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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2022-AP-1233
Circuit Court Case No. 2021-CV-712

Wisconsin Property Taxpayers, Inc.,

Plaintiff-Respondent,

v.

Town of Buchanan,

Defendant-Appellant.

APPEAL FROM FINAL ORDER AND JUDGMENT
DATED JUNE 27, 2022, OF THE OUTAGAMIE
COUNTY CIRCUIT COURT, CASE NO. 2021-CV-712,
THE HONORABLE MARK J. MCGINNIS, PRESIDING

BRIEF OF DEFENDANT – APPELLANT

RICHARD J. CARLSON
State Bar No. 1013627
Attorney for Defendant-Appellant Town of Buchanan
TOWN COUNSEL LAW & LITIGATION, LLC
940 E. Evergreen Drive
Kaukauna, WI 54130
P: (920) 725-1233
rcarlson@towncounselaw.com

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STATEMENT OF ISSUES

The issues in this case arise from the statutory authorization in Section 66.0827 Wis. Stats., for a town to establish a “utility district” to pay the cost of “district highways, sewers, sidewalks, and street lighting”, not paid for by special assessments, from a “fund” provided by “taxation of property in the district.” The issues presented are as follows:

1. Is the “district fund” authorized by Section 66.0827(2) simply an alternative revenue source to pay for a previously provided “service” funded by the general property tax levy that requires an equivalent reduction in the general property tax levy under Section 66.0602(3) Wis. Stats?

The trial court answered, yes.

2. Is the authorized “taxation of property in the district” a general property tax subject to the statutory general property tax levy limit and subject to the constitutional rule of uniformity (ad valorem – based on property value)?

The trial court did not answer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves the interplay of multiple statutory taxation provisions and current as well as historical legal concepts of municipal revenue through taxation. Oral argument could provide guidance to the Court in its analysis.

The Court’s decision should be published. The issue of whether the public improvements set forth under Section 66.0827 Wis. Stats. are “services” contemplated by Section 66.0602(3)(a) Wis. Stats. is one of first impression in the State. The issue of whether the “taxation of the property in the

district” as authorized by Section 66.0827(2) Wis. Stats., is simply a general property tax subject to the statutory levy limits and constitutional requirement of uniformity is likewise one of first impression in the State.

Moreover, there is statewide interest in the outcome of this case. Wisconsin municipalities are now facing substantial increases in public improvement construction costs but limited revenue sources because of tax levy limits and limited State shared revenue. It is publicly reported that many municipalities are considering alternative revenue sources such as transportation utility fee or tax (commonly referred to as a TUF). Greendale, Appleton, Hudson, Oshkosh, Tomahawk and Wauwatosa are among the municipalities reported to be considering a “transportation utility fee”.

STANDARD OF REVIEW

This case came before the trial court on a Joint Stipulation of Facts (Rec. 19; App., pp. 031-173). If the facts are stipulated, only a question of law remains. *Lewis v. Physicians Ins. Co.*, 2001 WI 60, ¶9, 243 Wis. 2d 648, 627 N.W.2d 484.

The interpretation of a statute, in this case, Sections 66.0827 and 66.0602 Wis. Stats., is a question of law. *Honthaners Restaurants, Inc. v. LIRC*, 2000 WI App. 273 ¶10, 240 Wis. 2d 234, 621 N.W.2d 660. Application of a statute to a particular set of facts is a question of law. *State v. Piddington*, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528.

An appellate court is not bound by a trial court’s conclusion of law and decides the matter *de novo*. An appellate

court must decide questions of law independently, without deference to the decision of the circuit court. *State v. Vanmanivong*, 2003 WI 41, ¶17, 261 Wis. 2d 202, 661 N.W.2d 76.

STATEMENT OF THE CASE

A. Case Summary

This case requires the Court to determine whether road reconstruction is a “service” within the meaning of Section 66.0602(3)(a) Wis. Stats., on levy limits. If not it requires the Court to determine whether the authorized “taxation of property” within the meaning of Section 66.0827 on utility districts is a general property tax or a special tax similar in nature to a special assessment which is not subject to levy limits.

The Town of Buchanan (“Town”) adopted an ordinance establishing a “Transportation Utility District” under authority conferred by Section 66.0827 Wis. Stats. (Rec. 19, pp 3-7; App., pp. 033-037). The District was created to fund road reconstruction as authorized by Section 66.0827(2). The cost of road reconstruction would come from a “district fund” provided by “taxation of the property in the district.” The Town created an annual tax/fee for each developed property based on the estimated number of vehicle trips generated by that property. (Rec. 19, pp. 8-9; App., pp. 38-39). The tax/fee raises approximately \$875,000. (Rec. 19, p. 8; App., 038).

Wisconsin Property Taxpayers, Inc. (WPT) sought declaratory judgment that the district tax/fee was a general

property tax subject to the general property tax levy limits and that the revenue generated by the District tax exceeded the Town's levy limit. WPT also argued that the district tax violated the constitutional uniformity requirement – all property taxes must be based on property value.

The case came before the trial court on motions for summary judgment by each party. Background facts came before the Outagamie County trial Court on a Joint Stipulation by the parties. (Rec. pp. 1-143; App., 031- 173). A hearing was held on June 6, 2022. The trial court made a decision from the bench. An Order Granting Summary Judgment for the Plaintiff (WPT) was entered on June 27, 2022. (Rec. 29, pp. 1-27; App. 004 – 030).

The trial court held that the District transportation tax/fee was a transfer of responsibility for providing a “service” that the Town itself previously provided. Therefore, the general property tax levy limit should decrease to reflect the cost that the Town would have otherwise incurred to provide that service. The Town exceeded its levy limit. The trial court relied on Section 66.0602(3)(a) Wis. Stats. (R. 29, p. 22; App., p. 027). The trial court did not determine whether the district transportation utility tax/fee was a general property tax.

The Town disagrees that road construction is a “service” subject to Section 66.0602(3)(a). The Town claims the district utility tax/fee is akin to special assessments which are not subject to levy limits or levy offsets. The Town filed its Notice of Appeal on July 21, 2022.

B. Background

The Town of Buchanan (“Town”) is located adjacent to the City of Appleton on the east side. The Town has a current population of approximately 8,000. Between 1980 and 1990, the population increased by 42 percent and between 1990 and 2000 it increased by 134 percent. These dramatic increases were attributable to the opening of USH 441 and the creation of a sanitary district. (Rec. 19, pp. 141 – 143; App., pp. 171 – 173). Over the last 10 years, population growth has been minimal. *Id.*

The Town has 46 miles of road. Most roads have a rural cross-section two lanes of travel, gravel shoulders and open roadside ditches for drainage. Under the State Pavement Surface Evaluation and Rating System, 24 miles are rated Fair to Very Poor. Within the next 10 years, 44 percent or 21 miles will have pavement that is 25 years or older. Pavement life is typically 25 years. The growth spurt of the 1990’s resulted in many Town roads needing reconstruction at the same time. (Rec. 19, pp. 14 – 16, 35; App., pp. 044 – 046, 065).

A major part of the Town road condition problems are drainage related. The Town has flat topography. The road ditch grades are, for the most part, less than one percent and inadequate to convey stormwater in roadside ditches. The flooded roads result in more rapid deterioration. Drainage problems are pervasive and persistent. *Id.*

The Town adopted a policy of road reconstruction with an urban cross-section two lanes of travel with a storm sewer, curb and gutter and sidewalks. An urban cross-section is

substantially more costly but much safer and effective for storm water management.

The Town has long financed road reconstruction on a “pay as you go” basis using funds from the general property tax levy along with state aids and grants. (Rec. 19, pp. 15 – 19; App., pp. 045 – 049). However, under state law, the Town is only able to increase the general tax levy by annual net new construction. (Section 66.0602(1) and (2) Wis. Stats.). Over the last five years, annual net construction value has been approximately 1.11 percent. Thus, the Town is limited to increasing the tax levy by slightly over one percent. (Rec. 19, pp. 17 – 19; App., pp. 047 – 049).

The levy limit and state aids have not kept up with road reconstruction costs and needs. A “pay as you go basis” is no longer possible. The Town is at its levy limit.

The Town prepared a Transportation System Financing Approach Report that was completed in 2019. Financing alternatives were considered including special assessing properties for road reconstruction; increasing the general tax levy limit by referendum; and adopting a transportation utility fee. (Rec. 19, pp. 10 – 40; App., pp. 040 – 070). The Report identified that an additional 1.25 million dollars in financing was needed annually to catch up with road reconstruction needs. *Id.*

After a series of public meetings and discussions, on April 2, 2019, the Town held a referendum to determine which of the three financing alternatives for road reconstruction was favored by Town residents. The question was as follows:

Should the Town of Buchanan rely principally on Special Assessments, a Transportation Utility Fee, or a Property Tax Levy increase to supplement the cost of street improvements projects?

Explanatory Statement and Effect of Vote:

If you answer “Special Assessments” to this question, you are indicating that you support the implementation of a Special Assessment Policy, where benefitting property owners in a project area are special assessed a portion of the cost for a street improvement project.

If you answer “Transportation Utility Fee” to this question, you are indicating that you support the establishment of a Transportation Utility, where all Town property owners are charged an annual fee based on an estimated number of trips generated to supplement the cost for street improvement projects.

If you answer “Property Tax Levy Increase” to this question, you are indicating that you support the increase of the Property Tax Levy, where all property owners would see an increase in their Town taxes to supplement the cost of street improvement projects.

The results of the referendum were 296 votes for special assessments; 899 votes for a transportation utility fee; and 379 votes for a property tax levy increase. The votes for a transportation utility fee were more than the votes for special assessments and tax levy increase combined. (Rec. 19, pp. 38 – 39; App., pp. 068 – 069).

On December 12, 2019, the Town Board adopted an Ordinance establishing a Transportation Utility District. Also on December 12, 2019, the Town Board adopted a resolution establishing the amount to be funded, a formula for calculating fees by land use category for all developed property, and a fee schedule for all developed property for 2019. (Rec. 19, pp. 3-9; App., pp. 033 – 039).

RELEVANT STATUTORY PROVISIONS

1. Section 66.0827 Wis. Stats. Utility Districts.

Section 60.23 Wis. Stats., enumerates miscellaneous powers of a town board. Section 60.23(2) provides that a town board may: “Establish utility districts under s. 66.0827 and provide that any convenience or public improvement in the district be paid for under that section.”

Section 66.0827 provides in relevant part as follows:

Utility districts. (1) Towns, villages and 3rd and 4th class cities may establish utility districts.

(a) In villages and 3rd and 4th class cities, the village board or common council may direct that the cost of utility district highways, sewers, sidewalks, street lighting and water for fire protection not paid for by special assessment be paid out of the district fund under sub. (2). The cost of bridges in the district may not be paid out of the district fund. (Emphasis added).

(b) In towns, the town board may direct that the cost of any convenience or public improvement provided in the district and not paid for by special assessment be paid from the district fund under sub. (2).

(2) The fund of each utility district shall be provided by taxation of the property in the district, upon an annual estimate by the department in charge of public works in cities and villages, and by the town chairperson in towns, filed by October 1. Separate account shall be kept of each district fund. (Emphasis Added)

(3) In towns a majority vote and in villages and cities a three-fourths vote of all the members of the governing body is required to establish, vacate, alter or consolidate a utility district. (Emphasis Added)

(4) Before the vote is effective to establish, vacate, alter or consolidate a utility district, a hearing shall be held as provided in s. 66.0703(7)(a). In towns the notice may be given by posting in 3 public places in the town, one of which shall be in the proposed district, at least 2 weeks prior to the hearing.

(Subsection (5) and (6) are omitted as they relate to an optional dissolution of a sanitary district and municipal consolidation.)

2. Section 66.0602 Wis. Stats. Local Levy Limits.

• • • •

(1)(d) “Valuation factor” means a percentage equal to or greater of either the percentage change in the political subdivision’s January 1 equalized value due to new construction less improvements removed between the previous year and the current or zero percent.

(2)(a) LEVY LIMIT. (a) Except as provided in subs. (3), (4) and (5), no political subdivision may increase its levy in any year by a percentage that exceeds the political subdivision’s valuation factor. . .

(2m)(b) 1. In this paragraph, “covered service” means garbage collection, fire protection, snow plowing, street sweeping, or storm water management, except that garbage collection may not be a covered service for any political subdivision that owned and operated a landfill on January 1, 2013. With regard to fire protection, “covered service” does not include the production, storage, transmission, sale and delivery, or furnishing of water for public fire protection purposes.

2. Except as provided in subd. 4., if a political subdivision receives revenues that are designated to pay for a covered service that was funded in 2013 by the levy of the political subdivision, the political subdivision shall reduce its levy limit in the current year by an amount equal to the estimated amount of fee revenue collected for providing the covered service, less any previous reductions made under this subdivision, not to exceed the amount funded in 2013 by the levy of the political subdivision.

3. Except as provided in subd. 4., if a political subdivision receives payments in lieu of taxes that are designated to pay for a covered service that was funded in 2013 by the levy of the political subdivision, the political subdivision shall reduce its levy limit in the current year by the estimated amount of payments in lieu of taxes received by the political subdivision to pay for the covered service, less any previous reductions made under this subdivision, not to exceed the amount funded in 2013 by the levy of the political subdivision.

(3) EXCEPTIONS. (a) If a political subdivision transfers to another governmental unit responsibility for providing any service that the political subdivision provided in the preceding year, the levy increase limit otherwise applicable under this section to the political subdivision in the current year is decreased to reflect the cost that the political subdivision would have incurred to provide that service, as determined by the department of revenue. (Emphasis Added)

3. Section 66.0703 Wis. Stats. Special Assessments.

Section 66.0703 provides in relevant part as follows:

(1) (a) Except as provided in s. 66.0721, as a complete alternative to all other methods provided by law, any city, town or village may, by resolution of its governing body, levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal work or improvement; and may provide for the payment of all or any part of the cost of the work or improvement out of the proceeds of the special assessments. (Emphasis Added)

4. Town of Buchanan Utility District Ordinance

Relevant provisions of the Town Ordinance establishing a Transportation Utility District are set forth below. (The Ordinance is codified in the Town Municipal Code as Chapter 482). (Rec. 19, pp. 3 – 7; App., 033 – 037).

§ 482-1 Findings, authority and applicability.

A. The Town of Buchanan Town Board finds that the timely maintenance and reconstruction of the Town's transportation system to ensure safe and efficient travel throughout the Town is a fundamental Town responsibility. A structurally sound and well-maintained transportation system enhances livability, property values and the economic vitality of the entire Town. Further, the Town Board finds that a community-wide Transportation Utility District applicable to all developed properties, paid annually to a specially designated account for transportation system maintenance and improvement, is an equitable and less-burdensome approach to financing transportation system maintenance and improvements in the Town.

B. In order to protect the health, safety and welfare of the public, the Town Board is exercising its authority to establish a Transportation Utility District and implement a transportation utility fee. The Town is acting under authority of §66.0827 and §§66.0621, 66.0807, 66.0811 and 66.0813, Wis. Stats., as they may apply.

C. The provisions of this chapter shall apply to all developed property located within the Town of Buchanan, including, without limitation, all property owned by local, state, and federal governments, nonprofit organizations and all other property whether subject to real property taxes or exempt therefrom.

§ 482-2 Definitions.

As used in this chapter, the following terms shall have the meanings indicated:

DEVELOPED PROPERTY OR IMPROVED PREMISES

Properties containing a developed principal use or principal structure.

RESPONSIBLE PARTY

The record owner of the property shall be the responsible party for the payment of the transportation utility fee.

§ 482-3 Transportation Utility District.

A. The Town of Buchanan is hereby establishing a Transportation Utility District. The operation of the Transportation Utility District shall be under the day-to-day management of the Town Administrator and under the supervision of the Town Board. He/she, or a designated representative, shall provide an annual estimate to the Town Chairperson by October 1 of each year.

B. The Town, acting through the Transportation Utility District, may, without limitation due to enumeration, acquire, construct, lease, own, operate, maintain, extend, expand, replace, repair, manage and finance such transportation facilities and related facilities, operations and activities, as are deemed by the Town to be proper and reasonably necessary to provide safe and efficient transportation facilities within the Town. The following

activities to be funded by the transportation utility fee are 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 and not paid in full by special assessment.

§ 482-4 Establishment of transportation utility fee.

A. Every developed property within the Town of Buchanan shall pay a transportation utility fee.

B. The Town Board shall by resolution determine the annual amount to be funded by a transportation utility fee, formulas for the calculation of the fee and specific use category classifications. Changes in formulas and classifications may be made by further resolution of the Town Board. All fees established pursuant to this section shall be fair and reasonable. A schedule of current fees shall be maintained and on file in the office of the Town Clerk.

C. Special assessment. Separate and in addition to any fees charged under this chapter, a special assessment may be imposed on property that is specially benefited by a particular transportation project or facility. This charge will be developed to reflect the benefits in a particular area that may not be appropriate to allocate to property throughout the Town and shall follow the special assessment processes defined within Chapter 10 and the relevant provisions of the Wisconsin State Statutes.

§ 482-5 Establishment of Transportation Utility District Fund.

A. All funds collected by the Town from a transportation utility fee shall be deposited into a Transportation Utility District Fund ("fund"), which is hereby created as an established enterprise fund in the Town budget. Such revenues shall be used exclusively for the transportation system purposes described wherein. Any excess of revenues over expenditures in a year will be retained by the fund for subsequent years' needs.

B. To the extent that the fees collected are insufficient to properly fund the transportation system purposes described wherein, the cost of the same may be paid from such other Town funds as may be determined by the Town Board. The Town Board may order reimbursement to such fund as additional fees are thereafter collected. Funds shall not be imposed in amounts greater than that which is necessary, in the judgment of the Town Board, to provide sufficient funds to properly operate, maintain and improve utility district highways, sewers, sidewalks, street lighting and the cost of any other convenience or public improvement provided in the district and not paid for by special assessment.

C. It shall not be required that the operations, maintenance and improvement expenditures from the fund specifically relate to any particular property from which the fees were collected.

D. All amounts in the fund may be invested in accordance with the Town investment policy. Earnings from such investments will be credited to the fund.

§ 482-6 Use of funds to maintain transportation system; exclusions.

A. The Town may improve other accepted local streets, bicycle and pedestrian facilities, and roads and intersections with county roads or state highways within or adjacent to the Town. Local streets to be improved exclude private streets, streets or any other facilities not yet accepted by the Town for maintenance and bridges.

B. The cost of initial construction of local streets within the Town right-of-way to serve new developments or subdivisions constructed after the effective date of this chapter or subject to a developer's agreement shall not be funded by the transportation utility fee.

§ 482-7 Billing and collection for transportation utility fee.

A. The transportation utility fee shall be billed and collected with and as part of the annual property tax bill. The responsible party for payment of the fee shall be the

same person(s) or entity responsible for payment of the parcel property tax bill. All such bills shall be rendered annually by the Town and shall become due and payable in accordance with the rules and regulations pertaining to the collection of property tax bills.

B. The Town Treasurer's Office shall be responsible for the fee billing and placing all such fees collected into the fund and separately kept to be used exclusively for the transportation system purposes provided herein.

C. The transportation utility fee for new developments shall commence upon occupancy, or use of the improvements, whichever comes first. The Town may prorate the fee based on the commencement date.

D. Any unpaid transportation utility fee shall become a lien on the property in the manner set forth in §§ 66.0809 and 66.0627, Wis. Stats. The fee shall automatically be extended on the current or next tax roll as a delinquent tax against the property and in all proceedings in relation to the collection, return and sale of property for delinquent real estate taxes.

§ 482-8 Appeals. (Omitted).

5. Town of Buchanan Resolution for 2019 Funding

RESOLUTION AUTHORIZING THE PROPOSED ANNUAL AMOUNT TO BE FUNDED BY A TRANSPORTATION UTILITY FEE, FORMULA FOR THE CALCULATION OF FEES, SPECIFIC USE CATEGORY CLASSIFICATION AND FEE SCHEDULE FOR THE 2019 TAX YEAR FOR THE TOWN OF BUCHANAN, OUTAGAMIE COUNTY, WI

WHEREAS, the Town Board finds that the timely maintenance and reconstruction of the Town's transportation system to ensure safe and efficient travel throughout the Town is a fundamental Town responsibility; and

WHEREAS, a structurally sound and well-maintained transportation system enhances livability, property values and the economic vitality of the entire Town; and

WHEREAS, the Town Board finds that a community wide Transportation Utility Fee applicable to all developed properties, paid annually to a specially designated account for transportation system maintenance and improvement is an equitable and less burdensome approach to financing transportation system maintenance and improvements in the Town; and

WHEREAS, at the September 17, 2019 Town Board meeting an annual estimate for a Transportation Utility Fee was provided to the Town Board Chairperson and Town Board members; and

WHEREAS, the Town Board unanimously approved setting the cost recovery amount for a Transportation Utility Fee at \$875,000; and

WHEREAS, at the same meeting a unanimous motion was approved to calculate the fees based on a hybrid formula, which included a base fee and a trip generation fee to equal the total Transportation Utility Fee for a developed property; and

WHEREAS, the classification categories to determine the average trips generated by a parcel are based on the Institute of Transportation Engineers (ITE) Land Use Codes, as defined in the ITE Trip Generation Handbook; and

WHEREAS, a public hearing was held on December 12, 2019 for the proposed budget and fee schedule of the Transportation Utility District.

NOW, THEREFORE, BE IT RESOLVED, by the Town Board of the Town of Buchanan, Outagamie County, Wisconsin that a Transportation Utility Fee is hereby imposed on all develop properties in the Town of Buchanan as defined by Section 11-2 of the Code of the Town of Buchanan in which the Town completes utility district highway, sewer, sidewalk, street lighting and other public improvement projects within the Transportation Utility District. The Town Treasurer is authorized to collect the appropriate fee by placing this fee on the 2019 tax bill for collection with real estate taxes.

BE IT FURTHER RESOLVED, the fee schedule, as attached, shall follow such schedule for the 2019 tax year.

The fee schedule is shown in Rec. 19, pp. 107 – 109; App. 137 – 139. It is akin to a schedule of special assessments, listing each developed property and the fee amount. Each residential unit has a base fee of \$315.29. Nonresidential has a fee based on use, size and ITE traffic generation estimates for that property. *Id.*

ARGUMENT

I. THE AUTHORIZATION IN §66.0827(1) AND (2) WIS. STATS., TO PAY THE “COST OF UTILITY DISTRICT HIGHWAYS, SEWERS, SIDEWALKS, STREET LIGHTING AND WATER NOT PAID FOR BY SPECIAL ASSESSMENT” BY A FUND “PROVIDED BY TAXATION OF PROPERTY IN THE DISTRICT,” RENDERS THE TOWN TRANSPORTATION UTILITY “FEE” A “TAX” AND NOT A FEE.

While labelled a transportation utility “fee” in the Town Ordinance, the so-called fee is really a taxation of property as identified in Section 66.0827(2) Wis. Stats.

Section 66.0827(1)(a) Wis. Stats., provides that “(I)n villages and 3rd and 4th class cities, the village board or common council may direct that the cost of district highways, sewers, sidewalks, street lighting and water for fire protection not paid for by special assessment be paid out of the district fund under sub. (2).”

Section 66.0827(1)(b) Wis. Stats., provides that “(I)n towns, the town board may direct that the cost of any convenience or public improvement provided in the district

and not paid for by special assessment be paid from the district fund under sub. (2).”

Section 66.0827(2) Wis. Stats., provides that “(T)he fund of each utility district shall be provided by taxation of property in the district upon an annual estimate by the department in charge of public works in cities and villages, and by the town chairperson in towns, filed by October 1.” (Emphasis Added).

In its briefs to the trial court, WPT claims that the Town transportation utility “fee” is really a “tax”. The Town agrees.

The primary difference between a tax and a fee or charge is the source of the municipality’s power and the municipality’s purpose in imposing the payment requirement. In *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶6, 358 Wis. 2d 610, 856 N.W.2d 546 the Court stated as follows:

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) (citations omitted). The purpose, and not the name it is given, determines whether 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.

“The substance and not the form of the imposition is the test of its true character.” *City of River Falls v. St. Bridget’s Catholic Church*, 182 Wis. 2d 436, 442, 513 N.W.2d 673 (Ct. App. 1994) (Citation omitted). The purpose of the Town

transportation utility tax is to fund the cost of highway reconstruction not paid for by special assessments. It has no purpose in covering the expense of providing services or regulation. It is not used to cover any expense of providing services.

II. BECAUSE THE PURPOSE AND SUBSTANCE OF THE UTILITY DISTRICT TAX ON PROPERTY IS TO FUND THE COST OF PUBLIC IMPROVEMENTS AND NOT FUND THE COST OF ANY “SERVICES,” SECTION 66.0602(3)(a) WIS. STATS., DOES NOT APPLY AND THE TRIAL COURT ERRED.

The trial court determined that Section 66.0827 Wis. Stats., provides authorization for the Town to create a Transportation Utility District and impose a transportation utility fee (Rec., 26, p. 20; App. 025). The trial court also indicated a belief that the Utility District fee based on a taxation of property in the District was not a general property tax under Chapters 70 and 74 Wis. Stats. (Rec. 26, pp. 20-21; App. 025 – 026).

However, the trial court determined that the Transportation Utility District tax constituted a transfer of responsibility from the Town to the District for funding a service that the Town previously funded by the general property tax levy. Consequently, the Town levy limit had to be reduced by an equivalent amount. The trial court relied on Section 66.0602(3)(a) which provides as follows:

If a political subdivision transfers to another governmental unit responsibility for providing any service that the political subdivision provided in the

preceding year, the levy increase limit otherwise applicable under this section to the political subdivision in the current year is decreased to reflect the cost that the political subdivision would have incurred to provide that service, as determined by the department of revenue. (Emphasis Added).

There is no dispute that the purpose and intent of the Town Transportation Utility District fee is to fund street reconstruction, most notably reconstructing streets from a rural cross-section to an urban cross section. The Transportation Utility fee funds public infrastructure. WPT itself acknowledges that the revenue from the Utility fee “is being used to pay for general infrastructure.” (Plaintiff’s Brief in Response to Defendant’s Motion for Summary Judgment, Rec. 21, p. 6 ¶2).

“(I)nfrastucture is not a service.” *CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶40, 380 Wis. 2d 399, 909 N.W.2d 136. “(A) roundabout is an improvement, not a service.” *Id.* “Improved infrastructure may facilitate the delivery of services to a property but it is not, in and of itself, a service.” *Id.*

In *CED*, the Court articulated what constitutes a “service” by relying on the definition in Section 66.0627 Wis. Stats. “Service” as defined in §66.0627(1)(c) includes:

Snow and ice removal, weed elimination, street sprinkling, oiling and tarring, repair of sidewalks or curb and gutter, garbage and refuse disposal, recycling, storm water management, including construction of storm water management facilities, tree care, removal and disposition of dead animals under s. 60.23(20), loan repayment under s. 70.57(4)(b), soil conservation work under s. 92.115, and snow removal under s. 86.105.

The *CED* court further articulated the distinction between a service and improvement in Note 17.

Under Wis. Stat. §66.0627(2), a municipality “may impose a special charge against real property for current services rendered. . . .” Section 66.0627(1)(c) defines “service”. In contrast, Wis. Stat. §66.0703 governs the levying and collection of “special assessment” for “special benefits” conferred on property by an improvement. Because special charges are imposed for services, whereas special assessments are levied and collected for improvements, the legislature regards services and improvements as distinct things subjecting property owners to different taxes: charges for services and assessments for improvements. (Emphasis Added).

Section 66.0602(2m) Wis. Stats., governs required “negative adjustments” to levy limits if services formerly funded by the general property tax levy are subsequently funded by other revenue sources. Section 66.0602(2m)(b)1, defines covered services in relevant part as follows:

“Covered service” means garbage collection, fire protection, snow plowing, street sweeping or storm water management.

“Covered service” as defined above, is consistent with the definition of services in Section 66.0627. Neither include public improvements either explicitly or implicitly.

The distinction between a service and a public improvement is a distinction with an important legal difference. The trial court did not consider the distinction. For that reason, the trial court erred in its determination that Section 66.0602(3)(a) applied and that the Town improperly exceeded its levy limit.

III. THE TOWN TRANSPORTATION UTILITY TAX IS SIMILAR TO A SPECIAL ASSESSMENT IN PURPOSE AND LEGAL BASIS AND IS NOT A GENERAL PROPERTY TAX.

Section 66.0827(1)(a) authorizes towns, villages and 3rd and 4th class cities to establish utility districts and “direct that the cost of utility district highways, sewers, sidewalks, street lighting and water for fire protection not paid for by special assessment be paid out of the district fund.” Section 66.0827(2) states that “the fund of each utility district shall be provided by taxation of property in the district. . .”

The Legislature has clearly established a public improvement purpose for a utility district. Moreover, it is not happenstance that the Legislature directs that the cost of these public improvements that are not paid for by special assessment, be paid out of a utility district fund.

The cost of a public improvement can be paid for by Town special assessment or by a district fund “provided by taxation of property in the district.” In other words, the Town could pay some of the cost by special assessment and the Utility District could pay some of the cost by a utility taxation of the property in the district.

Section 66.0703(1), the enabling authority for special assessments, provides: “(A)s a complete alternative to all other methods provided by law, any city, town or village may by resolution of its governing body, levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal work or improvement.” Section 66.0827 and its taxation of property is another method provided by law.

Special assessments, by law, are a form of taxation on property “‘A special assessment,’ also known as an ‘assessment for benefits,’ is defined as “the assessment of a tax

on property that benefits in some important way from a public improvement.”” (Emphasis Added). *Emjay Inv. Co. v. Village of Germantown*, 2011 WI 31, ¶25, 333 Wis. 2d 252, 263-264, 797 N.W.2d 844 (quoting Black’s Law Dictionary 112 (7th ed. 1999) and also citing *Park Ave. Plaza v. City of Mequon*, 2008 WI App 39, ¶17, 308 Wis. 2d 439, 747 N.W.2d 703.)

In *Milwaukee v. Taylor*, 229 Wis. 328, 282 N.W. 448 (1938) a special assessment was challenged as an unauthorized tax and a violation of the Constitution’s uniformity requirement because the assessment operates to recoup the city treasury and is therefore a general property tax which must be uniform. *Taylor*, p. 338. The Court denied the challenge quoting *Weeks v. Milwaukee*, 10 Wis. 242, 260-261 (1860):

This system of special taxation, upon the basis of supposed special benefits, had existed for years, and given rise to much discussion and litigation in the older states. Although, in itself, being strictly an exercise of the taxing power, yet it has been frequently assumed otherwise, and has been so far separated and distinguished from general taxation, as to have obtained a distinct name, and that name, assessment. As such it has been known and described for a number of years in the older states, in their contracts, laws, and constitutions. A clear distinction between it and other taxation was established.

It was argued that the word “assessment” referred to taxes generally but that was rejected by the court. The court said (p. *261):

“The word ‘assessment,’ then, includes all the steps necessary to this taxation, just as the word ‘taxation’ includes all necessary to taxation generally.” The court in effect held that “assessment” is a special form of taxation not subject to the rule of uniformity but based on benefits.

In *Lamasco Realty Co. v. Milwaukee*, 242 Wis. 357, 8 N.W.2d 372 (1943) the Court stated that “while a special

assessment is considered a tax for some purposes there is a wide distinction between special assessments and a tax levied generally for support of the government.” The Court then quoted *Dalrymple v. Milwaukee*, 53 Wis. 178, 185, 10 N.W. 141 (1881) as follows:

The theory of all taxation is, that taxes are imposed as a compensation for something received by the taxpayer. General taxes are paid for the support of government in return for the protection to life, liberty and property which government gives. Assessments of benefits accruing to property by reason of public improvements rest on the same principle. Both forms of taxation are for public purposes, and both are alike burdens upon property. The only substantial distinction between the two forms is, that general taxation is based upon value and subject to the constitutional rule of uniformity, while assessments are not. (Emphasis Added).

The Town Transportation Utility tax, like a special assessment, is not part of the Town general property taxing process. It is not a Town general tax on property. It is a utility tax on property for benefits.

The Transportation Utility tax not only shares a common legal basis with special assessments, the Utility has structured the application of the fee on a recognized and accepted special assessment methodology. Each developed property is subject to the tax. The tax is based upon the number of vehicle trips each property is projected to generate.

In *Park Ave. Plaza v. City of Mequon*, 2008 WI App 39, ¶30, 308 Wis. 2d 439, 456, 747 N.W.2d 703, the Court affirmed trip generation projections from the Institute of Traffic Engineers (ITE) as a reasonable and equitable methodology for special assessments. The Court stated:

First, we conclude that the evidence supports a uniform assessment. Uniformity means that the assessment is fairly and equitably apportioned among property owners in comparable situations. *Id.* As the City's report indicates, the City used the trip generation methodology to apportion costs; more specifically, the City based the assessment on "'theoretical' vehicle trips per day that a business generates by business zoning or category." The rates are based on the trip generation manual of the Institute of Traffic Engineers, with development-specific modifications according to the first phase of the Port Washington Road improvements. At the summary judgment hearing, Park Avenue conceded this was an accepted methodology.

In this case, the Town Utility prepared a 33-page schedule of fees that listed each developed property by use, square footage, trip generation and fee amount. The schedule is updated annually and is part of the annual Resolution. (Joint Stip., Ex. 11). This schedule is the equivalent of a schedule of assessments as part of a Final Resolution for special assessments.

The Town Transportation Utility taxation on property is similar to but distinct from special assessments. This point is evident by the express language of 66.0827 that the cost of

district public improvements not paid for by special assessment
be paid out of a district fund provided by taxation of property
in the district.

**IV. BY SECTION 60.0827 WIS. STATS., THE
LEGISLATURE AUTHORIZED A
UTILITY DISTRICT TO IMPOSE A
SPECIAL TAX ON PROPERTY TO PAY
FOR PUBLIC IMPROVEMENTS AS AN
ALTERNATIVE OR SUPPLEMENT TO
MUNICIPAL SPECIAL ASSESSMENTS
OR THE GENERAL PROPERTY TAX
LEVY.**

The substance of Section 66.0827 has a long history. It was first created by Chapter 167, Laws of 1915 numbered Section 959x-1 through 959x-5. It provided in relevant part as follows:

Section 1. There are added to the statutes five new sections to read: Section 959x-1. Cities of the fourth class, whether organized under general or special charter, are hereby authorized to establish and maintain as provided in sections 959x-1 to 959x-5, inclusive, of the statutes, districts to be known as utility districts and to be numbered from one upwards, and thereafter the expense of improvement and maintenance of streets and highways, construction and maintenance of sewers and sidewalks, maintenance of street lighting, and furnishing water for fire protection purposes, or either, as the council may determine, not chargeable to private property, shall be paid out of the fund of the proper utility district.

Section 959-2. The board of public works or the officer or officers designated to discharge its duties shall report to the council, on or before the first day of October of each year, as accurately as may be possible the amount of money required for such purposes for the ensuing year in each district; and the council may direct the levy and collection of a tax for such purposes in each utility district for such amount as may be necessary on all property subject to taxation in any such utility district, which tax shall, when collected, be placed in the fund of the utility district in which the same shall be collected.

A revision in 1917 added Villages. (Chapter 191). A revision in 1921 added Towns. (Chapter 590, Section 64). Third class cities were added in 1923. (Chapter 77).

In 1983, the Utility District provision, then numbered 66.072 Wis. Stats., revised the statute by replacing the language “not chargeable to private property” to “not paid for by special assessment.” (83 WIS ACT 532, Section 16).

A “Note” on the change states as follows:

The redraft assumes that reference in current law to the “expense. . . not chargeable to private property” refers to the cost of improvements not paid for by special assessment, and incorporates that terminology.

The legislative history provides further proof that the phrase “taxation of property” in the district does not refer to a special assessment but a different, alternative to a special assessment. (See App., 174 – 192).

Moreover, a utility district lacks legislative authority to levy special assessments. Section 66.0703(1)(a) Wis. Stats., authorizing special assessments, provides in relevant part: “(A)s a complete alternative to all other methods provided by law, any city, town or village may, by resolution of its governing body, levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal work or improvement.” (Emphasis Added) Utility districts are not listed as having such authority.

The Town acknowledges that special assessments are an available and important method of financing the cost of public improvements. However, there are significant drawbacks to

that financing method. With costs for street reconstruction significantly increasing over the years, it is not uncommon to have assessments of \$20,000.00 or more for a single residential property. A special assessment becomes a lien on the property for the full amount of the assessment when the municipality adopts a final resolution, even if the municipality authorizes payment in installments. See §§66.0703 and 66.0717 Wis. Stats. That lien would impair a property owner's ability to refinance or take out a home equity loan. Typically, a sale of the property requires full payment. The utility tax is paid by all developed properties in the district on an annual basis based on traffic generation. The cost is spread out over more properties over a longer period. It is not a lien unless unpaid. The citizens of Buchanan voted to use a utility tax over special assessment as a primary funding method by a 3 to 1 margin. (Joint Stip Rec. 19; App. p. 069).

Likewise, utility districts lack legislative authority to levy general property taxes. A utility district is not a "taxation district." A "taxation district" is defined in Section 70.045 Wis. Stats., as "a town, village or city in which general property taxes are levied and collected."

Section 66.0827 Wis. Stats., authorizing taxation of the property in the district makes no reference whatsoever to the detailed procedural and substantive requirements for ad valorem general property taxes found in Chapters 70 and 74, Wis. Stats. Instead, §66.0827 has its own procedures. "The fund of each utility district shall be provided by taxation of property in the district, upon an annual estimate by the department in charge of public works in cities and villages, and

by the town Chairperson in towns, filed by October 1.”
(Emphasis Added).

Looked at from a broader perspective, if taxation of property was simply an ad valorem general property tax, why go through the effort of establishing a utility district and utility district fund. It would make no sense. If taxation of property was simply a special assessment, why go through the effort of establishing a utility district. Again, it would make no sense.

V. THE “TAXATION OF PROPERTY IN THE DISTRICT” THAT IS AUTHORIZED IN SECTION 66.0827 WIS. STATS., IS A “SPECIAL TAX” FOR PUBLIC IMPROVEMENTS.

Section 74.01(5) Wis. Stats., defines special tax as follows:

“Special tax” means any amount entered in the tax roll which is not a general property tax, special assessment or special charge.”

Besides the taxation of the property in the district authorized by Section 66.0827, Section 61.47(1) Wis. Stats., authorizes a “street and sidewalk improvement tax” and Section 61.46(2) Wis. Stats., authorizes a highway tax.

61.47 Street and sidewalk improvement tax. For the purpose of improving the streets, making and improving sidewalks and crosswalks and setting out shade and ornamental trees in such village, the board may levy a tax in addition to the highway tax provided for in s. 61.46(2), and the amount fixed shall be levied, certified and collected as provided in these statutes. All moneys so collected shall be paid to the village treasurer and expended under the direction of the board of trustees.

(2) HIGHWAY. The village board shall, at the time and in like manner, determine the amount, if any, of highway tax to be levied and collected in such village for the current year. Such highway tax shall thereafter be assessed and collected by the village treasurer at the time and in the manner provided for the collection of other

village taxes; and such highway tax shall be kept as a separate fund, and shall be expended under the direction of the village board in the improvement of the streets, highways and bridges in said village.

Chapter 74, Wis. Stats., on “tax payments,” expressly recognizes special taxes as a distinct category from general property taxes and special assessments.

Sections 74.11(1),(2)(3) and (12)(a) Wis. Stats., provides in relevant part as follows:

- (1) APPLICABILITY. General property taxes, special assessment, special charges and special taxes collectible under this chapter are payable as provided in this section. . . . (Emphasis Added)
- (2) REAL PROPERTY AND LEASED IMPROVEMENT TAXES. All taxes on real property and on improvements on leased land shall be paid in one of the following ways:
 - (a) In full on or before January 31.
 - (b) In 2 equal installments, unless subject to sub. (5), with the first installment payable on or before January 31 and the 2nd installment payable on or before July 31.
- (3) SPECIAL ASSESSMENTS, SPECIAL CHARGES AND OTHER TAXES. All special assessments, special charges and special taxes that are placed in the tax roll shall be paid in full on or before January 31, except that the governing body of a taxation district may, by ordinance, on or before August 15 of the year before the ordinance is effective, authorize the payment of special assessments in installments. (Emphasis Added)
- (12) PAYMENT PRIORITY. (a) Except as provided in pars. (c) and (d), if a taxation district treasurer or county treasurer receives a payment from a taxpayer which is not sufficient to pay all amounts due, the treasurer shall apply the payment to the amounts due, including interest and penalties, in the following order:
 - 1g. Personal property taxes.
 - 1m. Delinquent utility charges.
 - 1r. Special charges.
 2. Special assessments.
 3. Special taxes. (Emphasis Added)

4. Real property taxes.

As a special tax for the cost of streets and highways, the taxation of the property in the district to fund street and highway reconstruction is an alternative and/or supplement to special assessments and general funds from the general property tax.

CONCLUSION

Road reconstruction is not a “service” under established law. It is a “public improvement.” Section 66.0602(3)(a) Wis. Stats., does not apply. The purpose of Section 66.0827 Wis. Stats., is to provide funding for public improvements, the cost of which are not paid for by special assessments, as an alternative or supplemental source of funding. The authorized “taxation of property” is not a general property tax. It is a special tax which, like special assessments, is not subject to levy limits or the rule of uniformity. Any other determination would raise the question of why have Section 66.0827 in the first instance.

Dated this 14th day of September, 2022.

TOWN COUNSEL LAW & LITIGATION, LLC
Attorneys for Defendant-Appellant,
Town of Buchanan

Electronically Signed by Richard J. Carlson

By: s/ Richard J. Carlson
Richard J. Carlson
State Bar No. 1013627

940 E. Evergreen Drive
Kaukauna, WI 54130
P: (920) 725-1233

CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,675 words.

Dated this 14th day of September, 2022.

TOWN COUNSEL LAW & LITIGATION, LLC
*Attorneys for Defendant-Appellant,
Town of Buchanan*

Electronically Signed by Richard J. Carlson

By: s/ Richard J. Carlson
Richard J. Carlson
State Bar No. 1013627

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of

juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of September, 2022.

TOWN COUNSEL LAW & LITIGATION, LLC
Attorneys for Defendant-Appellant,
Town of Buchanan

Electronically Signed by Richard J. Carlson

By: 

Richard J. Carlson
State Bar No. 1013627