LEAGUE OF WISCONSIN MUNICIPALITIES
131 W. Wilson St., Suite 505
Madison, Wisconsin 53703
phone (608) 267-2380; (800) 991-5502
fax: (608) 267-0645
league@lwm-info.org; www.lwm-info.org

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Funding Streets through Transportation Utility Fees

By: Curt Witynski, J.D., Deputy Executive Director
Claire Silverman, Legal Counsel
Maria Davis, Assistant Legal Counsel

Wisconsin municipalities are searching for alternative ways to pay for essential services like street maintenance and other transportation services. One reason is lack of adequate funding to pay for those services. Although Wisconsin municipalities' main source of revenue is the property tax, Wisconsin local governments have operated under the strictest property tax levy limits in the country for nearly a decade. Moreover, the State expressly prohibits municipalities from imposing other taxes such as a sales tax (with extremely limited exceptions) and local income taxes. At the same time, funding for state aid programs, such as shared revenue, has been flat or decreasing for years. State transportation aids currently cover, on average, sixteen percent (16%) of city and village transportation-related costs.

In addition to lack of funding, some municipal leaders have concluded that paying for street improvements through special assessments imposed on abutting property owners is inequitable and places a disproportionate burden on property owners for improvements that benefit the area or community in general. Substantial assessments can jeopardize the ability of some residents (e.g., those living on fixed or limited incomes) to remain in their homes.

As a result of these factors, some municipalities are turning to alternative revenue options like local vehicle registration fees and transportation utility fees to pay for street maintenance and other transportation services. Several League members have requested the League's legal opinion on whether Wisconsin municipalities may create transportation utilities and charge property owners transportation utility fees.

We conclude that a municipality may rely on its broad statutory and/or constitutional home rule powers to create a transportation utility and charge property owners transportation utility fees. Alternatively, a municipality may charge property owners a street maintenance user fee under Wis. Stat. § 66.0627. Any fee must be reasonably related to the cost of the services provided. The League suggests that a transportation utility fee is most defensible against challenge if the basis for the fee is closely related to property occupants' use of the local street network. It is the League's opinion that transportation utility fees with such a basis are accurately characterized as fees and not taxes. Such fees should be segregated and used only for street maintenance and other transportation services. To avoid needing to reduce the community's property tax levy under § 66.0602(2m)(b) of the levy limit law, municipalities should avoid using transportation utility fee revenue to pay for snow plowing or street sweeping.

Sources of Authority for Transportation Utility Fees

While no state statute expressly authorizes Wisconsin communities to create transportation utilities and charge transportation utility fees, Wisconsin municipalities have broad authority to create, manage, and finance utilities. Transportation utility fees are financing mechanisms that treat the community's street network and other transportation services like a utility. Residents and businesses are charged fees based on their use of the transportation system, analogous to how municipalities provide and pay for water, sewer, electric and stormwater services.

In the state's early years, no statutes existed expressly authorizing cities and villages to own and operate water, sewer, or other common municipal utilities. Instead, municipalities relied on non-specific, broad police power authority to create and fund such now-familiar utilities. Similarly, in the early 1990s, municipalities like Appleton, Glendale, and Eau Claire initially relied on their broad police power authority to create stormwater utilities and charge property owners stormwater fees based on the amount of impervious surface on the property. Cities over 10,000 in population began to charge such fees to help pay for the cost of complying with new state regulations requiring the removal of pollutants from stormwater. Only later did the Legislature add language to the predecessor of Wis. Stat. § 66.0681 expressly confirming municipal authority to create stormwater utilities and stormwater fees. See 1997 Wis. Act 53, which took effect January 9, 1998.

Notably, the Wisconsin Supreme Court determined fairly early that Wisconsin municipalities do not need explicit statutory authorization to create a municipally-owned utility. In 1895, the Court held that "it is not necessary to seek an expressed delegation of power to the city to build a water works and an electric lighting plant, because the power expressly granted to the city to pass ordinances for the preservation of the public health and general welfare includes the power to use the usual means of carrying out such powers, which includes municipal water and lighting services."[1] Similarly, a general grant of authority to act for the public health or general welfare is adequate legal authority today for Wisconsin cities and villages to create, operate, and finance through user charges, a transportation utility.

Statutory Home Rule Authority

Wisconsin cities and villages are vested by the state legislature with broad general police powers. The general city charter law, chapter 62, gives cities the "largest measure of self-government compatible with the constitution and general law." Wis. Stat. § 62.04. Wisconsin Stat. § 62.11(5), the general authority statute for city councils, provides:

> *Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.*

[1] *Ellinwood v. Reedsburg*, 91 Wis. 131 (1895).

The Legislature has directed courts to liberally construe this provision "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." Wis. Stat. § 62.04.

A virtually identical grant of authority is provided to Wisconsin village boards by Wis. Stat. § 61.34(1). That authority is also to be liberally construed in favor of "the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages and the inhabitants thereof" to give villages the largest measure of self government compatible with the Wisconsin constitution. Wis. Stat. § 61.34(5).

These grants of power to cities and villages are substantial and give the governing body of a city or village "all the powers that the legislature could by any possibility confer upon it." *Hack v. Mineral Point*, 203 Wis. 215, 219, 233 N.W. 82 (1931). These provisions are sufficient on their face to authorize city councils and village boards to create a municipal transportation utility and charge property owners transportation utility fees.

However, these broad powers are not absolute. Home rule powers granted by §§ 62.11(5) and 61.34(1) are constrained if the state has preempted municipal authority in a particular area. Statutory home rule powers may not be exercised if: the legislature has expressly withdrawn the power of municipalities to act; municipal action would logically conflict with state legislation; municipal action would defeat the purpose of state legislation; or, municipal action would go against the spirit of state legislation. See *Anchor Savings & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 355 N.W.2d 234 (1984); *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996). Nonetheless, municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement, the state legislation. *Johnston v. City of Sheboygan*, 30 Wis. 2d 179, 184, 140 N.W.2d 247 (1966).

Municipalities are not preempted in the area of creating transportation utilities and charging transportation fees. In applying the above preemption tests to creating a transportation utility and charging transportation user fees, the State has not expressly prohibited communities from creating such a utility and imposing such fees. Indeed, the state has not entered the field of municipal transportation finance other than to explicitly authorize certain methods of funding transportation infrastructure improvements such as through the levying of special assessments under Wis. Stat. § 66.0703, imposing special charges for current services under Wis. Stat. § 66.0627, and charging local vehicle registration fees under Wis. Stat. § 341.35.[2]

The State has also created and funded several aid programs to assist local governments with transportation costs, including the General Transportation Aids and the Local Road Improvement programs. None of these grants of authority and financial assistance programs impliedly preempt municipal authority to create a transportation utility and charge property owners a transportation user fee. Indeed, the statute authorizing special charges for current services expressly provides "The authority under this section is in addition to any other method provided by law." Wis. Stat. § 66.0627(2). Similarly, the special assessment authority granted pursuant to § 66.0703 expressly

[2] Wis. Stat. § 66.1113 authorizes six cities and villages to impose a sales tax on tourism-related retail and requires that the revenue be used on infrastructure costs.

states that it is a "complete alternative" to other methods provided by law. Wis. Stat.§ 66.0703(1)(a). Likewise, we are not aware of any statutory provisions that creation of a transportation utility would logically conflict with, defeat the purpose of, or go against the spirit of. Although there is an argument that Wis. Stat. § 66.0907 preempts municipalities from using transportation utility fees to finance sidewalk construction and repair because it specifies certain ways in which municipalities *may* cover expenses associated with sidewalks, we believe the stronger argument is that municipalities can use alternative means for financing sidewalks, such as transportation utility fees, because the language in § 66.0907 regarding financing options is permissive rather than mandatory.

The exercise of home rule authority under §§ 62.11(5) or 61.34(5) must also serve a legitimate public purpose. This is usually not a significant bar to action because Wisconsin courts have adopted a very expansive view of public purpose. See *State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis. 2d 32, 55, 205 N.W.2d 784 (1973). ("Public purpose is not a static concept. The trend of both legislative enactments and judicial decisions is to extend the concept of public purposes in considering the demands upon municipal governments to provide for the needs of the citizens.") Examples of public purposes that may be served by creating a transportation utility and imposing a user fee include protecting the health, safety and general welfare of the public as well as acting for the municipality's commercial benefit by ensuring the fiscal ability to safely maintain municipal transportation systems and improve such systems to accommodate and facilitate economic growth. Funding and maintaining a transportation system is critically important to a community's economy, tourism, and ability to attract and retain people and jobs. A well-maintained street network is also vital to ensuring that municipal emergency services can quickly and efficiently access commercial buildings and residences throughout the community.

Constitutional Home Rule Authority

A city or village may also rely on its constitutional home rule authority to create a transportation utility and charge transportation user fees. This authority is found in Article XI, Sec. 3 of the Wisconsin Constitution, which provides:

> Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.

The method of exercising such authority is specified in Wis. Stat. § 66.0101 and requires enacting a charter ordinance.

A charter ordinance exercising home rule authority is preempted if it conflicts with an existing state law that applies to all cities and villages. *Black v. City of Milwaukee,* 2016 WI 47, 369 Wis. 2d 272, 882 N.W.2d 333. However, no state law prohibits municipalities from creating transportation utilities and imposing transportation utility fees. For example, there are no state laws requiring communities to fund local transportation systems in a specific and exclusive way, precluding other options, such as a user fee. Similarly, no statute limits the type of utilities a municipality may create or the types of user fees it may charge. Indeed, the Legislature has chosen not to prohibit communities from charging transportation utility fees even though several

municipalities, like the City of Neenah, Village of Harrison, and Village of Weston, along with the Town of Buchanan have implemented such fees in recent years.

Special Charges for Current Services

In addition to the statutory and constitutional home rule powers mentioned above, Wis. Stat. § 66.0627 provides authority for a municipality to charge property owners for municipal transportation-related services. Under § 66.0627(2), a municipal governing body may impose a special charge against real property for current services rendered by allocating all or part of the cost to the properties served. The statutory definition of "services" includes transportation maintenance activities like "street sprinkling, oiling, and tarring" and repair of sidewalks, curb and gutter. The definition of "services" is not an exclusive list. The examples given are not meant to limit its application in any way, but merely to highlight possible uses. *Rusk v. City of Milwaukee,* 2007 WI App 7, ¶ 17, 298 Wis. 2d 407, 727 N.W.2d 358.

Fees for current services are not invalidated merely because a property does not use the service. In *City of River Falls v. St. Bridget's Catholic Church*, 182 Wis.2d 436, 512 N.W.2d 673 (Ct. App. 1994), the Wisconsin court of appeals held that charging user fees for making water available for fire protection services was valid, even though the party charged the fee had not used the water. Services under § 66.0627 can be rendered within a district and need not be performed for specific, individual properties. In *Grace Episcopal Church v. City of Madison***,** 129 Wis. 2d 331, 385 N.W.2d 200 (Ct. App. 1986), the court of appeals upheld service charges imposed under a predecessor to § 66.0627 (Wis. Stat. § 66.60(16)) on all properties within the State Street Mall and Capitol Concourse *district*, not just those abutting the pedestrian mall and concourse. The services the city provided to the district included lawn, tree, and shrub care, snow removal from walks and crosswalks, trash clean up and removal, and bus shelter and fixture maintenance. The city charged a portion of the annual cost of providing such services against property owners adjacent to or near the State Street Mall and Capitol Concourse. Municipalities may, therefore, rely on § 66.0627 to charge all property owners in a community a fee for current maintenance of the community's street network even though not all properties being charged actually abut the streets being reconstructed or maintained with the fee revenue at any one time. The fact that the entire transportation system is being maintained is sufficient to charge all property owners using the system a fee for current services rendered under § 66.0627.

Fees must Reasonably Relate to Costs

Whether a community relies on its broad statutory or constitutional home rule authority or § 66.0627, a transportation utility fee must bear a reasonable relationship to the service for which it is being charged. Wis. Stat. § 66.0628. That is, the fee amount that a community charges a property owner may not exceed the municipality's reasonable direct costs associated with activities the community takes related to the fee. Wis. Stat. § 66.0628(1).

In addition, the fee amount that any property owner pays should reasonably relate to how much the property's occupants use the transportation system. According to an expert on the use of transportation utility fees in the U.S., a transportation utility fee with a basis that is most closely related to actual use of the street network has the greatest chances of successful implementation

and withstanding critical scrutiny by a court or a tax appeals commission.[3] A transportation utility fee is most appropriate if its basis is closely related to property occupants' use of the local street network and is sensitive to local context and individual variation.[4] For example, a commercial business that generates a high amount of traffic may be charged a higher fee than a one-car household based on the different usage rates of a municipality's transportation system.

Generally, municipalities establish a more convincing link between transportation infrastructure usage and user fee charges when they base their transportation utility fee on the number of trips generated by the property. That is why, according to the U.S. Department of Transportation Federal Highway Administration, Center for Innovative Finance Support, most transportation utility fee programs in the United States use trip generation rates prepared by the Institute of Transportation Engineers (ITE).[5]

Fees v. Taxes.

Transportation utility fees are susceptible to challenge if the fees resemble an unauthorized tax. The primary difference between a tax and a fee is the source of the municipality's power and, more importantly, the municipality's purpose in imposing the payment requirement. The Wisconsin Court of Appeals explained the primary difference between a tax and fee as follows in *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶ 6, 358 Wis. 2d 610, 856 N.W.2d 546:

> A tax is an "enforced proportional contribution[ ] from persons and property" levied to support a government and its needs. *State ex rel. Bldg. Owners & Managers Ass'n v. Adamany*, 64 Wis.2d 280, 289, 219 N.W.2d 274 (1974) (citation omitted). The purpose, and not the name it is given, determines whether

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[3] *A TUF Sell: Transportation Utility Fee as User Fees for Local Roads and Streets*, by Carole Turley Voulgaris, Public Works Management & Policy 2016 Vol. 4 pages 305-323 (2016).

[4] *Id.*

[5] See *Transportation Utility Fees*, Center for Innovative Finance Support, U.S. Department of Transportation Federal Highway Administration, *available at* https://www.fhwa.dot.gov/ipd/value_capture/defined/transportation_utility_fees.aspx#. For discussion of the pros and cons of basing transportation utility fees on trip generation rates for different classes of property, see the following sources:

1. *Transportation Utility Fees: Possibilities for the City of Milwaukee*, a 2007 research paper prepared by students at the Robert M. La Follette School of Public Affairs, UW Madison. https://lafollette.wisc.edu/images/publications/workshops/2007-tuf.pdf
2. *Clintonville Road Maintenance and Transportation Utility Fee,* Andrew Robert Eveland (2019) https://www.lwm-info.org/DocumentCenter/View/3516/Eveland-Clintonville-TUF-Final-Thesis
3. *A TUF Sell: Transportation Utility Fee as User Fees for Local Roads and Streets*, by Carole Turley Voulgaris, Public Works Management & Policy 2016 Vol. 4 pages 305-323 (2016). https://journals.sagepub.com/doi/pdf/10.1177/1087724X16629961?casa_token=RJ3FY9IWC7gAAAAA:uzmdZqQTPn5YPKej33W2pYmTkfy3rYOzxmAhw8otjF8gpthIKMQcpnA9fjsH2JGwTPhaTHXGDyKunQ

> a government charge constitutes a tax. *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.,* 6 Wis.2d 299, 305-06, 94 N.W.2d 584 (1959). "[T]he primary purpose of a tax is to obtain revenue for the government" as opposed to covering the expense of providing certain services or regulation. *City of River Falls v. St. Bridget's Catholic Church of River Falls,* 182 Wis. 2d 436, 441-42, 513 N.W.2d 673 (Ct.App.1994). A "fee" imposed purely for revenue purposes is invalid absent permission from the state to the municipality to exact such a fee. *Milwaukee & Suburban Transp.,* 6 Wis. 2d at 306, 94 N.W.2d 584.

Municipal taxing power in Wisconsin is very limited. A municipality cannot impose a tax unless it is specifically authorized by the Legislature. Wisconsin municipalities are authorized to impose only property taxes and room taxes. (Six communities statewide are authorized to levy a sales tax on tourism-related retail sales under the Premier Resort Area tax laws. Wis. Stat. § 66.1113). In contrast, municipal fees are charged to cover the costs of specific services provided or the costs associated with regulating in a specific area.

As discussed above, a transportation utility fee would be imposed under a community's statutory or constitutional home rule powers or as a special charge for current services under § 66.0627. A transportation utility fee would not be implemented pursuant to a community's power to levy general property taxes under Wis. Stat. Chap. 70.

The Wisconsin Court of Appeals addressed service charges and their relation to general property taxes under the predecessor statute to Wis. Stat. § 66.0627 in *Grace Episcopal Church v. City of Madison***,** 129 Wis. 2d 331, 385 N.W.2d 200 (Ct. App. 1986). The court held that since the services provided were authorized by the Legislature by the predecessor to Wis. Stat. § 66.0627, the service charges were not general property taxes and the property tax exemption provided to churches by Wis. Stat.§ 70.11(4) did not exempt the church from paying the fees. *Grace Episcopal***,** 129 Wis. 2d at 335.

In contrast to the general property tax, the purpose of a transportation utility fee is exclusively to help pay for the cost of a specific governmental service, street maintenance.

A review of case law and scholarly literature on transportation utility fees suggests best practices that municipal officials can implement to avoid having a transportation utility fee ruled an illegal tax:

1. Place all transportation utility fee revenue in a separate fund used only on street maintenance and other transportation projects. *Emerson College v. City of Boston*, 462 N.E.2d 1098 (Mass. 1984).
2. Collect the transportation utility fee in the same manner as the community does other municipal utility fees by including the amounts on property owners' utility bills alongside sewer, water, and stormwater service charges.
3. Ensure the formula used to calculate fees is as accurate as possible. Over-generalization of fee-paying entities and ignoring real differences in their use of the street network or end-trip generation gives the fee strong tax-like characteristics. *Clintonville Road Maintenance and Transportation Utility Fee*, Andrew Robert Eveland (2019).

4. Transportation utility fee policies should avoid exempting tax-exempt properties as this gives the fee the appearance of being a tax. For the same reason, such policies should exempt undeveloped properties and vacant buildings. *Clintonville Road Maintenance and Transportation Utility Fee*, Andrew Robert Eveland (2019).
5. To the extent practicable, a transportation utility fee policy should include a process by which users are permitted to demonstrate reduced use of the street system to qualify for a lower fee. (e.g., Austin, Texas transportation utility fee ordinance allows residents who do not own or regularly use a motor vehicle to opt out of fee; Corpus Christi, Texas likewise has a process by which property applicants may appeal their fee level). *A TUF Sell: Transportation Utility Fee as User Fees for Local Roads and Streets*, by Carole Turley Voulgaris, Public Works Management & Policy 2016 Vol. 4.

Avoiding Levy Limit Consequences

The levy limit law requires a municipality to reduce its allowable levy by the estimated amount of fee revenue it collects for providing certain listed services, including snow plowing and street sweeping, if those services were funded in 2013 in part or whole by the property tax levy. Wis. Stat. § 66.0602(2m)(b). To avoid having this statute apply, a community that imposes a transportation utility fee to help pay for street maintenance and other transportation services, must not use the fee revenue to pay for snow plowing or street sweeping services.

Conclusion

Wisconsin cities and villages struggling to pay for the cost of maintaining quality streets and other transportation services residents and businesses demand, may rely on their broad statutory or constitutional home rule powers or, alternatively, Wis. Stat. § 66.0627, to charge property owners transportation utility fees. Such fees must be reasonably related to the cost of the services provided. Transportation utility fees are most defensible against a challenge if the basis for the fee is closely related to how much a property's occupants use the local street network. It is possible to design a transportation utility fee policy that is defensible against a challenge that the fee is more like an illegal tax. Finally, to avoid needing to reduce the community's property tax levy, municipalities should not use transportation utility fee revenue to pay for snow plowing or street sweeping.

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