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May 4, 2021

Greg Sprangers (chairperson@townofbuchanan.org)
Town Chairperson
Maggie Mahoney (maggie@townofbuchanan.org)
Town Administrator
N178 County Rd N.
Appleton, WI 54915

Re: Notice of Claim regarding the Town of Buchanan's Transportation Utility Fee

Dear Mr. McAndrews and Ms. Mahoney,

The Wisconsin Institute for Law & Liberty ("WILL") is a public policy legal center that seeks to promote constitutional government and the rule of law. WILL represents Wisconsin Property Taxpayers, Inc., a nonpartisan membership organization consisting of thousands of small business, farm, and property owners in every corner of the state, including the Town of Buchanan. Founded in 1985, the organization is committed to providing its members with up-to-date information, legislative advocacy, and exclusive cost-saving benefits.

Buchanan recently adopted what it calls a "transportation utility fee"—a charge imposed on all town properties for their predicted use of the roads—to generate revenue to pay for its roads. Buchanan Ordinances ch. 482. Despite its name, this "fee" is really an unlawful tax. Even if it could be characterized as a fee, nothing in state law authorizes municipalities to charge a road-use fee; rather, road costs are financed primarily through property taxes, which are subject to strict levy limits and uniformity requirements. The town appears to be using this fee to circumvent those limits on property taxes. We are hopeful that Buchanan will promptly eliminate this unlawful fee, but if such a resolution is not possible, we are prepared to file a complaint in court. Please let us know **within 120 days, by September 1, 2021**, whether Buchanan will remove this fee.

As you know, municipalities have "no inherent power to tax," and "may only enact the types of taxes authorized by the legislature." *Blue Top Motel, Inc. v. City of Stevens Point*, 107 Wis. 2d 392, 395 (1982). Moreover, taxes "cannot be imposed without clear and express" authorization, and "where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 106 (1965). Likewise, municipalities cannot charge a fee without statutory authorization. *See Town of Hoard v. Clark Cty.*, 2015 WI App 100, ¶ 16–28 (analyzing "whether the Town has authority to charge a [particular] fee."); *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶¶ 16–19 (same); *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 21 (Towns are "creatures of the legislature," with "no

inherent right of self-government beyond the powers expressly granted to them.”). Additionally, a town ordinance that “conflicts with,” “defeats the purpose of,” or goes against the spirit of” state law is preempted and invalid. *Wisconsin Carry*, 2007 WI App 7, ¶ 64.

Buchanan’s “transportation utility fee” is charged to “all developed properties” and is used to fund “the cost of utility district highways, stormwater management, sidewalks, street lighting, traffic control” and “any other convenience or public improvement.” Buchanan Ordinances §§ 482-3, 482-4. The Town Board sets the fee annually, *id.* § 482-4, by first determining how much revenue it wants to generate and then applying a formula based on a rough prediction of the “average trips” different types of property will generate.¹ Buchanan is currently using this fee to generate roughly \$850,000 in revenue, over 10% of its annual budget. *Id.*² Homeowners pay \$315 annually; businesses and other properties pay anywhere from \$200 to \$8,000.³

This “fee” is an illegal tax. Wisconsin courts have made clear that “[t]he purpose, and not the name it is given, determines whether a government charge constitutes a tax.” *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶ 6. “[T]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities.” *City of River Falls v. St. Bridget’s Cath. Church of River Falls*, 182 Wis. 2d 436, 441–42 (Ct. App. 1994). Buchanan’s “transportation utility fee” bears all the marks of a tax: it is imposed on all developed properties; it is not based on any actual, measured use of a service; it is incorporated into property tax bills; and failure to pay it results in lien “as a delinquent tax against the property.” Buchanan Ordinances § 482-7. The fee is calculated based on how much revenue Buchanan wants to generate; the funds can be used for any “convenience or public improvement,” and, according to the most recent budget documents, the revenues are transferred into other funds, including the general fund.⁴ In short, it is “an enforced proportional contribution from persons and property levied to support a government and its needs.” *Bentivenga*, 2014 WI App 118, ¶ 6 (citation omitted).

Even if the “transportation utility fee” can be characterized as a fee, rather than a tax, it is nevertheless illegal. Buchanan’s ordinance cites various statutes for authority, but none authorize such a fee.

Buchanan first cites Wis. Stat. § 66.0827, which allows for the creation of a “utility district,” along with an associated “district fund,” to finance “district highways, sewers, sidewalks, street lighting and water for fire protection.” Wis. Stat. § 66.0827(1). However, that section states explicitly that the “fund of each utility district shall be provided by *taxation* of the property in the district,” *id.* § 66.0827(2), subject to the levy limits and uniformity requirements discussed below. Section 66.0827 nowhere authorizes a fee for the use of the roads in a town (much less a fee for *predicted* use, rather than actual use).

¹ Resolution 2020-11, https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/750101/2020-11_Resolution_TUF_Annual_Amount_Fee_Calc_and_Use_Category.pdf

² 2021 Budget Summary, https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/775885/2021_Budget_Summary.pdf

³ Town Board Meeting Minutes from Dec. 12, 2019, at 2, *available at* <https://www.townofbuchanan.org/your-government/agendas-minutes>

⁴ *See* Transportation Utility Fund Expenditures, https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/775904/Transportation_Utility_Fund_Expenditure.pdf

The next statute Buchanan references, Wis. Stat. § 66.0621, fares no better. That provision authorizes municipalities to finance certain “public utilities” by issuing municipal bonds, selling “shares of stock” in the utility, or allocating money from the general fund. As a threshold matter, a town’s road system does not meet the definition of a “public utility” in this section; it is not a “revenue producing facility or enterprise owned by a municipality,” like a “toll bridge.” *Id.* § 66.0621(1)(b). But even if an entire road system could fit the definition, nothing in this section authorizes any usage fees whatsoever. It only authorizes three types of funding, none of which support Buchanan’s fee: “issuing bonds,” selling “shares of stocks,” or allocating money “from the general fund,” which generally comes from “levying taxes.” *Id.* § 66.0621(3), (4), (5).

The last three sections Buchanan invokes, Wis. Stat. §§ 66.0807, 66.0811, and 66.0813, are especially puzzling, as they are clearly inapplicable. These sections apply only to a limited kind of “public utility”: a municipal-owned entity “for the production, transmission, delivery or furnishing of heat, light, water or power,” for the “transmission or delivery of natural gas,” or “a telecommunications utility.” Wis. Stat. §§ 66.0801(1)(b); 196.01(5). A road system obviously does not fit any of these categories. Additionally, none of these sections relate in any way to usage fees, even for the narrow category of “public utilities” to which they apply: 66.0807 allows a municipality to contract with a privately-owned utility; 66.0811 addresses how utilities may or must use their funds; and 66.0813 authorizes a municipal-owned utility to serve areas outside the municipality.

Ultimately, Buchanan appears to be using this fee to exceed its levy limit and evade the uniformity requirements under Article VIII, section 1 of the Wisconsin Constitution. As you know, Wisconsin places strict limits on property tax increases. Wis. Stat. § 66.0602. According to its most recent filing with the Department of Revenue, Buchanan is currently at its limit of \$2.4 million, yet it is charging property owners an additional \$850,000 through the “transportation utility fee,” exceeding its levy limit by over 33%. The Wisconsin Constitution also requires property taxes to be “uniform,” which “[g]enerally ... [means] that real property is taxed according to its fair market value.” *Applegate-Bader Farm, LLC v. Wisconsin Dep’t of Revenue*, 2021 WI 26, ¶ 5. Buchanan does not apportion its “transportation utility fee” based on a property’s market value, but instead on a prediction about the “average trips” a property will generate based on its classification, which disproportionately shifts the costs of roads onto local businesses.⁵ Thus, Buchanan’s transportation utility fee “conflicts with,” “defeats the purpose of,” or goes against the spirit of” the levy limits, and it violates the uniformity clause. *Wisconsin Carry*, 2007 WI App 7, ¶ 64.

Eliminating the “transportation utility fee” will not prevent Buchanan from financing its roads. Wisconsin law provides other funding mechanisms, including increasing property taxes above the levy limit by submitting a binding referendum to voters. Wis. Stat. § 66.0602(4). Or, better yet, Buchanan could cut costs elsewhere. But whatever route Buchanan chooses to fund its roads, it must comply with the law, including the uniformity requirements under the Wisconsin Constitution.

⁵ See Town of Buchanan Newsletter, *Roadway System: Now and into the Future* (2019), <https://www.townofbuchanan.org/home/showpublisheddocument?id=236> (comparing the effects of the transportation utility fee with a property tax increase).

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

Luke N. Berg
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