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IN THE FOURTH JUDICIAL DISTRICT COURT – PROVO
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, Plaintiffs, v. PLEASANT GROVE CITY, Defendant.	MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER Case No.: 180401255 Judge: Roger W. Griffin

INTRODUCTION

The court should grant Plaintiffs' request for temporary restraining order because defendant Pleasant Grove City ("the City") passed a Transportation Utility Fee ("TUF") to raise revenue to fund road maintenance, but without legal authority to do so. A city's authority to raise revenue is defined and limited by the Utah Constitution and statutes passed by the Legislature. While a city has the authority to pass certain taxes and impose certain types of fees as prescribed

by general law, it has no authority to implement something like the City's TUF. The TUF is a tax disguised as a fee, but even as a fee it is illegitimate and illegal.

The TUF causes Plaintiffs irreparable harm because funds taken from Plaintiffs are lost forever and can never be returned once spent. The City can only raise revenue by taking from its residents and businesses, so in order to replace the TUF funds taken and spent the City would have to again take money from the very people it has to refund. Additionally, the TUF violates Plaintiffs' constitutional rights to due process, the right to protect their property, and the right against taxation outside the bounds of prescribed law. These constitutional violations by themselves irreparably harm Plaintiffs.

Finally, a stay of the TUF will further the public interest, not act adverse to it, because it will hold the City's action within its legal limits. A stay will also result in zero harm to the City as it would maintain the *status quo*.

Accordingly, the court should issue the temporary restraining order.

FACTS

In 2011 the Pleasant Grove City Council (the "City Council") commissioned a road analysis from J-U-B Engineers (JUB) which included the assessment of all roads within the City and assigning a Pavement Condition Index (PCI) to each road.

From 2011 to 2014 the City Council discussed several options to increase road funding including but not limited to: increasing franchise fee to 6%, bonding, road fee, and use of general fund monies.

In the summer of 2014 the City Council commissioned JUB to conduct another study of the costs of road improvement over the next 10 years.

On January 27, 2015 based on both JUB studies a report was presented stating that 62% of the City's roads had a PCI of less than 70, the City set a goal of maintaining all roads at a minimum PCI of 70, and to be able to achieve the 70 PCI goal the city would need to invest $3.8 million a year for 20 years. On March 10, 2015 JUB presented an updated plan that increased that amount to $4 million a year over 20 years.

In March 2015 the state legislature passed a fuel tax increase. It also passed HB 362 which gave counties the option to increase sales tax by .25% if the electorate passed it in the November 2015 election. Both measures would increase city revenue for road maintenance. For example, the fuel tax increase was estimated to provide Pleasant Gove an additional $180,000 annually for road funding. Residents of Utah County, however, did not pass Proposition 1, which was Pleasant Grove's attempt to implement the tax increase permitted by HB 362 in the November 2015 election.

As early as the summer of 2015 the City Council had determined to move forward with implementing a road fee structure to raise part of the needed revenue for annual road maintenance. The City commissioned a Road Fee Study through Lewis Young Robertson & Burningham (LYRB), a self-proclaimed independent municipal financial advisory and consulting firm. The purpose of the study was to determine the logistics of implementing a road fee. LYRB was tasked with calculating what it would take to generate $1 million in new revenue each year.

On December 1, 2015 the City unveiled a Three-Year Coordinated Road and Utilities plan which focused on updating the city with new roads and utilities. This plan focused on what projects would be completed and the cost of said projects but was not a plan for revenue generation.

On January 19, 2016, LYRM presented its Road Fee Study, which calculated road fee structures based on the County parcel database, the City business license database, and the roadway demands. (Study attached to Petition as Exhibit A.) The land uses were divided into three categories comprised of residential, non-residential, and public use, and the study analyzed peak day adjusted trips, total square footage, address counts, and units. The road fees were calculated at an annual rate and then broken down into monthly payments. The original report provided by LYRM had an example monthly fee structure with ten different classifications ranging from $3.50 a month for an apartment to $492.40 for a convenience store. Other categories included churches, schools, general offices, medical and dental offices, fast food restaurants, small retail space, and large retail space.

In November 2017, residents of Pleasant Grove overwhelmingly rejected the Fund Roads First ballot initiative that would have required the City to put $2.65 million from the general fund into road maintenance – $2.3 million more than what is currently taken from the general fund annually for road maintenance. Upon rejection of this initiative, the City Council continued its course in trying to raise additional funds for road maintenance through a road fee. Although its statutory options included raising the property tax, issuing bonds, and creating a local district for

road maintenance, it opted to pursue the "road fee" route, an option for which the City Council cited no legal authority in any of its public hearings or publications.

From January 2016 to April 2018, the City Council continued to discuss the road fee issue and held public hearings on the issue. Although much opposition was presented at the public hearings, the City Council was set on its course in passing a road fee despite it being the most legally tenuous option.

On April 10, 2018, the City Council passed Resolution No. 2018-021 which established a Transportation Utility Special Revenue Fund (the "Fund") and adopted a Transportation Utility Fee (TUF). (Attached to Petition as Exhibit B.) Although the definition of "Public Utility" in the Utah Code does not include an organization that maintains roads or otherwise involves transportation, this did not stop the City Council from giving the law the misleading title of "utility," presumably an attempt to give their proposal some legal justification.

In the TUF ordinance a three-tier system was established by dividing up the City into residents and businesses. The residential fee was fixed for all residential units. The business fees were divided into those business that make less than 4 trips a month and those that make more than 4 trips a month, the former being charged $41.27 per month and the latter being charged $236.06 per month. This classification system was in part based on the Peak Day Adjusted Trips analysis made by LYRM, but that analysis set forth a four-tier system as opposed to the two-tier system implemented by the City in its ordinance. Why the City Council deviated from its consulting firm's recommendation of a four-tier system is unclear.

Three months later, the City Council scrapped its own trip-based classification system by rescinding Resolution No. 2018-021 on July 17, 2018 and instead passed an Amended Resolution. The City Council also passed Ordinance No. 2018-19 to replace the April ordinance and gave it an effective date of August 1, 2018. (Resolution and Ordinance attached to Petition as Exhibit C.)

The new classification system, and ultimately the system that is enforced beginning August 1, 2018, is as follows:

- Residential – this is based on a per residential unit standard and makes no differentiation between a single-family home, apartment, condo, or vacation home and implements the same standard fixed fee regardless of how many people live in a residential unit, how many vehicles they own, or how many drivers live in the single unit.

- Tier one 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).

- Tier two business – this includes gas station/convenience store, restaurants with drive-thru service, and businesses with more than 250 parking stalls (except for churches). There is no explanation why a restaurant that services the same number of customers as a restaurant with a drive thru is assessed a fee nearly six times lower than restaurants with drive thrus, especially in light of the fact that the drive thru portion of business is on private property rather than public property. Further, there is no explanation how 250 parking stalls became the arbitrary number for implementing the engorged tier-two fee.

The business classifications bear no resemblance to the original classifications or to the study commissioned by LYRB. Similarly, the monthly fees to be collected are unsupported, or at the most loosely supported, by road use statistics or other measurable means to determine a proportional and equitable cost per user. The fees for the three classifications are respectively $8.45 (residential), $41.27 (Tier 1 business), and $236.05 (Tier 2 business) – the exact same amounts as the original ordinance, but applicable now to completely different classifications. These amounts appear to have been arbitrarily created as they have no support in LYRB's study and are not otherwise supported by empirical evidence, although the ordinance itself states that the amounts attributed to commercial users are based on intensity of use using the LYRB study as a "guideline." The established residential fee has no intensity of use basis, or at least none is cited in the ordinance, and it is unclear how the City Council determined the fee amount for residential units.

By eliminating the classification system based on number of trips, the amended TUF removed approximately a third of the businesses out of the highest fee tier set by the original ordinance in April 2018.

Additionally, the amounts of the fees for the two business tiers are based on a 45% exemption, where the residential fee has 0% exemption. (See Roads FAQ, page 3, attached to Petition as Exhibit D.) The explanation for this disparity between residential and businesses is that residents get a 45% exemption on property taxes while businesses do not, yet that was the extent of the analysis in justifying the business exemption.

On August 1, 2018 the TUF went into effect.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS BECAUSE THE CITY HAS NO STATUTORY AUTHORITY TO PASS THE TUF AS A TAX OR FEE

a. The City has Only Those Powers Specifically Delegated to it by the State Legislature, which does not Include the Authority to Impose the TUF.

A city is a political subdivision of the State, thereby deriving all of its powers from the Utah Constitution and the Legislature. Utah Code 10-1-201. "The rule is well established that a city organized and operating under general law may possess and exercise only the powers granted in express words and such as are necessarily or fairly implied in, or incident to, the powers expressly granted, or those essential to the declared objects and purposes of the corporation not merely convenient but indispensable." *Wadsworth v. Santaquin City*, 28 P.2d 161, 171 (Utah 1933) *quoting Ogden City v. Bear Lake & River Water-Works Irr. Co.*, 52 P. 697.

Article XI Section 5 of the Utah Constitution sets forth the constitutional powers of a city, which includes: (a) the power to "levy, assess and collect taxes and borrow money, within the limits prescribed by general law, and to levy and collect special assessments for benefits conferred."; (b) "To furnish all local public services…and to grant local public utility franchises and within its powers regulate the exercise thereof."; (c) "To make local public improvements" and to secure property necessary to do so; and, (d) "To issue and sell bonds… of any public utility owned by the city…"

The Legislature has further extended city powers by statute. *See* Utah Code 10-1-202 granting the power to sue and enter into contracts; Utah Code 10-8-1 *et seq*. setting forth a city's general powers including the power to construct and maintain city streets (Utah Code 10-8-8);

Utah Code 10-2-86 establishing a public transportation system in locations not covered by a state transit district; Utah Code 10-8-90 granting the power to own and operate hospitals; the power to establish pedestrian malls (Utah Code 10-15-4); the power to provide cable television services (Utah Code 10-18-101 *et seq*.); the power to own and operate water works (Utah Code 10-7-4);

In order to carry out all of the powers with which the Legislature has entrusted cities, the Utah Constitution provides cities with the power to tax as limited by the Legislature. A city's power to tax "is derived solely from legislative enactment and it has only such authority as is expressly conferred or necessarily implied." *Moss ex rel. State Tax Commission v. Board of Com'rs of Salt Lake City*, 261 P.2d 961, 971 (Utah 1953). Taken one step further, if there is any question or uncertainty as to whether a municipality has a specific power to tax, "the doubt must be resolved in favor of the taxpayer." *Id*.

The Utah Legislature has defined through statute the methods by which a city can raise revenue. Specifically, the Legislature passed the Municipal Energy Sales and Use Tax Act "to provide for a stable revenue source for municipalities…" (Utah Code 10-1-302(5)) and the Municipal Telecommunications License Tax Act which permits cities to levy a license tax on telecommunications providers (Utah Code 10-1-403). Other specific grants of revenue raising power to Utah cities includes the authority to "divide the city into districts for the purpose of local taxation" (Utah Code 10-8-3); the power to issue business licenses (Utah Code 10-8-4(1)(a) and 10-1-203(2)); the power to levy "special taxes" (Utah Code 10-8-4(1)(b)); the power "to impose a sales and use tax" to fund a municipal public transportation system (Utah Code 10-8-86(1)); the power to levy a property tax for the purpose of operating hospitals (Utah Code 10-8-

91); the power to pass by ordinance the levying and colleting of a license fee or tax on a parking service business and a public assembly facility (Utah Code 10-1-203); the power to levy property taxes for general and special funds (Utah Code 10-6-133); the power to levy a special tax to fund sewage and water works systems (Utah Code 10-7-14.2).

Perhaps most comprehensive is the Legislature's granting municipalities to create "local districts" for specific services which include: (1) airports; (2) cemeteries; (3) fire protection, paramedic, and emergency services; (4) garbage collection; (5) health care and hospitals; (6) libraries; (7) insect abatement; (8) parks and recreation; (9) sewage; (10) construction and maintenance of right-of-ways; (11) public transit and providing streets and roads; (12) water works; (13) groundwater management; (14) law enforcement; (15) electric utility lines; (16) earth movement management; (17) animal control; and (18) renewal energy system management. *See* Utah Code 17B-1-202. The Legislature even provided these local districts with independent power to impose a property tax on the residents within the local district to fund the district. *See* Utah Code 17B-1-1001. Additionally, the Legislature gave the local districts the statutory authority to impose service fees and charges to customers of the local district and if a customer fails to pay, the district can suspend the service. *See* Utah Code 17B-1-901 *et seq*.

The City had various ways in which it could have gone about raising revenue for the maintenance of its city roads (creating a local district, dividing the city into special tax districts, issuing bonds, and raising the property tax), but it chose to instead take an *ultra vires* approach. Conspicuously absent from the state statutes is the granting of authority to cities to impose a TUF. Furthermore, the City's attempt to bring this revenue-raising measure within the bounds of

the city's statutorily delegated authority by using misleading language to classify it as a "Transportation Utility Fee" must necessarily fail. As set forth above, Utah cities have both constitutional and statutory power to implement fees and taxes for the operation and maintenance of public utilities, but the Legislature defines "Public Utility" as

> every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Section 54-2-201 where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.

Utah Code 54-2-1(21). The definition does not include a city road system and the City's use of misleading vernacular does not make what never was a utility into a utility.

b. Even if the City had the Statutory Authority to Pass the TUF, the TUF is Neither a Legitimate Fee for Service nor a Regulatory Fee.

There are at least two broad types of fees that municipalities can impose: "(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." *V-1 Oil Company v. Utah State Tax Commission*, 942 P.2d 906, 911 (Utah 1996).

As stated in the language of the ordinance that created the TUF, the purpose of the TUF "is to establish a comprehensive transportation utility service with the purpose and power of undertaking such maintenance, repair, and improvement of city streets…" Thus, the plain

language of the ordinance negates any suggestion that the TUF could be a regulatory fee. It regulates nothing.

Whether the TUF is a fee for service follows a different analysis. "To 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…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." *V-1 Oil Company,* at 911. "If the fee bears no reasonable relationship to some need created by the one paying the fee…or 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." *Id.* at 912.

Here, the TUF is neither proportional nor equitable. This is evident from the fact that the City deviated completely from LYRB's Road Fee Analysis, which was at least an attempt to provide a proportional and equitable manner to approach this issue.[1] The TUF sets forth three tiers of fees. First, a residential fee of $8.45/month. This is regardless of whether a residential unit houses one or 15 people, has no vehicles or several, travels primarily within city limits or out, etc., thereby negating the proportional and equitable standard on this tier alone. Second, is Tier 1 business whose members pay $41.27/month and which includes every business except gas stations, convenience stores, restaurants with drive thru service, and businesses with more than

[1] Even if the City had followed LYKB's Road Fee Analysis to a tee, it still would not justify its passage as a fee for service. The study is based on a myriad of false assumptions and is little more than an educated guess on who uses the City's roads, when they use them, and how each user is benefitted. There is simply no way to determine an equitable way to divvy up the costs and benefits to the users of the road system.

250 parking stalls (but not churches) which together constitute the Tier 2 business and pay $236.05/month. The business tier system is arbitrary and capricious and does not fall on businesses that are similarly situated. This is again evident from the City's own commissioned study which set forth eight categories of business users with different monthly fees. The fees are nor proportional or equitable. The sole proprietor with one office and who works exclusively online and has no customers who come to his office pays the same amount as the medical clinic with 15 employees, 30 parking stalls, and 50 patients who arrive for treatment each day or the construction company that owns 20 dump trucks. Thus, those who are situated differently are charged the same and those who are similarly situated are treated differently. There is no reasonable relationship between the services provided (road maintenance), the benefits received by the varying businesses (road use), or the need created (road use and maintenance) and those who are actually paying the fee. The TUF, therefore, cannot be considered a legitimate fee for service.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM

"'Irreparable harm,' a term often interchanged with 'irreparable injury,' is defined as 'a harm that a court would be unable to remedy even if the movant would prevail in the final adjudication.' Moore, § 65.06[2]. We have also explained that irreparable injury consists of 'wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard.' *Carrier v. Lindquist*, 2001 UT 105, ¶ 26, 37 P.3d 1112 (internal quotation marks omitted). A party proves irreparable injury when establishing that 'he or she is unlikely to be made whole by an award of monetary damages or

some other legal, as opposed to equitable, remedy…Thus, an injury is irreparable if the damages are estimable only by conjecture and not by any accurate standard.' 42 Am.Jur.2d Injunctions § 33 (2004); *see also Carrier*, 2001 UT 105, ¶ 26, 37 P.3d 1112." *Johnson v. Hermes Associates, Ltd.*, 2005 UT 82, 128 P.3d 1151, (2005).

Here, Plaintiffs will suffer irreparable harm if the TUF is not stayed because the TUF's implementation and enforcement in violation of statutory and constitutional law will cause Plaintiffs (and all the City residents and businesses) to lose funds which can never be replaced. The City only raises revenue by taking funds from its residents and businesses. It does not have profits from production that can then be disbursed to those it injures such a Plaintiffs. Thus, once collected and used the funds are gone forever, even if Plaintiffs prevail on the merits at trial. This is because the only way the City can recoup the funds spent to bay back Plaintiffs is to act within its statutory and constitutional authority to raise revenue, but that can only be done by taking funds from the very people and businesses who the City will have to pay back.

Furthermore, when a government deprives its citizens of a constitutional right, irreparable harm is presumed. *See, e.g., Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) ("We therefore assume that plaintiffs have suffered irreparable injury when a government deprives plaintiffs of their commercial speech rights."); *Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005); *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004); *Newsom v. Albemarle Ctny. Sch. Bd.*, 354 F.3d 249, 254 (4th Cir. 2003); *Brown v. Cal. Dep't of Trans.*, 321 F.3d 1217, 1225 (9th Cir. 2003); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) ("Limitations on the free exercise of religion inflict

irreparable injury."); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002); *Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999); *Miss. Women's Med. Clinic v. McMillan*, 866 F.2d 788, 795 (5th Cir. 1989); see also 11A C. WRIGHT, A. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, § 2948.1 at 161 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

The Utah Constitution sets forth certain rights that every Utahan has including: (1) the right "to possess and protect property." Article I, Section 1; (2) the right to be protected against being "deprive of…property, without due process of law." Article I, Section 7; and (3) each resident of a city has the right to be taxed by that city only "within the limits prescribed by general law." Article XI, Section 5. Here, the City's passing of the TUF violates each of these constitutional rights. First, the TUF deprives the City's residents and businesses of their property. Second, the TUF violates Plaintiffs' right to due process of law because it deprives them of their property through a means not authorized by either statute or the Utah Constitution: the TUF is neither a tax nor a legitimate fee. Finally, TUF does not fall under one of the enumerated powers granted to cities by the Utah Constitution because it is neither a tax nor a special assessment passed "within the limits prescribed by general law." Thus, the City's violations of Plaintiffs' constitutional rights constitute irreparable harm.

III. THE HARM CAUSED TO PLAINTIFFS BY THE TUF OUTWEIGHS THE EFFECT A STAY WOULD HAVE ON THE CITY

If the court stays the TUF, the City still has several other constitutional and statutory means of accomplishing its goal of raising revenue to maintain its city roads. It suffers no harm as a result of a stay. On the other hand, permitting the City to enforce the TUF will immediately harm Plaintiffs and every other resident and business in the City as the fee will be collected and spent without an ability for Plaintiffs to recover even if they prevail on the merits at trial and will created a persistent and continued violation of Plaintiffs' constitutional rights.

IV. RESTRAINING THE CITY FROM ENFORCING THE TUF UNTIL PLAINTIFFS' PETITION IS DECIDED IS NOT ADVERSE TO THE PUBLIC INTEREST

Issuing the requested injunction will serve the public interest as residents of the City have an absolute right to hold their city government to the constitutional and statutory limitations imposed on it. Staying the TUF will only further that interest to prevent *ultra vires* acts by governmental bodies.

CONCLUSION

Rule 65A is satisfied and the court should issue a temporary restraining order against Pleasant Grove City staying its implementation and enforcement of the Transportation Utility Fee. Plaintiffs have been and will continue to be irreparably harmed because the TUF violates several of Plaintiffs' constitutional rights and Plaintiffs can never be made whole once their funds are forcibly taken from them by this measure. Plaintiffs are likely to be successful on the merits of their claims because the City has no authority under either the Utah Constitution or Utah statutes to pass the TUF. Finally, issuing the injunction will maintain the *status quo,* thereby harming no one and will promote the public interests because it will protect Plaintiffs

and all of the City's residents and businesses from an *ultra vires* act that infringes on their property rights.

For these and all the foregoing reasons, the court should issue the TRO.

DATED this 1st day of August 2018.

SALCIDO LAW FIRM PLLC

/s/ Gerald M. Salcido
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I caused a true and correct copy of the foregoing to be served on the persons stated below in the manners indicated:

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant
(*via email to City Attorney Christine Petersen cpetersen@pgcity.org*)

/s/ Gerald M. Salcido