

STATE OF WISCONSIN

CIRCUIT COURT OUTAGAMIE COUNTY
BRANCH __

WISCONSIN PROPERTY TAXPAYERS, INC.

P.O. Box 1493
Madison, WI 53701

Plaintiff,

v.

TOWN OF BUCHANAN

N178 County Road N.
Appleton, WI 54915

Defendant.

Declaratory Judgment

Case Code: 30701

Case No. 21-CV-

COMPLAINT

Plaintiff Wisconsin Property Taxpayers, Inc., by their undersigned attorneys at the Wisconsin Institute for Law & Liberty, hereby alleges as follows:

INTRODUCTION

1. Municipalities may only impose taxes and fees that are authorized by state law.
2. The Legislature has also imposed strict limits on property tax increases without approval by taxpayers, and the Wisconsin Constitution requires property taxes to be uniform.
3. To generate revenue without complying with these constraints, the Town of Buchanan created what it calls a “transportation utility fee,” without any authority under state law for such a “fee.”
4. This “fee” is really an illegal tax, and imposing it violates the levy limits under state law and uniformity requirements under the Wisconsin Constitution.

5. Even if properly characterized as a fee, nothing in state law authorizes a “transportation utility fee.”

6. Plaintiff, on behalf of its members in the Town of Buchanan currently paying this “fee,” seeks a declaratory judgment that Buchanan’s “transportation utility fee” is unlawful and an injunction against further collection and enforcement of it.

PARTIES

7. Plaintiff Wisconsin Property Taxpayers, Inc. (WPT) is a nonpartisan membership organization consisting of thousands of small business, farm, and property owners throughout Wisconsin, including in the Town of Buchanan.

8. One of WPT’s primary goals is to ensure that its members are not subjected to unlawful or excessive taxes and fees.

9. Multiple of Plaintiff’s members reside in the Town of Buchanan and have been charged the “transportation utility fee.”

10. Defendant Town of Buchanan is the local municipality responsible for the adoption and collection of the “transportation utility fee” challenged in this lawsuit.

JURISDICTION AND VENUE

11. Plaintiff seeks a declaration that the “transportation utility fee” is void and unenforceable, giving this Court jurisdiction pursuant to Wis. Stat. § 806.04.

12. Plaintiff Wisconsin Property Taxpayers, Inc. has standing to assert this claim on behalf of its members currently paying the “transportation utility fee” who reside within the Town of Buchanan.

13. Plaintiff sent the Town of Buchanan a notice of claim, pursuant to Wis. Stat. § 893.80(1d), on May 4, 2021, which Buchanan denied on August 20, 2021.

14. Venue is proper in this court under Wis. Stat. § 801.50(2).

BACKGROUND

15. In December 2019, the Town of Buchanan adopted an ordinance imposing a “transportation utility fee.” Buchanan Ordinance ch. 482.¹

16. This “transportation utility fee” is charged to “every developed property” within Buchanan. Revenue raised through this “fee” 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.

17. The “fee” amount is not defined in the ordinance.

18. Instead, the “fee” is set annually by the Town Board, *id.* § 482-4(B), by first determining how much revenue the “fee” should generate and then applying a formula loosely based on an estimate of the “average trips” different types of private property will generate. Resolution 2020-11, Buchanan Town Board (Nov. 2020) (setting the “cost recovery amount for a Transportation Utility Fee at \$854,733”)²; *Road Funding*, Town of Buchanan, <https://www.townofbuchanan.org/town-services/road-funding> (last visited Sept. 10, 2021) (explaining that the fee “is based on a weighted average trip generation rate by land use utilizing data collected by an industry accepted source, the Institute of Transportation Engineers (ITE)”).

¹ Buchanan Ordinance ch. 482 is available at <https://ecode360.com/35478376>.

² https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/750101/2020-11_Resolution_TUF_Annual_Amount__Fee_Calc_and_Use_Category.pdf

19. The Town of Buchanan currently generates more than ten percent of its annual revenue from its “transportation utility fee.” 2021 Budget Summary, Town of Buchanan.³

20. Homeowners currently pay a flat fee of \$315.29 annually, while businesses and other revenue-generating properties may be required to pay up to or exceeding \$8,000 every year. *See Road Funding, supra* ¶ 18.

CAUSES OF ACTION

CLAIM ONE: Buchanan’s “Transportation Utility Fee” is an Illegal Tax

21. Plaintiff realleges and incorporates the preceding allegations of the complaint.

22. 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).

23. 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).

24. “The 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.

25. Buchanan’s “transportation utility fee” bears all the marks of a tax.

26. Buchanan’s “fee” is imposed on all developed properties in the town. *See Buchanan Ordinance* § 482-4(A).

³ https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/775885/2021_Budget_Summary.pdf

27. The “fee” is calculated by the Town Board first determining how much revenue it wants to generate. Buchanan Ordinance § 482-4(B). *Supra* ¶ 18.

28. A property’s contribution is not based on any actual, measured use of a service, but instead on a prediction of how many road trips each kind of property will generate. *Supra* ¶ 18.

29. It is “billed and collected with and as part of the annual property tax bill.” Buchanan Ordinance § 482-7(A).

30. Failure to pay the “fee” results in a lien “as a delinquent tax against the property.” Buchanan Ordinance § 482-7(D).

31. The funds generated by the “fee” can be used to pay for the “cost of utility district highways, stormwater management, sidewalks, street lighting, traffic control and the cost of *any other convenience or public improvement provided in the District.*” Buchanan Ordinance § 482-3(B).

32. And, according to Buchanan’s most recent budget documents, the funds generated are transferred into other funds, including the general fund. *See Transportation Utility Fund Expenditures*, Town of Buchanan (Dec. 2020).⁴

33. In short, Buchanan’s “fee” is “an enforced proportional contribution from persons and property levied to support a government and its needs”—in other words, a tax. *Bentivenga*, 2014 WI App 118, ¶ 6.

34. Nothing in state law authorizes this type of tax, and therefore it is unlawful.

⁴ https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/775904/Transportation_Utility_Fund_Expenditure.pdf. The link to this document is contained in the agenda for the Town Board’s December 15, 2020 meeting, at item 12.e, which itself is available at <https://www.townofbuchanan.org/your-government/agendas-minutes>.

CLAIM TWO: Buchanan’s “Transportation Utility Fee” Violates State Levy Limits

35. Plaintiff realleges and incorporates the preceding allegations of the complaint.

36. Wisconsin strictly limits property tax increases via levy limits. Wis. Stat. § 66.0602.

37. To increase property taxes beyond its levy limit, a town must seek permission from its residents via referendum. Wis. Stat. § 66.0602(4).

38. According to its most recent filing with the Wisconsin Department of Revenue, Buchanan’s property tax levy limit is \$2,374,348. A true and accurate copy of that filing is attached to this Complaint as Exhibit 1.

39. In November 2020, the Buchanan Town Board set the property tax levy at \$2,374,348, right at the limit. *See* Resolution No. 2020-15, Buchanan Town Board (Nov. 2020);⁵ Minutes from Nov. 17, 2020 Town Board Meeting, Item 12(k).⁶

40. Buchanan is charging property owners an additional \$854,733 through the “transportation utility fee.” *See* Resolution No. 2020-11, Buchanan Town Board (Nov. 2020);⁷ Minutes from Nov. 17, 2020 Town Board Meeting, Item 12(g), Buchanan Town Board.⁸

41. Thus, Buchanan is using its unlawful “fee” to exceed its levy limit by over 33%.

42. Buchanan did not go through the referendum process set forth in Wis. Stat. § 66.0602(4) to exceed its levy limit.

⁵ https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/750106/2020-15_Resolution_Adopting_the_2021_Town_Budget_2020-11-17.pdf

⁶ *See* <https://www.townofbuchanan.org/your-government/agendas-minutes/town-board-2020>

⁷ https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/750101/2020-11_Resolution_TUF_Annual_Amount__Fee_Calc_and_Use_Category.pdf

⁸ *See supra* n. 6.

43. Buchanan’s “transportation utility fee” therefore violates Wis. Stat. § 66.0602.

44. Additionally, or in the alternative, Buchanan’s “transportation utility fee” is preempted by Wis. Stat. § 66.0602 because it “conflicts with,” “defeats the purpose of,” and “goes against the spirit of” the levy limits therein, and because that statute “expressly withdraw[s]” municipalities’ ability to circumvent levy limits by re-labeling a tax increase as a fee. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 64, 373 Wis. 2d 543, 892 N.W.2d 233.

CLAIM THREE: Buchanan’s “Transportation Utility Fee” Violates the Uniformity Clause of the Wisconsin Constitution

45. Plaintiff realleges and incorporates the preceding allegations of the complaint.

46. Article VIII, section 1 of the Wisconsin Constitution 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, 396 Wis. 2d 69, 955 N.W.2d 793.

47. Buchanan does not apportion its “transportation utility fee” based on a property’s market value, but 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. *Supra* ¶ 18.

48. As explained above, Buchanan’s “fee” is really a tax.

49. Thus, Buchanan’s “fee” violates Article VIII, section 1 of the Wisconsin Constitution.

CLAIM FOUR: Even if Properly Characterized as a Fee, No State Law Authorizes a “Transportation Utility Fee”

50. Plaintiff realleges and incorporates the preceding allegations of the complaint.

51. Even if the “transportation utility fee” is properly characterized as a fee and not a tax, Buchanan nevertheless lacks authority to impose such a fee.

52. 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.”).

53. No statute authorizes a town to impose a “transportation utility fee” like Buchanan’s.

54. Buchanan’s “fee” is therefore unlawful.

REQUEST FOR RELIEF

Plaintiff therefore requests the following relief:

- A. A declaration that Buchanan’s “transportation utility fee” is unlawful;
- B. An injunction prohibiting Buchanan from levying, enforcing, or collecting the “transportation utility fee”;
- C. Costs as allowed by law; and
- D. Such other relief as the Court deems appropriate.

Dated: September 16, 2021

Respectfully Submitted,

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