FILED
10-14-2022
CLERK OF WISCONSIN
COURT OF APPEALS

No. 2022AP1233

In the Wisconsin Court of Appeals

DISTRICT III

WISCONSIN PROPERTY TAXPAYERS, INC.,
PLAINTIFF-RESPONDENT,

v.

TOWN OF BUCHANAN,
DEFENDANT-APPELLANT

On Appeal from the Outagamie County Circuit Court,
The Honorable Mark J. McGinnis, Presiding,
Case No. 2021CV712

PLAINTIFF-RESPONDENT'S RESPONSE BRIEF

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUKE N. BERG
LUCAS T. VEBBER
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

INTRODUCTION 5

ISSUES PRESENTED 6

ORAL ARGUMENT AND PUBLICATION 7

STATEMENT OF THE CASE 7

A. Legal and Factual Background 7

B. Procedural Background 10

STANDARD OF REVIEW 11

ARGUMENT 11

I. No Statute Authorizes Municipalities to Impose a "Transportation Utility Fee" 12

II. Buchanan's TUF Violates the Town's Levy Limit 15

III. Buchanan's TUF Violates the Uniformity Clause 20

IV. Buchanan's TUF Is Not a Special Assessment, and If It Is, Buchanan Violated the Special Assessment Process 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Applegate-Bader Farm, LLC v. Wisconsin Dep't of Revenue,
2021 WI 26, 396 Wis. 2d 69, 955 N.W.2d 793....................................22

B & D Contractors, Inc. v. Arwin Window Sys., Inc.,
2006 WI App 123, 294 Wis. 2d 378, 718 N.W.2d 256............................16

Blue Top Motel, Inc. v. City of Stevens Point,
107 Wis. 2d 392, 320 N.W.2d 172 (1982)..13

Brown Cty. v. Brown Cty. Taxpayers Ass'n,
2022 WI 13, 400 Wis. 2d 781, 971 N.W.2d 491.......................................16

CED Properties, LLC v. City of Oshkosh,
2018 WI 24, 380 Wis. 2d 399, 909 N.W.2d 136................................25, 26

City of Milwaukee v. Taylor, 229 Wis. 328, 282 N.W. 448 (1938)...28

City of Plymouth v. Elsner,
28 Wis. 2d 102, 135 N.W.2d 799 (1965).. passim

Columbia Cty. v. Bd. of Trustees of Wisconsin Ret. Fund,
17 Wis. 2d 310, 116 N.W.2d 142 (1962)..22

Duncan Dev. Corp. v. Crestview Sanitary Dist.,
22 Wis. 2d 258, 125 N.W.2d 617 (1964)..26

Genrich v. City of Rice Lake,
2003 WI App 255, 268 Wis. 2d 233, 673 N.W.2d 361................25, 26, 27

Glendenning's Limestone & Ready-Mix Co. v. Reimer,
2006 WI App 161, 295 Wis. 2d 556, 721 N.W.2d 704......................16, 21

Gottlieb v. City of Milwaukee,
33 Wis. 2d 408, 147 N.W.2d 633 (1967)..21

Lamasco Realty Co. v. City of Milwaukee, 242 Wis. 357, 8 N.W.2d 372 (1943)..28

McCulloch v. Maryland,
17 U.S. 316 (1819)..12

Noffke ex rel. Swenson v. Bakke,
2009 WI 10, 315 Wis.2d 350, 760 N.W.2d 156.......................................12

Park Ave. Plaza v. City of Mequon,
2008 WI App 39, 308 Wis. 2d 439, 747 N.W.2d 703..................26, 27, 28

Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie,
93 Wis. 2d 392, 288 N.W.2d 85 (1980)...22, 24

State ex rel. Keane v. Bd. of Rev. of City of Milwaukee,
99 Wis. 2d 584, 299 N.W.2d 638, 640 (Ct. App. 1980)....................22

State v. Johnson,
170 Wis. 218, 175 N.W. 589 (1919)....................22

Telemark Dev., Inc. v. Dep't of Revenue,
218 Wis. 2d 809, 581 N.W.2d 585 (Ct. App. 1998)....................14, 22

Town of Clayton v. Cardinal Const. Co.,
2009 WI App 54, 317 Wis. 2d 424, 767 N.W.2d 605....................13

U.S. Oil Co. v. City of Milwaukee,
2011 WI App 4, 331 Wis. 2d 407, 794 N.W.2d 904....................21

Voters with Facts v. City of Eau Claire,
2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131....................22

Werner v. Indus. Comm'n,
212 Wis. 76, 248 N.W. 793 (1933)....................13

Statutes

Wis. Stat. § 200.13....................18

Wis. Stat. § 200.55....................18

Wis. Stat. § 66.0602....................passim

Wis. Stat. § 66.0703....................passim

Wis. Stat. § 66.0827....................passim

Wis. Stat. § 70.01....................14, 18

Wis. Stat. § 70.045....................17

Wis. Stat. § 70.05....................14, 18

Wis. Stat. § 74.01....................19

Wis. Stat. § 74.11....................19

Wis. Stat. § 82.08....................19

Other Authorities

Buchanan Ordinances § 482-1....................8, 15

Buchanan Ordinances § 482-3....................15

Buchanan Ordinances § 482-3....................8, 26

Buchanan Ordinances § 482-4....................15, 27

Buchanan Ordinances § 482-5....................25, 26

Buchanan Ordinances § 482-7....................11

INTRODUCTION

This case is about whether the Town of Buchanan's "Transportation Utility Fee" or "TUF"—effectively a tax on all properties in Buchanan for their predicted use of the road system—is lawful. No Wisconsin statute authorizes municipalities to impose a "transportation utility fee," yet Buchanan and other municipalities around the State have adopted "TUFs" in recent years as a work-around to state levy limits and the Uniformity Clause to the Wisconsin Constitution. Since there is no "TUF" statute, Buchanan, like other municipalities, has taken a shotgun approach to justifying its tax, attempting to shoehorn it into a variety of statutes, at times characterizing it as a utility fee, a special charge, a special assessment, and a special tax.

Now on appeal, Buchanan concedes that its TUF "is really a taxation of property," Br. 21, but continues to shift back and forth between various theories and analogies. Buchanan argues its TUF *is* a property tax for purposes of Wis. Stat. § 66.0827, but *not* a property tax for purposes of the Uniformity Clause or levy limits. With respect to those, Buchanan says its TUF is more like a special assessment, but apparently not enough like one to follow the requirements and procedures for special assessments under Wis. Stat. § 66.0703. In reality, Buchanan's TUF does not fit any of these categories. Buchanan relies on this sleight of hand because nothing in state law authorizes a "transportation utility fee" or anything like it.

Buchanan's TUF is unlawful for three independent reasons. First, it does not fit as a property tax under § 66.0827, and there is no statutory authority for a tax based on properties' predicted use of the road system. And even if Buchanan's TUF could fit as a property tax under § 66.0827, it would then violate both state levy limits and the Uniformity Clause. Although the Circuit Court invalidated Buchanan's TUF based only on the levy limit statute, this Court should affirm on all three grounds.

ISSUES PRESENTED

1. Does the Town of Buchanan have statutory authority for its Transportation Utility Fee?

The Circuit Court answered yes, concluding that Buchanan's TUF could fit under Wis. Stat. § 66.0827's authorization to impose a property tax to fund improvements in a utility district.

This Court should hold that Buchanan's TUF does not fit as a property tax under § 66.0827 and that no other statute authorizes Buchanan to impose a TUF like Buchanan's.

2. Does the Town of Buchanan's Transportation Utility Fee violate its levy limit under Wis. Stat. § 66.0602?

The Circuit Court answered: Yes

This Court should affirm that decision.

3. Does the Town of Buchanan's Transportation Utility Fee violate the Uniformity Clause of the Wisconsin Constitution?

The Circuit Court did not answer this question.

This Court should hold that Buchanan's TUF violates the constitutional rule of uniformity.

ORAL ARGUMENT AND PUBLICATION

This case presents important questions of law regarding local government's ability to tax its residents, an important issue impacting all Wisconsinites. For this reason, oral argument may be beneficial to the Court and publication of this case is warranted.

STATEMENT OF THE CASE

A. Legal and Factual Background

In December 2019, Buchanan enacted Chapter 482 of the town's ordinances, establishing a "transportation utility district" and imposing the TUF on "all developed property" within town limits. Buchanan Ordinances § 482-1.[1] The TUF applies to every property, "whether subject to real property taxes or exempt therefrom." *Id.* § 482-1(C). According to the ordinance, the revenue generated can be used to pay for "the cost of utility district highways, stormwater management, sidewalks, street lighting, traffic control," and "any other convenience or public improvement provided in the District." Buchanan Ordinances § 482-3(B). For authority, the ordinance invokes "§ 66.0827 and §§ 66.0621, 66.0807, 66.0811, and 66.0813, Wis. Stats., as they may apply," *id.* § 482-1(B)—none of which actually authorizes a "transportation utility fee." On appeal, Buchanan has abandoned all but § 66.0827 as legal authority for its TUF, focusing exclusively on that statute.

Wis. Stat. § 66.0827 allows municipalities to create a "utility district" within its boundaries, along with an associated "district fund," to finance various kinds of public improvements within the district. Villages and cities can use a utility district and associated fund to pay

[1] The relevant ordinances are in Buchanan's brief at pp. 15–19 and Appendix at pp. App. 33–37.

for "district highways, sewers, sidewalks, street lighting and water for fire protection not paid for by special assessment," whereas towns like Buchanan can use a utility district/fund to pay for "any convenience or public improvement provided in the district and not paid for by special assessment." *Id.* § 66.0827(1)(b).

Importantly, the statute provides only two methods for funding improvements in a utility district: "special assessments," and general property taxes. The "fund of each utility district *shall be provided by taxation of the property in the district*," *id.* § 66.0827(2), and any improvements "not paid for by special assessment" are "paid from the district fund under sub. (2)," *id.* § 66.0827(1)(b).

Buchanan's ordinance does not fix the amount of its TUF, but authorizes the Town Board to set it every year by resolution. Buchanan Ordinances § 482-4(B). To determine the amount of the charge to be imposed, the Town Board *first* decides how much revenue it wants to generate. *Id.* ("The Town Board shall by resolution determine the annual amount to be funded by a transportation utility fee."); *e.g.*, Town Board Resolution 2021-12, App. 88–89 (setting the "annual amount to be funded by a transportation utility fee at $855,000"). That amount is then divided among all properties in the town using a "hybrid formula, which include[s] a base fee and a trip generation fee." *Id.* The "trip generation" portion is not based on any actual measured use of the roads, but instead based on the "average trips" properties of a given type are expected to generate "based on the Institute of Transportation Engineers (ITE) Land Use Codes, as defined in the ITE Trip Generation Handbook." *Id.* And because the Town Board starts with the revenue it wants to generate and works backwards, the cost per predicted trip is also not based on any actual, measured, or even estimated costs that a real "trip" would impose on Buchanan's road system. Instead, the cost per trip, for purposes of the TUF, is backed into by dividing the revenue Buchanan wants to generate

(after subtracting out the base fee revenue) by the total sum of predicted trips generated by all properties in Buchanan.

A report presented to the Town Board at its meeting in September 2019 lays out the steps to calculate the TUF, and provides an example:

Step 1. Define Cost Recovery Amount

Step 2. Set Residential Property Transportation Utility per Parcel Base Fee (RTUF) Total

Step 3. Set Non-Residential Property Transportation Utility per Parcel Base Fee (NRTUF) Total

Step 4. RTUF Base Fee Total + NRTUF Base Fee Total = Base Fee Revenue

Step 5. Cost Recovery Amount – Base Fee Revenue = Remaining Cost Recovery Amount

Step 6. Remaining Cost Recovery Amount / Total Trips = Trip Generation Fee per Trip applied to each Parcel's Average Trips

Step 7. Base Fee + Trip Generation Fee = Total Transportation Utility Fee

Budget	$	875,000
Residential Base Fee (RBF)/Parcel	$	200
Residential Units		2184
RBF Total	$	436,800
Non-Residental Base Fee (NRBF)/Parcel	$	1,050
Non-Residential Units		138
NRBF Total	$	144,900
Total Based Fee Revenue	$	581,700
Remaining Budget	$	293,300
Total Trips	$	33,095
Trip Generation Fee/Trip	$	8.86

App. 59–60 (Report to the Board describing different options for calculating the transportation utility fee); App. 76 (Minutes from September 17, 2019 Town Board Meeting showing that the Board adopted "Option #5" from this report).

For both 2021 and 2022, the Board set the "annual amount to be funded by a "transportation utility fee" at around $855,000. App. 79–80,

88–89. Applying the formula described above, this results in an annual charge of $315.29 for all residential properties and up to $8,404.25 for non-residential properties. App. 137–39; *see also Road Funding*, Town of Buchanan, https://www.townofbuchanan.org/town-services/road-funding (last visited Oct. 10, 2022).

The revenue generated by the TUF accounts for over 10% of Buchanan's annual budget. App. 142 (2022 Budget Summary); App. 83 (2021 Budget Summary).

The TUF has allowed Buchanan to blow past its levy limits by roughly 33%. In 2020, Buchanan's levy limit (for its 2021 budget) was $2,374,348, and its property tax levy was exactly that amount. App. 81–82, 84–87. Likewise, the Town Board set its 2021 property tax levy (for its 2022 budget) right at its levy limit of $2,490,680. App. 140–41, 162–65.

The assessments from the TUF are sent out along with each property's property tax bill, and a failure to pay the TUF is treated in the same way as an unpaid tax—namely, as a lien against the property. Buchanan Ordinances § 482-7(A), (D).

B. Procedural Background

Plaintiff-Respondent Wisconsin Property Taxpayers, Inc. ("WPT") filed a notice of claim with Buchanan on May 4, 2021, which it disallowed on August 20, 2021. R. 2 ¶ 13, 5 ¶ 13. WPT timely filed this lawsuit on September 16, 2021. R. 2. Both parties moved for summary judgment on jointly stipulated facts. The Circuit Court heard arguments on the motions on June 6, 2022, during which it issued an oral ruling, App. 21–28, followed by a written order on June 27. App. 4–5.

The Circuit Court agreed with WPT that Buchanan's TUF is best characterized as a tax and not a fee, App. 24, and, if so characterized,

could be authorized as a "taxation of the property in the district" under Wis. Stat. § 66.0827(2), App. 24–25. The Court agreed with WPT, however, that if Buchanan's TUF was a "taxation of [ ] property" under § 66.0827, then it would count against Buchanan's levy limit, and the Court further concluded that Buchanan had exceeded its levy limit by the amount of the TUF. App. 25–27. The Court noted that WPT had raised a Uniformity Clause challenge to Buchanan's TUF as well, but decided not to reach that issue based on its holding with respect to levy limits. App. 28. The Court issued a declaratory judgment that Buchanan's TUF "violates Buchanan's levy limit" and permanently enjoined Buchanan from "levying, enforcing, or collecting the Transportation Utility Fee, as currently implemented, in any amount above its levy limit." App. 5. Buchanan appealed.

STANDARD OF REVIEW

Whether a circuit court correctly granted summary judgment is a question of law which this Court reviews de novo, as are issues of statutory and constitutional interpretation. *See, e.g., Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶9, 315 Wis.2d 350, 760 N.W.2d 156.

ARGUMENT

Two hundred years ago, Chief Justice John Marshall famously declared that "[t]he power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). State law recognizes this fact, imposing strict limitations on which taxes municipalities may adopt and how those taxes are imposed. To avoid these strict limits, Buchanan chose to impose a TUF that adds hundreds of dollars or more to the tax bill of each property annually.

To justify this tax, Buchanan argues that its TUF is a lawful property tax under Wis. Stat. § 66.0827, but *not* a property tax for purposes of levy limits and the Uniformity Clause. Buchanan does not

get to have it both ways. Buchanan's TUF not only is not authorized by Wis. Stat. § 66.0827, it also plainly violates both statutory levy limits and the Uniformity Clause.

I. No Statute Authorizes Municipalities to Impose a "Transportation Utility Fee"

"[T]owns are quasi municipal corporations with very limited powers." *Werner v. Indus. Comm'n*, 212 Wis. 76, 248 N.W. 793, 794 (1933). "A town is a creature of the legislature, having only the powers delegated to it by statute." *Town of Clayton v. Cardinal Const. Co.*, 2009 WI App 54, ¶ 9, 317 Wis. 2d 424, 767 N.W.2d 605.

Municipalities in Wisconsin have "no inherent power to tax," and "may only enact the types of taxes authorized by the legislature." *Blue Top Motel, Inc. v. City of Stevens Point*, 107 Wis. 2d 392, 395, 320 N.W.2d 172 (1982). Taxes "cannot be imposed without clear and express" authorization, and "where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 106, 135 N.W.2d 799 (1965).

In *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 107, the Supreme Court considered the legality of a tax on electrical service meters in the City of Plymouth. The City of Plymouth imposed a monthly charge for each "electrical service meter" ($.50/month for residential and $1.00/month for commercial) to "provide funds for the industrial expansion and growth of industry and new industries in the City of Plymouth." The Court had "no hesitancy in holding that [the] city was without any constitutional or statutory authority to levy th[is] tax," even though it was unclear how to characterize it (whether as "a property tax [or] an excise tax"). 28 Wis. 2d at 104, 107. Regardless of characterization, the Court found "no constitutional or statutory provision which authorizes a city to levy an excise tax to be added to the

amounts payable for charges imposed for a public utility service such as electricity." *Id*. at 106.

The same is true here. There is *no* state statute that authorizes municipalities to impose a "transportation utility fee" (which, despite the name, Buchanan concedes "is really a taxation of property," Br. 21). The Court will not find the phrase "transportation utility fee" anywhere in the statutes. Nor will it find any statute that authorizes a tax against all properties for their estimated or predicted use of the roads. Buchanan's theory is that its TUF qualifies as a "taxation of property" authorized by Wis. Stat. § 66.0827, but its square peg does not fit the round hole, for multiple reasons.

First, Buchanan's TUF does not fit under § 66.0827 because it is not a traditional property tax. Section 66.0827 authorizes the "taxation of the property in the district" (i.e., property taxes), to finance a utility district fund, *not* a tax based on each property's estimated or predicted use of the road system. As outlined in detail below in the section on the Uniformity Clause, Wisconsin courts have long recognized that property taxes are, by definition, based on market value. *Infra* Part III; *e.g.*, *Telemark Dev., Inc. v. Dep't of Revenue*, 218 Wis. 2d 809, 825, 581 N.W.2d 585 (Ct. App. 1998) ("The [uniformity] clause [ ] is limited to property taxes—recurring ad valorem taxes on property.").

Moreover, Chapter 70 of the Wisconsin Statutes sets forth the exclusive process for taxing real property. Section 70.01 provides that "taxes shall be levied, *under this chapter*, upon all general property in this state except property that is exempt from taxation." And § 70.05(1) further requires that "the assessment of general property for taxation in all the towns, cities and villages of this state shall be made according to this chapter unless otherwise specifically provided," *id*. § 70.05(1). Nothing in § 66.0827 "specifically provide[s]" a different method for taxing property within a utility district. Thus, the "taxation of property"

under § 66.0827 must be value based and follow the process under ch. 70. It is undisputed that Buchanan's TUF does neither.

Second, and relatedly, Buchanan's TUF applies 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*." Buchanan Ordinances § 482-1(C). Buchanan cannot, on the one hand, assert that its TUF is "really a taxation of property," Br. 21, but then, on the other hand, charge it to properties that are exempt from property taxes. That Buchanan charges tax-exempt properties illustrates that its tax, however characterized, does not fit as a property tax authorized by Wis. Stat. § 66.0827.

Third, even if Buchanan's TUF could be characterized as the kind of property tax authorized by Wis. Stat. § 66.0827, a "utility district" under this section is not intended to encompass an entire municipality. Subsection (6), which describes what happens to utility districts when two municipalities merge, distinguishes between services provided "*on a municipality-wide basis rather than on a utility district basis*," indicating that a utility district is meant for something smaller than a "municipality-wide" area. Buchanan's ordinance creates a utility district that covers the entire "Town of Buchanan," Buchanan Ordinances § 482-3, and includes "[e]very developed property within the Town," *id.* § 482-4, which again, is not what § 66.0827 contemplates.

For all these reasons, Buchanan's TUF does not fit as a "taxation of property" authorized by Wis. Stat. § 66.0827, and there is no other statute that empowers municipalities to adopt a "transportation utility fee" or tax properties for their estimated or predicted use of the road system. To the extent there is any ambiguity, it must be resolved *against*

Buchanan, given that Buchanan concedes its TUF is really a tax. *City of Plymouth*, 28 Wis. 2d at 106.[2]

II. Buchanan's TUF Violates the Town's Levy Limit.

Wisconsin's levy limit statute, Wis. Stat. § 66.0602, places strict limits on property tax increases, to protect taxpayers from ever-increasing taxes. *Brown Cty. v. Brown Cty. Taxpayers Ass'n*, 2022 WI 13, ¶ 23, 400 Wis. 2d 781, 971 N.W.2d 491 ("Section 66.0602 … limit[s] [ ] the amount a governmental subdivision may increase its property tax levy in a given year."). Levy limits apply broadly to a "political subdivision's" total "levy" against property within its jurisdiction. Wis. Stat. § 66.0602(1). Indeed, the widely-recognized purpose of the levy limit statute was to "freeze property taxes." *See* Governor Jim Doyle's Partial Veto Message on 2005 Wis. Act 25, at 71–73 (July 25, 2005)[3]; *Brown Cty.*, 2022 WI 13, ¶ 23. There is a long list of exclusions and adjustments to a municipality's levy limit, Wis. Stat. § 66.0602(3)(a)–(n)—including, for example, money raised for and spent on schools, libraries, and bridges, *id.* § 66.0602(3)(e)—but there is no exception either for roads generally or for property taxes under § 66.0827. A town

---

[2] Although the Circuit Court concluded that Buchanan's TUF could fit under Wis. Stat. § 66.0827, App. 24–25, this Court can "affirm the circuit court on an alternative ground as long as the record is adequate and the parties have the opportunity to brief the issue on appeal." *E.g.*, *Glendenning's Limestone & Ready-Mix Co. v. Reimer*, 2006 WI App 161, ¶ 14, 295 Wis. 2d 556, 721 N.W.2d 704. And "a party that prevails in the trial court need not file a cross-appeal to preserve for review an alternative ground to affirm." *B & D Contractors, Inc. v. Arwin Window Sys., Inc.*, 2006 WI App 123 ¶ 4 n.3, 294 Wis. 2d 378, 718 N.W.2d 256. WPT argued below that there is no statutory authority for Buchanan's TUF and that Wis. Stat. § 66.0827 does not fit, R. 18:5–8, :13, 21:1–2; App. 7–8, and this case was submitted on jointly stipulated facts, so these are purely legal issues that this Court can resolve on appeal.

[3] Available at https://docs.legis.wisconsin.gov/2005/related/veto_messages/2005_wisconsin_act_25_details.pdf (linked from https://docs.legis.wisconsin.gov/2005/proposals/ab100).

can increase property taxes beyond its levy limit, but it must seek permission from its residents via a referendum process. Wis. Stat. § 66.0602(4).

According to its filings with the Department of Revenue, Buchanan is and has been at its levy limit of roughly $2.4 million, *supra* p. 9, yet it is charging property owners in Buchanan an additional $850,000 through its TUF, exceeding its levy limit by over 33%, App. 142. Buchanan did not go through the referendum process as required by Wis. Stat. § 66.0602(4). R. 2, ¶ 42; 5, ¶ 42 (denying only that "§ 66.0602(4) applies").

Importantly, a "utility district" created under Wis. Stat. § 66.0827 is not a separate entity with independent authority to levy taxes and its own separate levy limit, as Buchanan concedes. Br. 32 ("A utility district is not a 'taxation district.'"). The levy limit statute applies to "political subdivisions" of the state, a defined term that covers only cities, villages, towns, and counties. Wis. Stat. § 66.0602(1)(c). The levy limit statute also references "taxation districts," *see id.* § 66.0602(6m)(b), a term that is defined elsewhere to include only political subdivisions like towns, villages, and cites, Wis. Stat. § 70.045; Br. 32.

The exceptions in the levy limit statute illustrate that taxes imposed on various types of districts within a "political subdivision," like a town, are generally included in the town's levy limit, unless there is an exception. For example, there are special rules in the levy limit statute for "tax incremental district[s]," Wis. Stat. § 66.0602(3)(dm), (ds), and for "joint emergency medical services district[s]," *id.* § 66.0602(3)(h).

The Legislature has also created levy limit exceptions for other types of "districts" in other statutes, further reinforcing the point that levy limits apply broadly to all property taxes within a "political subdivision." Chapter 200, for example, authorizes the creation of

"metropolitan sewerage districts" and provides for financing such districts through a "tax upon the taxable property in the district." Wis. Stat. §§ 200.13(2); 200.55(6). But, unlike for § 66.0827, the Legislature expressly provided that this tax "shall not be included within any limitation on county or municipality taxes." Wis. Stat. §§ 200.13(2); 200.55(6)(b) ("This proportionate amount of the tax is not subject to any limitation on county, city, village or town taxes."). There is no such exclusion in § 66.0827.

Buchanan argues that the "taxation of property" authorized by Wis. Stat. § 66.0827 is a special kind of tax that is not subject to the levy limit statute, Br. 30–35, but Buchanan cites nothing to support the idea that there are different kinds of property taxes, some of which are not subject to the levy limit, nor does it cite any case holding that the property tax referenced in § 66.0827 is not subject to the levy limit statute. And, as just noted, the levy limit statute contains a long list of exceptions, Wis. Stat. § 66.0602 (3)(a)–(n), and there is no exception for § 66.0827.

Section 66.0827's reference to "taxation of property" should not be interpreted as a different kind of property tax, but instead as authorizing a municipality to use ordinary property taxes to fund improvements in a utility district. As noted above, multiple portions of chapter 70 indicate that it is the exclusive means for taxing real property, unless there is an explicit, alternate process elsewhere. Wis. Stat. § 70.01, for example, provides that "taxes shall be levied, under this chapter, upon all general property in this state except property that is exempt from taxation," and § 70.05(1) further requires that "the assessment of general property for taxation in all the towns, cities and villages of this state shall be made according to this chapter unless otherwise specifically provided," *id.* § 70.05(1). Nothing in § 66.0827 "specifically provide[s]" a different method for taxing property within a utility district. Thus, the "taxation

of property" under § 66.0827 is just a general property tax subject to the levy limits.

But even if the property tax authorized by Wis. Stat. § 66.0827 were classified as a separate kind of property tax from the general property tax under Chapter 70, it is clear that the levy limit statute would still apply to it. The exception for the bridge-repair tax proves the point. The bridge-repair tax is authorized in a separate statute, Wis. Stat. § 82.08(2), yet the levy limit statute contains an express exemption for it in subsection (3)(e)3. This exception would be unnecessary if levy limits only applied to general property taxes under Chapter 70.

As noted above, the widely-recognized purpose of levy limits was to "freeze property taxes." It would be strange indeed if § 66.0827's passing reference to "taxation of property" were interpreted as an entirely different kind of property tax that the Legislature somehow missed when it adopted levy limits. Those limits would be eviscerated if towns could simply create a town-wide "utility district" and pay for any "public improvement" using an alternate property tax not subject to the levy limit. Moreover, it would eliminate the important procedural requirement that municipalities must get approval *from their voters* through the referendum process in § 66.0602(4) before raising taxes beyond those limits.

Buchanan's reference to the definition of "special taxes" in Chapter 74 also does not help its case. Br. 33–35. Buchanan cites no authority for the proposition that the property tax authorized in § 66.0827(2) is a "special tax," rather than a "general property tax" or "tax[ ] on real property," and multiple provisions in Chapter 74 suggest it would fit the latter category. See Wis. Stat. § 74.01(1) (defining "general property taxes" as "taxes levied upon general property … and measured by the property's value."); § 74.11(2) (providing the process by which "[a]ll taxes on real property … shall be paid."). But even if a tax under § 66.0827

were categorized as a "special tax," Buchanan cites nothing in chapter 74 (or anywhere else) indicating that a "special tax" that is also a "taxation of property" (as it must be if under § 66.0827) would not be subject to a political subdivision's levy limit.

Buchanan also focuses heavily on Wis. Stat. § 66.0602(3) and seems to believe that this entire case hinges on whether or not road construction is a "service" under Wis. Stat. § 66.0602(3)(a). Br. 23–25. But Buchanan misunderstands WPT's arguments and the Circuit Court's reasoning. WPT argued below, as here, that the long list of exceptions proves that the levy limit statute applies beyond just general property taxes, but also to any type of taxation on property imposed by a political subdivision. App. 10–12, 20–21; R. 24:1–4. Echoing those arguments, the Circuit Court emphasized that, although the legislature empowered municipalities "to create property taxes for specific areas of concern under Chapter 61 and 66," the Legislature "has also specified that the imposition of any of these other types of taxes reduces the municipalities['] levy limit for the general property taxes." App. 26–27. The Court cited Wis. Stat. § 66.0602(3) as an *example*, and then concluded that, while Buchanan "can create the utility district" and "impose a transportation utility fee," "that fee cannot be a mechanism to exceed the Town of Buchanan's levy limit." App. 27. If there were any doubt, the Court also summarized this conclusion earlier in its remarks: "That leaves us then with whether or not the imposition and collection of that transportation utility fee is in excess of the levy limit, and I'm going to conclude that it does." App. 25.

Buchanan admits that it is the taxing jurisdiction that is imposing its TUF, Br. 32, and that its TUF "is really a taxation of property," Br. 21. That is all that matters. Thus, the revenue generated by its TUF counts against its levy limit, and it has exceeded that limit by the entire amount of its TUF.

III. Buchanan's TUF Violates the Uniformity Clause

WPT argued below that Buchanan's TUF also violates the Uniformity Clause of the Wisconsin Constitution. Although the Circuit Court did not reach this issue, this Court can "affirm the circuit court on an alternative ground as long as the record is adequate and the parties have the opportunity to brief the issue on appeal." *E.g.*, *Glendenning's Limestone*, 2006 WI App at ¶ 14. Buchanan's statement of issues recognizes that the application of the Uniformity Clause is one of the main issues raised in this case. Br. 6. The issues were submitted below on jointly stipulated facts, so the application of the Uniformity Clause is a purely legal issue that this Court can address directly. And Buchanan's TUF clearly violates the Uniformity Clause under existing precedent. Thus, this Court should reach this issue and hold that Buchanan's TUF violates the Uniformity Clause.

The Uniformity Clause provides that "[t]he rule of taxation shall be uniform." Wis. Const., Art. VIII, sec. 1. The Uniformity Clause "requires that the method or mode of taxing real property must be applied uniformly to all classes of property within the tax district." *U.S. Oil Co. v. City of Milwaukee*, 2011 WI App 4, ¶ 23, 331 Wis. 2d 407, 794 N.W.2d 904 (citing *State ex rel. Hensel v. Town of Wilson*, 55 Wis. 2d 101, 106, 197 N.W.2d 794 (1972)).

In *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967), the seminal case on the Uniformity Clause, the Wisconsin Supreme Court outlined certain "principles" for applying that Clause, the first two of which are that, "[f]or direct taxation of property," "all property taxed must bear its burden equally on an ad valorem basis" (i.e., based on market value) and "there can be but one constitutional class." *Id*. In other words, the Uniformity Clause "[g]enerally … [means] that real property is taxed according to its fair market value." *Applegate-*

Bader Farm, LLC v. Wisconsin Dep't of Revenue, 2021 WI 26, ¶ 5, 396 Wis. 2d 69, 955 N.W.2d 793.

Numerous cases have repeated these basic principles. *E.g.*, *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 409–10, 288 N.W.2d 85 (1980) (quoting *Knowlton v. Bd. of Sup'rs of Rock Cty.*, 9 Wis. 410, 420 (1859)) ("[W]hen property is the object of taxation, it should all alike in proportion to its value, contribute towards paying the expense of such benefits and protection."); *City of Plymouth*, 28 Wis. 2d at 107 ("[T]he uniformity clause, as applied to a property tax, [ ] require[s] practical equality based on value."); *Columbia Cty. v. Bd. of Trustees of Wisconsin Ret. Fund*, 17 Wis. 2d 310, 325, 116 N.W.2d 142 (1962) ("[T]he uniformity requirement applies" to "direct taxes on real estate."); *State v. Johnson*, 170 Wis. 218, 175 N.W. 589, 599 (1919) ("[T]he uniformity clause of the Constitution applies to property tax."); *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 132, 382 Wis. 2d 1, 913 N.W.2d 131 (Bradley, J., dissenting) ("Generally speaking, the uniformity clause applies to property taxes, which are 'direct taxes on real estate.'"); *Telemark Dev.,* 218 Wis. 2d at 825 ("The [uniformity] clause [ ] is limited to property taxes—recurring ad valorem taxes on property."); *State ex rel. Keane v. Bd. of Rev. of City of Milwaukee*, 99 Wis. 2d 584, 588, 299 N.W.2d 638, 640 (Ct. App. 1980) ("Valuation of both real and personal property for property tax purposes is based upon fair market value.").

The Supreme Court has held that a tax on property violates the Uniformity Clause if it is not based on market value or creates different classes. In *City of Plymouth v. Elsner*, 28 Wis. 2d at 107, discussed above, the Court held that the City of Plymouth's charge on electrical service meters violated the Uniformity Clause in multiple ways. First, "all residence properties having electrical service meters are taxed fifty cents per month regardless of value. A residential property having an assessed

value of $5,000 is required to pay the same tax as one having an assessed value of $20,000." *Id.* at 107. The charge also violated the Uniformity Clause for a second reason, because it "tax[ed] commercial properties at a higher rate than residential properties." *Id.*

Buchanan's TUF violates the Uniformity Clause for exactly the same two reasons. Buchanan taxes parcels, not based on their "fair market value," but instead based on Buchanan's *predicted* estimate of how many trips properties of that *type* might generate, resulting in a significantly higher effective rate for some parcels than for others. *Supra* p. 8–9. And all residential properties are charged exactly the same rate, regardless of the property's fair market value, or *even without regard to whether the owners have a car or how much they use it.* Thus, a residential property with an assessed value of $100,000 must pay the same TUF charge as a residential property with an assessed value of $200,000. *Id.* As in *City of Plymouth*, properties of the same class are being taxed at a higher effective rate than other parcels in the same class.

Buchanan's TUF charge is also calculated differently for residential properties, which all pay the same amount, and nonresidential properties, which must pay substantially more. *Supra* p. 9 (non-residential properties charged up to $8,404.25). This, too, violates the Uniformity Clause as the Court held in *City of Plymouth*. 28 Wis. 2d at 107–108.

Buchanan effectively concedes that its TUF does not meet these well-established uniformity-clause requirements. Although it is not entirely clear about this, Buchanan's theory appears to be that its TUF is "similar" enough to a "special assessment" that the Uniformity Clause does not apply to it. Br. 25–30. That is wrong—Buchanan's TUF does not share any of the characteristics of a special assessment, nor did Buchanan follow the procedures for special assessments, as it concedes.

Br. 31–32; *infra* Part IV. But even if Buchanan's TUF can be considered "similar to" a special assessment, it cannot at the same time be a property tax for purposes of Wis. Stat. § 66.0827(2). Indeed, § 66.0827 itself distinguishes between special assessments and property taxes: "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)." To be authorized by Wis. Stat. § 66.0827, *but see supra* Part I, the TUF has to be a "taxation of property," and any taxation of property is subject to Uniformity Clause. *Supra* p. 20; *e.g.*, *Sigma Tau*, 93 Wis. 2d at 409–10 (quoting *Knowlton*, 9 Wis. at 420) ("[W]hen property is the object of taxation, it should all alike in proportion to its value, contribute towards paying the expense of such benefits and protection."). If the TUF is a property tax, it violates the Uniformity Clause and levy limits; if it's a special assessment, it violates Wis. Stat. § 66.0703, as explained below.

IV. Buchanan's TUF Is Not a Special Assessment, and If It Is, Buchanan Violated the Special Assessment Process

Although Buchanan concedes that its TUF "is really a 'tax,'" Br. 22, it also argues (confusingly) that its TUF is "similar to a special assessment." Br. 25–30. Buchanan appears to concede that it is not *actually* a special assessment, Br. 29 (arguing it is "distinct from" special assessments), but asks this Court to hold that it is enough "like" a special assessment to be "not subject to levy limits or the rule of uniformity." Br. 35. The premise of this argument is wrong, as explained below; Buchanan's TUF shares none of the features of a "special assessment." And Buchanan did not follow any of the procedural requirements. But even if Buchanan's TUF shares some similarities to special assessments, Buchanan cites nothing for the proposition that a municipality can adopt a tax that is "close enough" to a special assessment to evade levy limits and the Uniformity Clause. Special assessments are a distinct category

under Wisconsin law, with well-defined prerequisites and procedures, none of which Buchanan's TUF meet.

Buchanan's TUF is not "similar to" a special assessment for multiple reasons. As a preliminary matter, it is worth noting that, until this case, Buchanan *itself* has never characterized its TUF as a special assessment. Indeed, as it describes in its brief, Buchanan pitched the TUF to its residents as an *alternative* to special assessments. Br. 12; App. 50–51, 55, 167–68. Even more, Buchanan's ordinance says that TUF funds can be used only for public improvements that are "not paid for by special assessment." Buchanan Ordinances § 482-5(B). And in its accounting for its "Capital Projects Fund," Buchanan has separate line items for "special assessments" and "transfer[s] in [from the] Transportation Utility Fund." App. 155.

Even putting Buchanan's own characterization aside, the TUF does not meet any of the characteristics of a special assessment. At a high level, a special assessment is a one-time charge for a "special benefit" or "uncommon advantage" accruing to a property from a discrete road-improvement project near the property. *CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶¶ 23–25, 35, 38–39, 380 Wis. 2d 399, 909 N.W.2d 136; *Genrich v. City of Rice Lake*, 2003 WI App 255, ¶ 13, 268 Wis. 2d 233, 673 N.W.2d 361. Buchanan's TUF is not based on special benefits to properties, it is not a one-time charge, it is not tied to any particular project, and it is not localized.

First, Buchanan's TUF is not based on any calculation or estimate of "special benefits conferred upon" properties by a particular project, as required by Wis. Stat. § 66.0703(1). Buchanan charges all residential properties in the town exactly the same the amount (currently $315.29), *see* App. 139, and it charges the fee year after year, based on the amount of revenue it wants to generate. App. 38–39, 79–80, 88–89. Indeed, Buchanan's ordinance even disclaims any relationship between the

charge and special benefits to a property. Buchanan Ordinances § 482-5(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.").

Second, Buchanan's TUF is not tied to any particular project, nor is it a one-time charge, rendering it impossible for Buchanan to comply with many of the statutory procedures for special assessments. For example, Wis. Stat. § 66.0703(11) requires municipalities to refund property owners "if the cost of the project is less than the special assessments levied." Yet Buchanan's TUF is charged annually and the revenue transferred into its general "Capital Projects Fund," which in turn funds multiple projects, including "any [ ] convenience or public improvement provided in the District." Buchanan Ordinances § 482-3(B); App. 159 (showing most TUF funds are transferred to the Capital Projects Fund); App. 154 (showing the various uses of the Capital Projects Fund).

Third, the revenue is being used to pay for general infrastructure improvements, and it is well-established that "special assessments can be levied only for local improvements." *CED Properties*, 2018 WI 24, ¶¶ 36–37; *Park Ave. Plaza v. City of Mequon*, 2008 WI App 39, ¶ 20, 308 Wis. 2d 439, 747 N.W.2d 703; *Genrich*, 2003 WI App 255, ¶ 7; *Duncan Dev. Corp. v. Crestview Sanitary Dist.*, 22 Wis. 2d 258, 264, 125 N.W.2d 617 (1964). General improvements, by contrast, "are funded by general taxes and *must comply with the rule of uniformity*." *Genrich*, 2003 WI App 255, ¶ 8; *Duncan Dev. Corp.*, 22 Wis. 2d at 620. A general improvement "is one that confers a general benefit, that is, a 'substantially equal benefit and advantage' to the property of the whole community, or benefits the public at large." *Genrich*, 2003 WI App, ¶ 8. "In contrast, a local improvement, although incidentally beneficial to the public at large, is primarily made for the accommodation and

convenience of inhabitants in a particular locality and confers 'special benefits' to their properties." *Genrich*, 2003 WI App 255, ¶ 8. Again, Buchanan is using the funds from the TUF to pay for any and all public improvements in the town.

Finally, a special assessment may only be levied "upon property in a limited and determinable area." Wis. Stat. § 66.0703(1)(a); *Genrich*, 2003 WI App. 255, ¶ 19 (citing a predecessor statute for the same). Yet Buchanan's TUF applies to "[e]very developed property within the Town." Buchanan Ordinances § 482-4. In other words, the charge is not limited to nearby properties that receive a "special" benefit from a particular project, but is imposed on all properties to generate revenue to be used generally.

Even if the TUF could be characterized as a special assessment, Buchanan did not follow the statutory process for special assessments. Section 66.0703, entitled "Special assessments, generally," contains a detailed procedure for imposing special assessments. *See generally*, *Park Ave. Plaza*, 2008 WI 39, ¶¶ 12–14 (outlining the process). First, "before the exercise of any powers conferred by this section, the governing body shall declare by preliminary resolution its intention to exercise the powers for a stated municipal purpose." Wis. Stat. § 66.0703(4). Buchanan does not point to any such resolution. Next, a town must prepare a report that includes "the preliminary or final plans and specifications" of the project, "an estimate of the entire cost of the proposed work or improvement," and an estimated assessment for each affected property, including a determination of the "benefits" to each property and any "damages to be awarded for property taken or damaged." *Id.* § 66.0703(5). A town must file that report with the municipal clerk for inspection by the affected property owners. *Id.* § 66.0703(6). Buchanan does not point to any such report. Third, a town must notice and conduct a hearing where affected property owners can

object to the particular assessment for their property. *Id.* § 66.0703(7). Buchanan does not point to any such hearing. Finally, as noted above, assessments must be refunded "if the cost of the project is less than the special assessments levied," *id.* § 66.0703(11)—which is not even possible because Buchanan's TUF is not tied to any particular project.

None of the cases Buchanan cites support characterizing its TUF as a special assessment. *Park Avenue Plaza* involved a project to improve a single road, and only adjacent commercial properties were assessed for the special benefits they received from the updated road. 2008 WI 39, ¶¶ 1–2, 26. Likewise, both *Milwaukee v. Taylor* and *Lamasco Realty Co.* considered assessments against properties along a discrete project to widen Kilbourn Avenue in Milwaukee. 282 N.W. 448, 450, 453–54; 8 N.W.2d 372, 373–75. Instead of supporting Buchanan's argument, these cases illustrate how special assessments are supposed to be used, and provide a stark contrast to Buchanan's TUF.

CONCLUSION

The decision of the Circuit Court should be affirmed.

Dated: October 14, 2022.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by Luke N. Berg

Richard M. Esenberg (WI Bar No. 1005622)
Lucas T. Vebber (WI Bar No. 1067543)
Luke N. Berg (WI Bar No. 1095644)
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385

Rick@will-law.org
Lucas@will-law.org
Luke@will-law.org

Attorneys for Plaintiff-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,982 words.

Dated: October 14, 2022.

Electronically signed by Luke N. Berg

LUKE N. BERG