

The City of Austin has attempted to mask a tax as a fee to raise revenue for maintenance of its infrastructure. The Transportation User Fee (“TUF”) is a demand for payment included on utility bills for residences and businesses alike. The TUF is not linked to any regulatory purpose and is not limited to a specific subset of individuals who are targeted by regulation. Instead, the TUF is applied to the public at large for the purpose of general revenue raising. The TUF was not enacted by an election, but rather through an ordinance entered by the city council.

The TUF is calculated by a formula created by the city council based on broad assumptions of motor vehicle use and building types. While the director of the department assigns a portion of that formula, that assignment is based on assumptions from the city council. The formula does not contain any reference to a property’s valuation and is not equal or uniform, violating Article VIII, Sections 1(a) and 1(b) of the Texas Constitution.

Plaintiffs, who own properties in Austin, receive utility bills every month which contain the TUF. Plaintiffs are required to pay the TUF each month, if they refuse, they risk having their utilities shut off by the City or having a legal action brought against them. This ongoing burden is unlawful.

The TUF is not a permissible regulatory fee but an illegal tax. The TUF is not connected to a regulatory purpose and is imposed on the public at large. Furthermore, the formula relied upon to calculate the TUF is not equal or uniform and does not consider the valuation of real or personal property in violation of the Texas Constitution. Plaintiffs, therefore, petition this Court to stop the assessment and collection of this illegal tax.

II. DISCOVERY CONTROL PLAN

Plaintiffs intend to conduct Level 2 discovery under Rule 190 of the Texas Rules of Civil Procedure.

III. PARTIES

A. PLAINTIFFS

Alexandra Cunningham

1. Alexandra Cunningham is a resident of the City of Austin.

2. Ms. Cunningham resides in a townhome residence.

3. Ms. Cunningham receives monthly utility bills which include the TUF.

4. Ms. Cunningham is younger than 65 years of age, owns a vehicle, and regularly drives her vehicle, all which disqualifies her for an exemption from the TUF.

5. The TUF included in Ms. Cunningham's monthly utility bill is \$16.35 and is based on the type of building that characterizes her residence.

6. The TUF included in Ms. Cunningham's monthly utility bill is not connected to her property's value.

7. Ms. Cunningham must pay the TUF included in the utility bill or risk having either the utilities to her residence shut off or the City instituting a legal action against her.

Daniel Glenn

8. Daniel Glenn is a resident of the City of Austin.

9. Mr. Glenn resides in a multifamily residence.

10. Mr. Glenn receives monthly utility bills which include the TUF.

11. Mr. Glenn is younger than 65 years of age, owns a vehicle, and regularly drives his vehicle, all which disqualifies him for an exemption from the TUF.

12. The TUF included in Mr. Glenn's monthly utility bill is \$16.57 and is based on the type of building that characterizes his residence.

13. The TUF included in Mr. Glenn's monthly utility bill is not connected to his property's value.

14. Mr. Glenn must pay the TUF included in the utility bill or risk having either the utilities to his residence shut off or the City instituting a legal action against him.

B. DEFENDANTS

15. Defendants are the City of Austin, Austin Transportation and Public Works, and Richard Mendoza in his official capacity as the Director of Austin Transportation and Public Works.

16. The City of Austin is a home rule municipality headquartered in Travis County, Texas. Under Texas Civil Practice and Remedies Code Section 37.006(b), the City must be joined as a defendant for claims challenging the constitutional validity of its ordinances. Defendant City of Austin may be served by serving its City Clerk, Erika Brady, at Austin City Hall, 301 W. Second St., Suite 2030, Austin, TX 78701.

17. Austin Transportation and Public Works is a department within the City of Austin government that oversees the city's infrastructure. On information and belief, Defendant Austin Transportation and Public Works may be served at Austin City Hall, 301 W. Second St., Suite 2030, Austin, TX 78701.

18. Defendant Richard Mendoza is the Director of Austin Transportation and Public Works. On information and belief, Defendant Mendoza may be served at Austin City Hall, 301 W. Second St., Suite 2030, Austin, TX 78701.

19. Pursuant to Texas Civil Practice and Remedies Code Section 17.024(b), the City of Austin may be served by serving the mayor, clerk, secretary, or treasurer. Plaintiffs request that the Clerk issue citations and service of process on all Defendants.

20. Because this suit raises a constitutional challenge to the City's ordinance establishing the Transportation User Fee, the Attorney General of Texas is required, under Texas Civil Practice and Remedies Code Section 37.006(b), to be

served with process at 300 W. 15th Street, Austin, Texas 78701. Plaintiffs request that the Clerk issue citation and service of process upon the Texas Attorney General.

IV. JURISDICTION AND VENUE

21. Jurisdiction is proper in this Court pursuant to Article V, Section 1 of the Texas Constitution and Section 24.008 of the Texas Government Code. This Court has subject matter jurisdiction pursuant to the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001 *et seq.*, because Plaintiffs' rights, legal status, and other legal relations are affected by a law that is constitutionally invalid.

22. Venue is appropriate in Travis County, Texas pursuant to Sections 15.002(a)(3), 15.005, and 65.023 of the Texas Civil Practice and Remedies Code.

V. STATEMENT OF FACTS

23. Under Article XI, Section 5 of the Texas Constitution, home rule municipalities may levy taxes so long as those taxes are authorized by law or by their charters.

24. The City of Austin is a home rule municipality with over 5,000 residents.

25. Article I Section 5 of the Austin City Charter regarding street development and improvement provides:

The cost of such development and improvement shall be paid by the city, or partly by the city and partly by assessments levied against the property abutting thereon and the owners thereof, and such assessments may be levied in any amounts and under any procedure now or hereafter permitted by state law.

26. Chapter 327 of the Texas Tax Code allows municipalities to impose a sales and use tax to raise revenue to maintain streets and sidewalks so long as the tax is first approved by the residents through an election. Tex. Tax Code §§327.001-327.008.

27. The Municipal Sales and Use Tax Act also allows municipalities to enact sales and use taxes if those taxes were approved in an election by the municipalities' inhabitants. Tex. Tax Code §§321.001-321.510.

28. The city of Austin enacted the TUF through ordinance 910911-A on September 11, 1991, without an election.

29. Article VIII, Section 1(a) of the Texas Constitution mandates that taxes be equal and uniform.

30. Article VIII, Section 1(b) of the Texas Constitution provides that real and personal property be taxed in proportion to its value.

31. The TUF is assessed against any residence, business, or lot with improvements with vehicle traffic. City of Austin Code, § 14-10-1.

32. The TUF is calculated by a formula that differs based on the property type. §§ 14-10-1-14-10-5.

33. The formula is not connected to a property's value. *Id.*

34. The TUF must be paid by the person responsible for utility billing at the property. § 14-10-5.

35. The TUF is applied to the monthly utility bill for the property and payment is due upon bill receipt. § 14-10-7.

36. In the event the TUF is not paid, the city may either recover the TUF in an action at law or discontinue the utility service to the property. § 14-10-12.

37. The TUF does not apply to vacant property, properties solely used for off-street parking, or to users that are 65 years of age or older or users who do not own or regularly use a motor vehicle. § 14-10-14.

VI. CAUSE OF ACTION

A. **COUNT ONE: THE TRANSPORTATION USER FEE IS AN ILLEGAL TAX**

38. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

39. Municipalities may impose fees pursuant to their regulatory authority under the police power. *Texas Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997).

40. When a fee is used as a vehicle for general revenue raising, untied to any regulatory purpose, it is no longer a permissible regulatory fee but instead a tax. *Hurt v. Cooper*, 110 S.W.2d 896, 899-90 (Tex. 1937).

41. Courts will usually consider the following three factors in determining whether an assessment is a fee or a tax: (1) whether the assessment was imposed by the legislature or by a regulatory agency; (2) whether the assessment is imposed on the community as a whole or on only those subject to regulation; and (3) whether the assessment covers regulatory costs or generally raises revenue. *Reagan Nat'l Adver. of Austin, Inc. v. City of Austin*, 498 S.W.3d 236, 244 (Tex. App.—Austin, 2016).

42. The TUF was imposed by the city council and not by a regulatory agency.

43. The TUF is imposed on the community as a whole.

44. The TUF does not cover regulatory costs and there is no tie to a regulated industry or agency.

45. The TUF is used to raise revenue for infrastructure maintenance and repair.

46. Based on the characteristics of the TUF, it is a tax rather than a regulatory fee.

47. In violation of its own charter, the City imposes the TUF on nearly all property instead of those abutting areas for development or improvement.

48. The City instituted the TUF by city ordinance and did not hold an election in violation of Chapters 321 and 327 of the Texas Tax Code.

49. The calculation for the TUF depends on a mathematical formula created by the City that depends on the type of building structure, an assumption of how many daily vehicle trips are normal for that type of structure, and a monthly fee per acre. §14-10-5.

50. The TUF lacks uniformity and equality as its calculation differs based on a building's structure type in violation of Article VIII, Section 1(a) of the Texas Constitution.

51. The formula also lacks any nexus to a property's value and is not assessed in proportion to that value in violation of Article VIII, Section 1(b) of the Texas Constitution.

52. Therefore, the TUF is an illegal tax which violates Texas law, the Texas Constitution, and the City's charter.

VII. DECLARATORY RELIEF ALLEGATIONS

53. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

54. An actual and substantial controversy exists between Plaintiffs and Defendants as to their legal rights and duties with respect to whether the TUF violates the Texas Constitution as applied to the Plaintiffs.

55. This case is presently justiciable because the TUF applies to Plaintiffs on its face and has been applied against the Plaintiffs because Defendants have collected and continue to collect the TUF from the Plaintiffs.

56. Pursuant to Tex. Civ. Prac. & Rem. Code Ann. §37.003, it is appropriate and proper that a declaratory judgment be issued by this Court.

VIII. APPLICATION FOR PERMANENT INJUNCTION

57. The preceding paragraphs are realleged and incorporated by reference.

58. An injunction must issue where a party is acting contrary to law.

59. The City's implementation of the TUF was without an election and contrary to Texas law.

60. The City's assessment of the TUF against the general public violates its city charter.

61. The City's assessment and collection of the TUF violates Article VIII, Section 1(a) of the Texas Constitution.

62. The City's assessment and collection of the TUF violates Article VIII, Section 1(b) of the Texas Constitution.

63. The City's assessment and collection of the TUF violates Article XI, Section 5 of the Texas Constitution.

64. The City's illegal tax against Plaintiffs' properties causes imminent and irreparable harm to Plaintiffs.

65. Plaintiffs lack any other adequate remedy at law.

66. Therefore, pursuant to Tex. Civ. Prac. & Rem. Code §§ 37.011 and 65.011, Plaintiffs respectfully request that this Court, following a decision on the merits, issue permanent injunctions against Defendants, as well as any and all agents, administrators, employees, and other persons acting on behalf of Defendants, enjoining the collection and assessment of the City's transportation user fee against Plaintiffs' properties.

IX. ATTORNEYS' FEES

67. Under the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.009, Plaintiffs are entitled to recover "costs and reasonable and necessary attorney's fees as are equitable and just."

68. Plaintiffs seek an award of reasonable attorneys' fees for the preparation of this suit, prosecution of this suit, and all appeals.

X. REQUEST FOR DISCLOSURE

69. Plaintiffs request that Defendants disclose the information and materials described in Rule 194.2 of the Texas Rules of Civil Procedure.

XI. PRAYER AND CONCLUSION

THEREFORE, Plaintiffs request this Court issue the following relief:

- i. A declaration that the Transportation User Fee is an illegal tax;
- ii. A declaration that the Transportation User Fee violates Article VIII, Section 1(a) of the Texas Constitution;
- iii. A declaration that the Transportation User Fee violates Article VIII, Section 1(b) of the Texas Constitution;
- iv. A declaration that the Transportation User Fee violates Article XI, Section 5 of the Texas Constitution;
- v. An injunction against Defendants, as well as any and all agents, administrators, employees, and other persons acting on behalf of Defendants, enjoining the City of Austin from imposing or collecting the Transportation User Fee;
- vi. An award to Plaintiffs of attorneys' fees and reasonable costs; and
- vii. All other and further relief that this Court may deem proper in law or equity.

Respectfully submitted,

/s/Heidi Walusimbi

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