the first category of a fee for service.

The City argues the TUF falls into the first category because the fee collected is deposited into a restricted fund that can only be used for the specific purpose of maintaining the local road system and that the TUF does not collect an excessive amount of money, in fact it only generates enough revenue to partially address the projected need. The Court acknowledges 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. 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.

In *V-1 Oil* the Court said, "We analyze the surcharge under both concepts to determine whether it can be fairly characterized as a legitimate fee under either concept. If it cannot, then it is a general revenue-raising measure and must be classified as a tax." *Id.* In this case after

considering whether the TUF collected is a fee for service or a regulatory fee and concluding it is not, the Court can only conclude the TUF must in fact be classified as a tax.

Since the TUF is in fact a tax it must go through the necessary procedures outlined in Utah Code before it can be implemented. Therefore, the Court finds in this case the Plaintiffs are entitled to summary judgment in their favor on this issue.

IV. CONCLUSION

This case presents difficult questions that are not clear cut. This is an important issue and everybody would benefit from the Legislature clarifying its intentions on this issue. However, based on the current state of the law, this Court is persuaded while the City has authority to implement a TUF, the TUF that was implemented here is clearly a tax and therefore improperly collected until the City satisfies the additional requirements set out by the Utah Code for an increase in the tax rate.

ORDER

Based on the foregoing, the Court enters the following order:

1. The Defendant's Motion for Summary Judgment is granted in part and denied in part. The Court will grant summary judgment in favor of the Defendant on the issue that the City does have authority to implement a TUF. However, the Court denies summary judgment on the issue that the TUF, as implemented in this case, is a fee and not a tax.
2. The Plaintiffs' Motion for Summary Judgment is granted regarding the TUF, as implemented in this case, is a tax and not a fee. On the issue of whether the City has authority to implement a TUF, the Court denies summary judgment in favor

of the Plaintiffs.

APPROVED AS TO FORM:

SNOW CHRISTENSEN MARTINEAU

/Robert C. Keller

(Signed by Gerald M. Salcido with Permission via E-Mail)
ROBERT C. KELLER

Attorneys for Defendants

End of Order
The electronic signature of the Court and the date of entry is affixed to the first page of this Order.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached **ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT** in Case No. 180100165 before the Fourth Juridical District Court in and for Utah County, State of Utah, was served upon the parties listed below via electronic notification from the Court's Green Filing system on the 27th day of February, 2020.

Counsel for Defendants

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4828-3034-5629, v. 1