



October 10, 2024

City Clerk Char Nagel
City of Neenah
211 Walnut Street
Neenah, Wisconsin 54956

**RE: Notice of Circumstances Giving Rise to a Claim and Notice of Claim
Pursuant to Wis. Stat. § 893.80**

To City Clerk Nagel:

Please take notice that, with this letter, Wisconsin Manufacturers and Commerce Inc. (WMC) hereby provides formal notice to the City of Neenah (Neenah or City) of circumstances giving rise to a claim and further gives notice of claim, including a statement of relief sought.

WMC is Wisconsin's chamber of commerce and manufacturers' association. WMC is a membership-based trade association with members throughout Wisconsin, including members in Neenah.

With this letter, WMC notifies you that Neenah Ordinance Chapter 17, Article VIII (hereafter, the Ordinance), titled "Transportation Assessment Replacement Fee," which establishes a so-called transportation assessment replacement fee (TARF), is unlawful.

You are hereby notified of this claim pursuant to Wis. Stat. § 893.80.

Claimant's name and address are as follows:

Wisconsin Manufacturers and Commerce Inc.
501 East Washington Avenue
Madison, Wisconsin 53703

The Ordinance harms WMC members as taxpayers and persons who are subject to it and further harms WMC including by impeding WMC's mission to make Wisconsin the most competitive state in the nation in which to conduct business.



I. The “transportation assessment replacement fee” is an illegal tax under *Wisconsin Property Taxpayers v. Town of Buchanan* and *WMC v. Village of Pewaukee*.

a. The “transportation assessment replacement fee” is a tax.

The City has imposed on property owners a charge called a “transportation assessment replacement fee.” Although the City calls this charge a fee, it is, in reality, a tax. Two recent, binding cases—*Wisconsin Property Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100, and *WMC v. Village of Pewaukee*, 2024 WI App 23, 411 Wis. 2d 622, 5 N.W.3d 949—confirm this conclusion.

According to the City, the TARF was enacted to “generate revenue that will allow the City to eliminate special assessments for Street Resurfacing, Street Reconstruction and Sidewalk Construction projects.” Transportation Assessment Replacement Fee (TARF) Frequently Asked Questions, https://www.ci.neenah.wi.us/wp-content/uploads/2023/09/TARF-FAQ_final.pdf. To achieve that purpose, the TARF is imposed on all property owners in the City. See Ordinance §§ 17-206(1), 17-207.

The amount of the TARF is ultimately based on a property’s estimated traffic generated. Specifically, the amount of TARF that a given property is charged is based on that property’s impervious surface area, because Neenah believes “there is a correlation between the amount of impervious surface on a property parcel and the traffic generated from that parcel.” Ordinance § 17-201.

“The purpose [of a government charge], and not the name it is given, determines whether [that charge] constitutes a tax.” *Buchanan*, 2023 WI 58, ¶10 (quoting *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶6, 358 Wis. 2d 610, 856 N.W.2d 546 (citing *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d 299, 305–06, 94 N.W.2d 584 (1959))). In both *Buchanan* and *Pewaukee*, the court held that a so-called “transportation utility fee” or “transportation user fee” (collectively, TUF) was a tax. Neenah’s TARF is materially the same as those TUFs, so it too is a tax.

In *Buchanan*, the town adopted a TUF that was “based on property owners’ estimated usage of roads within the municipality.” *Buchanan*, 2023 WI 58, ¶13. Despite its name, the Wisconsin Supreme Court concluded that the TUF was a tax because the Town of Buchanan “imposed it on a class of residents for the purpose of generating revenue.” *Id.*

Earlier this year, in *Pewaukee*, the Wisconsin Court of Appeals relied on that holding from *Buchanan*, concluding a TUF materially identical to Buchanan’s was also a tax. *Pewaukee*, 2024 WI App 23, ¶7 (citing *Buchanan*, 2023 WI 58, ¶10). Just



like Pewaukee's TUF, Buchanan's was imposed on every developed property in the municipality. *Id.* (citing *Buchanan*, 2023 WI 58, ¶3). Also like Pewaukee's TUF, Buchanan's was used "to fund a transportation utility that would be responsible for funding safe and efficient transportation facilities within the Town." *Id.* (citing *Buchanan*, 2023 WI 58, ¶3) (internal quotation marks omitted). Yet again like Pewaukee's TUF, the amount of Buchanan's TUF was the same for all residential properties, but it varied for commercial properties "based on their size, type of business, and the number of trips they were estimated to take on municipal roads." *Id.* (citing *Buchanan*, 2023 WI 58, ¶4). These similarities, the court held, rendered the two TUFs indistinguishable; that meant both were taxes.

As follows from *Buchanan* and *Pewaukee*, Neenah's TARF is also a tax. Like the TUFs, Neenah's TARF is imposed on every developed property in the municipality. *See* Ordinance §§ 17-206(1), 17-207. Like the TUFs, Neenah's TARF is used to generate revenue for transportation facilities. Ordinance § 17-201(2). Like the TUFs, Neenah's TARF is equal for most residential properties but varies for commercial properties based on their size and estimated usage. *See* Ordinance § 17-206. Neenah's TARF is indistinguishable from the TUFs at issue in *Buchanan* and *Pewaukee*. Neenah's TARF is therefore a tax under those binding precedents.

b. As a tax with no statutory authority, the "transportation assessment replacement fee" is *ultra vires* and illegal.

"In Wisconsin, municipalities have no inherent powers." *Northwest Properties v. Outagamie County*, 223 Wis. 2d 483, 478, 589 N.W.2d 683 (Ct. App. 1998). As a result, cities have no inherent power to tax. *Buchanan*, 2023 WI 58, ¶11 (citing *Blue Top Motel, Inc. v. City of Stevens Point*, 107 Wis. 2d 392, 395, 320 N.W.2d 172 (1982)). Notably, cities "can only resort to the types of taxes that the legislature has authorized them to use." *Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965); *see also Buchanan*, 2023 WI 58, ¶11; *Blue Top Motel*, 107 Wis. 2d at 395. "[A] tax cannot be imposed without clear and express language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." *Buchanan*, 2023 WI 58, ¶11 (quoting *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 106, 135 N.W.2d 799 (1965)). Because the Wisconsin Legislature did not clearly and expressly authorize Neenah to implement the TARF, it is illegal.

Our supreme court recently, unanimously agreed with the argument that "Wisconsin Statutes do not authorize municipalities to impose a TUF on property owners based on estimated use of the municipality's roads." *Buchanan*, 2023 WI 58, ¶2. That holding is controlling here. Because Neenah's TARF is materially identical to the TUF in *Buchanan*, Neenah's TARF also lacks statutory authority.



Yet Neenah's TARF ordinance purports to draw authority from Wis. Stat. chapters 62 and 66, in particular Wis. Stat. §§ 62.04, 62.11, 66.0621, 66.0807, 66.0809, 66.0811 and 66.0813. Ordinance § 17-201(3). None of those statutes authorize the TARF.

First, Wis. Stat. § 62.04 is an intent and construction statute. It states:

For the purpose of giving to cities the largest measure of self-government compatible with the constitution and general law, it is hereby declared that ss. 62.01 to 62.26 shall be liberally construed in favor of the rights, powers and privileges of cities to promote the general welfare, peace, good order and prosperity of such cities and the inhabitants thereof.

This statute merely conveys legislative intent; it confers no power. Stating that municipalities are still bound by "the constitution and general law," § 62.04 is essentially a guide to interpreting the statutes. In effect, § 62.04 only serves to bolster the *explicit* powers delegated to municipalities elsewhere in ch. 62. This statute says nothing whatsoever about taxes, let alone taxes based on traffic generated to pay for transportation systems.

Wisconsin Stat. § 66.0621 also does not confer any power to tax. This statute provides that a municipality may finance certain "public utilities" by issuing municipal bonds, selling "shares of stock" in the utility, or allocating money "from the general fund." Wis. Stat. § 66.0621(3), (5). But although a municipality may use the general fund to pay for a public utility, Neenah's TARF is not drawing money from the general fund. Instead, Neenah's TARF is a charge separate from the general fund. This statute does not authorize a municipality to levy a tax.

Neenah also cites to Wis. Stat § 66.0807 for authority, but this statute offers no such power. Wisconsin Stat. § 66.0807 states that a city may contract with privately owned public utilities. Its only purpose is to explain how a municipality must work with a private utility. This statute does not authorize a municipality to levy a tax. It does not mention taxes even once.

Wisconsin Stat. § 66.0809 likewise does not authorize the TARF. This statute fails to authorize any tax, much less the TARF.

Neenah also cites Wis. Stat. § 66.0811, which does not authorize a city to levy a tax. It falls far short of providing clear and express authority to levy a TARF tax.

Finally, Wis. Stat § 66.0813 merely enables certain utilities to provide service to people living in "adjoining municipalities not owning or operating a similar utility."



This statute says nothing about how a utility may charge for that service, so it cannot authorize the TARF.

In conclusion, none of the statutory authorities Neenah claims to act under explicitly authorizes the TARF tax. Municipalities may not levy taxes without clear and explicit statutory authority to do so. Therefore, Neenah's TARF is *ultra vires* and illegal.

II. In addition, the TARF is an unconstitutional property tax.

As just explained, Neenah's TARF is a tax just like the TUF in *Buchanan* was a tax. And more precisely, the TARF is a property tax. The supreme court in *Buchanan* unanimously concluded that "a TUF is a property tax." *Buchanan*, 2023 WI 58, ¶18. Because Neenah's TARF is materially indistinguishable from the TUF in *Buchanan*, the TARF is a property tax, too.

And because the TARF is non-uniform, it is unconstitutional. "Article VIII, section 1 of the Wisconsin Constitution requires that the method or mode of taxing real property must be applied uniformly to all classes of property within the tax district." *U.S. Oil Co. v. City of Milwaukee*, 2011 WI App 4, ¶23, 331 Wis. 2d 407, 794 N.W.2d 904 (footnote omitted). Real property must be taxed based on its fair market value. *Id.* ¶24. Neenah's TARF is not based on fair market value of the subject property. See Ordinance § 17-207. The TARF thus violates the Wisconsin Constitution's uniformity clause. It is unlawful for this reason, as well.

III. In addition, state law preempts Neenah's TARF.

Regardless of whether Neenah's TARF is a tax or a fee, it is preempted by state law and therefore illegal. "An ordinance is preempted when any of the following four tests are satisfied: (1) the legislature has expressly withdrawn the power of the municipality to act, (2) the ordinance logically conflicts with state legislation, (3) the ordinance defeats the purpose of state legislation, or (4) the ordinance violates the spirit of state legislation." *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984).

First, the TARF is preempted because it defeats the purpose and the spirit of Wis. Stat. § 70.11. Wisconsin Stat. § 70.11 is our state's tax-exemption statute for real property. This statute would be largely meaningless if cities could impose "fees" on tax-exempt property to pay for basic governmental functions like road repair.

Second, the TARF is preempted because it defeats the purpose and the spirit of Wis. Stat. § 66.0602. "The law limits the amount by which municipalities may increase property taxes. "[Wisconsin Stat. §] 66.0602, among other provisions,



includes a limit on the amount a governmental subdivision may increase its property tax levy in a given year.” *Buchanan*, 2023 WI 58, ¶ 22 (alteration in original) (citation omitted). These levy limits would be largely meaningless if cities could effectively exceed them by imposing tax-like “fees” on properties to pay for basic governmental functions like road repair.

Third, Wis. Stat. § 66.0628(2) also preempts the TARF if it is a fee. This statute requires that “[a]ny fee” imposed by a city “bear a reasonable relationship to the service for which the fee is imposed.” Wis. Stat. § 66.0628(2). “Reasonable relationship” is then statutorily defined; it “means that the cost charged by a political subdivision for a service provided to a person may not exceed the political subdivision’s reasonable direct costs that are associated with any activity undertaken by the political subdivision that is related to the fee.” Wis. Stat. § 66.0628(1)(b). “*For a service provided to a person*”—that language is pivotal. Given full effect, it bars municipalities from imposing a fee on a property rather than on a person, and for a service provided to the public rather than to one person. Because the TARF is imposed on property (rather than on persons) for general governmental functions (rather than for services provided to a person), the TARF conflicts with Wis. Stat. § 66.0628 if it is a fee.

IV. Claimant may seek attorney fees in a lawsuit challenging the TARF’s validity.

Under the binding precedent of *Buchanan* and *Pewaukee*, Neenah’s TARF is an unlawful tax. If Neenah advances a frivolous defense of its TARF in litigation, WMC may seek an award of costs and attorney fees.

“[Wisconsin Stat.] § 895.044(1) provides that a party or attorney may be liable for costs and fees as damages ‘for commencing, using, or continuing an action, special proceeding, counterclaim, *defense*, cross claim, or appeal’ that is found to be frivolous by a court.” *Thompson v. Ouellette*, 2023 WI App 7, ¶26, 406 Wis. 2d 99, 986 N.W.2d 338 (emphasis added). A defense is frivolous if it is “without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.” Wis. Stat. § 895.044(1)(b).

In light of *Buchanan* and *Pewaukee*, Neenah has no reasonable basis for arguing that its TARF is lawful. Neenah’s TARF is an unlawful tax because it is materially identical to the TUFs that were struck down in *Buchanan* and *Pewaukee*. Those cases, binding precedent in *every* municipality in the state, are dispositive here.

Last fall, several months after the Wisconsin Supreme Court unanimously struck down the Town of Buchanan’s unlawful TUF, Neenah announced plans “to



sharply increase” its TARF.¹ Neenah’s “City Attorney David Rashid said he is comfortable with the legality of Neenah’s [TARF].”² According to Attorney Rashid, Neenah’s TARF “never was deemed to be a tax. It’s a fee. It also was a replacement for assessments. Those are the two principal distinctions between what [Neenah is] doing and what (Buchanan) did.”³

Attorney Rashid’s two grounds for distinguishing Neenah’s transportation tax from the Town of Buchanan’s transportation tax are unfounded. Like Neenah, the Town of Buchanan labeled its transportation tax a “fee.” *Buchanan*, 2023 WI 58, ¶10. Also like Neenah, Buchanan adopted that tax as an alternative to special assessments. *Id.* ¶3. Neenah thus has no reasonable legal basis for enforcing (let alone increasing) its transportation tax, in plain violation of *Buchanan* and *Pewaukee*.

Indeed, the League of Wisconsin Municipalities recently agreed that “Pewaukee’s TUF and similar TUFs enacted under home rule authority are illegal for now. This means that municipalities should not implement or continue operating a TUF that is structured in this manner.”⁴ The League is correct that a city or village “may not adopt a tax under its home rule authority.” *Pewaukee*, 2024 WI App 23, ¶9. To be lawful, a tax requires clear and express authorization from the Wisconsin Legislature. *Buchanan*, 2023 WI 58, ¶¶10–11. And, as the Wisconsin Supreme Court has unanimously agreed, “Wisconsin Statutes do not authorize municipalities to impose a TUF on property owners based on estimated use of the municipality’s roads.” *Id.* ¶2. Because Neenah’s TARF is a TUF by a different name, it is clearly unlawful under the very recent, binding precedents in *Buchanan* and *Pewaukee*.

Statement of Relief Sought

For the reasons stated herein, the TARF Ordinance is unlawful. The Ordinance harms WMC and its members. They are injured on an ongoing basis because of the Ordinance.

Accordingly, unless the City repeals the unlawful TARF Ordinance and any related resolution, Claimant will commence an action in the Winnebago County

¹ Duke Behnke, *Appleton Post-Crescent*, “Neenah plans to increase transportation fee to cover street reconstruction projects” (Sep. 28, 2023), <https://www.postcrescent.com/story/news/local/2023/09/28/neenah-plans-to-double-its-transportation-fee-to-cover-rising-costs/70979122007/>.

² *Id.*

³ *Id.* (second alteration in original).

⁴ League of Wisconsin Municipalities, “TUF Break: Supreme Court Denies Pewaukee’s Petition” (Aug. 6, 2024), https://myemail.constantcontact.com/League-EL---TUF-Break--Supreme-Court-Denies-Pewaukee-s-Petition.html?soid=1102478489879&aid=4JTcI7_RuIs.



Circuit Court seeking declaratory relief that the Ordinance is unlawful as discussed herein, and further will seek injunctive relief preventing the City from enforcing the Ordinance. If Neenah advances a frivolous defense of its TARF in litigation, Claimant may seek an award of costs and attorney fees.

Conclusion

Service of this Notice of Claim does not waive any other claims or arguments to support the claims that may be made.

Going forward, any communications to WMC on this matter should be directed to my attention.

Sincerely,

A handwritten signature in black ink that reads "Scott E. Rosenow".

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