No. 2023AP690

In the Wisconsin Court of Appeals

DISTRICT II

WISCONSIN MANUFACTURERS AND COMMERCE, INC.,
Plaintiff-Appellant,

v.

VILLAGE OF PEWAUKEE,
Defendant-Respondent.

On Appeal from a Judgment Entered in
the Waukesha County Circuit Court, the
Honorable Michael J. Aprahamian,
Presiding

OPENING BRIEF OF APPELLANT WISCONSIN MANUFACTURERS AND COMMERCE, INC.

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INTRODUCTION

When striking down a transportation tax, our supreme court noted that "municipalities generally have been seeking new sources of revenue." *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d 299, 308, 94 N.W.2d 584 (1959). They still are. In recent years, several Wisconsin municipalities enacted what they call a "transportation utility fee," and several others are considering doing so.

The Village of Pewaukee is one of them. It adopted a "transportation user fee"—a recurring charge imposed on all developed properties based on their estimated traffic generated. Revenue from this charge funds road repair and related expenses.

Pewaukee's transportation user fee is really an unlawful tax. 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). Wisconsin law recognizes the significance of the taxing power and greatly limits local governments' ability to impose new taxes. Municipalities may not evade the limits on their taxing power by making up new "fees" to charge their residents.

Even if Pewaukee's transportation user fee is a fee rather than a tax, it is still illegal for two independent reasons: it lacks explicit statutory authority, and three statutes preempt it.

Under the circuit court's flawed reasoning upholding this "fee," Pewaukee could pave its streets with gold and charge its residents millions of dollars in transportation user fees. Such "fees" would have no limit, even if they far exceed ordinary property taxes. The circuit court's answer is that if Pewaukee residents dislike exorbitant local fees, they can leave. But there are legal limits—not just political limits—on a municipality's ability to impose new charges on its residents.

This Court should reverse.

ISSUES PRESENTED

1. Is the Village of Pewaukee's transportation user fee an unlawful tax?

The circuit court answered "no" by concluding that the transportation user fee is not a tax.

This Court should answer "yes" and reverse.

2. If the Village of Pewaukee's transportation user fee is a fee rather than a tax, is it unlawful because it lacks statutory authority?

The circuit court answered "no."

This Court should answer "yes" and reverse if it reaches this issue.

3. If the Village of Pewaukee's transportation user fee is a fee rather than a tax, is it preempted by state law?

The circuit court answered "no."

This Court should answer "yes" and reverse if it reaches this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wisconsin Manufacturers and Commerce, Inc. ("WMC") does not request oral argument because the briefs should "fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant." *See* Wis. Stat. § 809.22(2)(b).

WMC requests publication because this case is "of substantial and continuing public interest." *See* Wis. Stat. § 809.23(1)(a)5.

STATEMENT OF THE CASE

A. Adoption of the "transportation user fee"

The Board of Trustees ("Board") of the Village of Pewaukee ("Pewaukee" or "Village") held a meeting on February 2, 2021. At that meeting, the Board, Village employees, and members of the public discussed the Board's possible adoption of a "transportation user fee" ("TUF"). After discussion, the Board adopted an ordinance that created a TUF.

At the February 2 meeting, a person from an engineering firm said that "the levy limits" for property taxation were one reason to consider adopting a TUF. (R. 3:17.) He also said that "residential properties would pay for about 38% of the total cost of transportation user fees, compared to the assessed values where the residential properties pay for about 76% through property taxes." (R. 3:17.) Trustee Bob Rohde echoed those numbers. (R. 3:20.)

Board members explained how the TUF could avoid property tax levy limits and property tax exemptions. Trustee Ed Hill said that "Village residents already pay for road reconstruction in their property taxes." (R. 3:18.) He continued, "The general fund is restricted by the levy but . . . the debt levy should go down as road construction costs will be paid for by the Transportation Utility." (R. 3:18.) Regarding tax exemptions, Trustee Craig Roberts explained that the transportation "utility will help recoup fees and costs as the school doesn't currently pay property taxes but they will be contributing to this utility." (R. 3:18.)

Board members also said that the TUF was a way to raise revenue. Trustee Hill said that "[t]his is an equitable way to garner the revenues needed to keep the infrastructure up to date." (R. 3:20.) Likewise, "Trustee [Tony] Hopkins stated that no one wants to implement this ordinance; however, there is no way to increase revenues and expenses keep going up." (R. 3:20.)

One resident at the meeting "expressed her concern due to the levy limits put on the property taxes; [she asked] what would keep the Village from raising taxes each year in the Transportation Utility." (R. 3:18.) The Village Attorney responded that "if the residents are not happy with the way the budget is being administered that the ballot box is where you can cast your vote." (R. 3:18.)

Another resident similarly "asked what keeps the charges from skyrocketing." (R. 3:18.) The Village Attorney reiterated that "[i]f the residents are not happy with the decisions being made their ultimate control is with the ballot box as to who they elect to serve on the Village Board." (R. 3:19.)

After discussion, the Board adopted a resolution that created a "Transportation Utility" and "Transportation User Fee . . . in accordance with Section 92.105 of the Village Code."[1] (R. 3:6, 21.) At that same meeting, the

[1] This resolution is available at https://www.villageofpewaukee.com/Data/Sites/38/media/for-residents/resolutions/resolution-2021-02-.pdf.

Board adopted Ordinance No. 2021-01 ("Ordinance"), which created Chapter 92 of the Village Code.[2] (R. 3:8–14, 20.)

B. The Ordinance

The Ordinance states that "[t]he Village Board reviewed funding options for transportation system funding, including a Transportation Utility, during 2020 and determined that establishment of a Transportation Utility with fees based on trips generated by property uses is the most appropriate method to provide the necessary funds." (R. 3:8.) The "Transportation Utility . . . requires those who make the greatest use of the Village transportation system [to be] the most responsible for the cost of said system." (R. 3:8.) The Ordinance further states, "A transportation utility provides a sustainable source of funds for the maintenance, construction and reconstruction of transportation infrastructure under the jurisdiction of the Village of Pewaukee." (R. 3:8.)

All fees collected under the Ordinance "shall be deposited in the Village's Transportation Utility Fund." (R. 3:10.) The TUF may fund only:

> 1) related administration costs; 2) pavement preservation activities (grind/inlay, slurry seal, crack seal, chip seal, or other generally accepted means of maintenance); 3) street construction and/or reconstruction activities on Village streets; 4) sidewalk maintenance, construction or reconstruction; 5) street lighting and appurtenances; 6) traffic control and signalization maintenance, construction or reconstruction; 7) pedestrian facilities; and/or 8) structures used for the storage, maintenance and repair of operational equipment.

(R. 3:10.)

Every "developed property" in Pewaukee is required to pay a TUF. (R. 3:10.) Only undeveloped properties and parking lots that are used exclusively for parking are exempt from this requirement. (R. 3:10–11.) Part of the TUF may be waived for vacant property under certain circumstances. (R. 3:12.)

The TUF consists "of a Base Fee and a Usage Fee." (R. 3:11.) The base fee "is equal for all utility accounts" and "is determined by dividing the total

[2] The Ordinance is available at https://library.municode.com/wi/pewaukee/codes/code_of_ordinances?nodeId=PTIIMUCO_CH92TRUT.

amount of fixed base costs by the total number of utility accounts." (R. 3:11.) The usage fee is "a fee on each utility account that is determined by multiplying the number of trips assigned to the utility account by the per-trip rate." (R. 3:11.) The Director of Public Works or Village Engineer determines a given utility customer's estimated number of trips by categorizing its property according to the Institute of Traffic Engineers Manual. (R. 3:11.)

The Board sets the base fee and the usage fee's per-trip rate. (R. 3:11.) The Board may adjust those charges "based on the proposed transportation system improvements budget for the projected improvement program time frame." (R. 3:11.) "The per-trip rate is determined by dividing the target budget (not including the fixed base costs budget) by the total number of trips generated by all utility accounts." (R. 3:11.) As of 2021, the TUF had a "per-trip rate" of $1.28, plus an annual base fee of $15.74 for every utility account. (R. 3:6.)

The TUF is "billed and collected quarterly with and as part of the combined Village Utility billing which includes water, wastewater, and stormwater fees." (R. 3:12.) "If the [TUF] is not paid when due, the Village shall proceed to collect such charges in any manner provided by law, or seek imposition of the charges in the property tax bill for the benefitted property through Waukesha County." (R. 3:12.)

C. Procedural history

On behalf of its affected member businesses, WMC filed this lawsuit to challenge the TUF's validity. (R. 2.) The circuit court entered summary judgment in Pewaukee's favor, reasoning that the TUF is a permissible fee for services rather than a tax. (R. 55.)

WMC appeals that decision. (R. 59.)

SUMMARY OF ARGUMENT

I. Pewaukee's TUF is an illegal tax. It is a tax because its purpose is to raise revenue for the government: it is an involuntarily incurred charge that funds governmental (rather than proprietary) functions of general benefit. The TUF is thus an excise tax or a property tax—and it is illegal either way. If an excise tax, the TUF lacks clear and express statutory authority. If a property tax, the TUF violates the Wisconsin Constitution's Uniformity Clause.

II. Even if the TUF is a fee, it is illegal because it lacks statutory authority. The TUF falls outside municipal home-rule authority because it involves use of the roads and sufficiently resembles a tax. No statute expressly allows a municipality to charge developed properties for their estimated use of the roads.

III. Further, even if the TUF is a home-rule fee, state law preempts it. The TUF is preempted by a statute that protects the free use of all highways because the TUF charges properties for their use of the roads. The TUF is also preempted by two statutes that create property tax exemptions and limit property tax levy increases. The TUF violates the spirit and purpose of those tax statutes.

STANDARD OF REVIEW

This Court "review[s] a grant of summary judgment de novo." *Munger v. Seehafer*, 2016 WI App 89, ¶ 46, 372 Wis. 2d 749, 890 N.W.2d 22. Whether a governmental charge is a tax or a fee is a question of law subject to de novo review. *See Bentivenga v. City of Delavan*, 2014 WI App 118, ¶ 5, 358 Wis. 2d 610, 856 N.W.2d 546. Interpretation and application of statutes and the Wisconsin Constitution are questions of law subject to de novo review. *U.S. Oil Co. v. City of Milwaukee*, 2011 WI App 4, ¶ 12, 331 Wis. 2d 407, 794 N.W.2d 904. Whether a statute preempts a local ordinance is a question of law subject to de novo review. *DeRosso Landfill Co. Inc. v. City of Oak Creek*, 200 Wis. 2d 642, 652, 547 N.W.2d 770 (1996).

ARGUMENT

I. Pewaukee's TUF is an illegal tax.

Pewaukee's TUF is a tax, not a fee. It is an excise tax or a property tax, and either way it is illegal.

A. The TUF is a tax.

1. Whether a governmental charge is a tax or a fee hinges on its purpose.

"The law distinguishes between taxes and fees." *Edgerton Contractors, Inc. v. City of Wauwatosa*, 2010 WI App 45, ¶ 16, 324 Wis. 2d 256, 781 N.W.2d 228. "The purpose, and not the name it is given, determines whether a government charge constitutes a tax." *Bentivenga*, 2014 WI App 118, ¶ 6.

"'[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." *Id.* (alteration in original) (quoting *City of River Falls v. St. Bridget's Cath. Church of River Falls*, 182 Wis. 2d 436, 441–42, 513 N.W.2d 673 (Ct. App. 1994)).[3]

The distinction between governmental and proprietary functions is crucial to the difference between fees for services and taxes. *See, e.g.*, *Bargo Foods North Inc. v. Dep't of Revenue*, 141 Wis. 2d 589, 597–98 & n.5, 415 N.W.2d 581 (Ct. App. 1987). "Municipal corporations possess both a governmental character and a proprietary or private character." *Id.* at 597. When acting in a proprietary capacity, a municipality may generally exercise the same powers as a private corporation. *Meier v. City of Madison*, 257 Wis. 174, 181–82, 42 N.W.2d 914 (1950).

"A tax is an enforcement of proportional contributions from persons and property, imposed by a state or municipality in its *governmental capacity* for the support of its government and its public needs." *City of River Falls*, 182 Wis. 2d at 441 (emphasis added). "Any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining *governmental functions*, where the special benefits derived from their performance is merged in the general benefit, *is a tax*." *Milwaukee & Suburban*, 6 Wis. 2d at 304 (emphases added) (citation omitted).

Taxes, in other words, "are the *enforced proportional contributions* from persons and property, *levied by the State by virtue of its sovereignty* for the support of government and for all public needs." *City of De Pere v. Pub. Serv. Comm'n*, 266 Wis. 319, 325, 63 N.W.2d 764 (1954). When imposed by a municipality, a tax is levied "in the exercise of [the municipality's] sovereign power delegated to it by the state." *See id.*

In contrast to a tax, a charge for municipal services is a fee if its "purpose . . . is a proprietary function." *See City of River Falls*, 182 Wis. 2d at 442–43. Such a charge is not a tax because it is imposed "in the city's proprietary capacity" and thus "is not imposed by the city in the exercise of its sovereign power delegated to it by the state." *See City of De Pere*, 266 Wis. at 325.

[3] The TUF indisputably is not a fee for regulation.

Several cases highlight that distinction. In *City of River Falls*, 182 Wis. 2d at 442–43, a city's water-storage charge for firefighting needs was a fee rather than a tax. This Court reasoned that "[m]aking water available, storing it and ensuring its delivery is a proprietary function, not a governmental function." *Id.* at 443. In *Bargo*, 141 Wis. 2d at 597–98, this Court held that because "the operation of the Milwaukee county airport is a proprietary function," the "fees the county charged for Bargo's use of the airport are not taxes." The Court noted that its "decision rests on the conclusion that operation of the airport is a proprietary rather than a governmental function." *Id.* at 597 n.5. The Court distinguished *Milwaukee & Suburban*, which had held that a city's charge on trolleys was a tax, because "control of streets is a governmental function." *Id.* And in *City of De Pere*, 266 Wis. 2d at 325, the supreme court held that a city's charge for connecting to a water main was a fee rather than a tax, reasoning that the charge was imposed "in the city's proprietary capacity."[4]

Voluntariness is also relevant in determining whether a charge is a tax or a fee for services. Taxes are "forced" payments to the government. *Milwaukee & Suburban*, 6 Wis. 2d at 304 (citations omitted). "A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974). In *City of De Pere*, for example, our supreme court emphasized the voluntary nature of a water-connection fee. The court explained that "the necessity for payment does not arise unless and until the individual requests the public authority to make the connection to the [water] main. So long as the service is not asked, the money will never be demanded." 266 Wis. at 326. The court thus reasoned that the charge was "a voluntary fee 'in the sense that the party who pays it originally has, of his own volition, asked a public officer to

[4] Other jurisdictions have also recognized that municipal fees for services have a proprietary nature. *See, e.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 n.12 (1981); *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994); *Exec. Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 426, 845 P.2d 57 (1993) (quoting *Emerson College v. City of Boston*, 391 Mass. 415, 424–25, 462 N.E.2d 1098 (1984)).

perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society.'" *Id.* at 328 (citation omitted).[5]

As *City of De Pere* indicated, the nature of the derived benefit also helps distinguish a tax from a fee for services. Such a fee involves a "benefit" that is presumably bestowed on the payer and "not shared by other members of society." *See id.* (citation omitted); *see also, e.g.*, *Nat'l Cable Television*, 415 U.S. at 340–41 (noting a fee presumably "bestows a benefit on the [payer], not shared by other members of society").[6]

By contrast, taxes support functions of "general benefit." *Milwaukee & Suburban*, 6 Wis. 2d at 304 (citation omitted). Municipal improvements that confer a general benefit "are funded by general taxes." *Genrich v. City of Rice Lake*, 2003 WI App 255, ¶ 8, 268 Wis. 2d 233, 673 N.W.2d 361.

The circuit court got these foundational principles wrong. According to the circuit court, "a municipality may levy a charge if the money generated by the charge is used to fund a service provided by the municipality." (R. 55:18.) In holding "the TUF is a fee and not a tax," the court stressed that "the Village may only use funds generated by the TUF for road maintenance." (R. 55:18.) That statement of the law is too broad because it would treat every earmarked tax as a permissible fee for services. As explained below, taxes can be and often are earmarked.

The primary-purpose test takes a narrower view of what constitutes a service. A charge's primary purpose "is to cover the expense of providing a service"—and thus the charge is a fee—if the service "is a proprietary function, not a governmental function." *See City of River Falls*, 182 Wis. 2d at 441–43. The distinction between a tax and a fee for services "rests on" whether the

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[5] Many jurisdictions besides Wisconsin have held that fees for services, unlike taxes, are voluntarily incurred in exchange for a governmental benefit or service. *See, e.g.*, *Heartland Apartment Ass'n, Inc. v. City of Mission*, 306 Kan. 2, 15, 392 P.3d 98 (2017); *Denver St. LLC v. Town of Saugus*, 462 Mass. 651, 652, 970 N.E.2d 273 (2012); *Nw. Energetic Servs., LLC v. California Franchise Tax Bd.*, 159 Cal. App. 4th 841, 854, 71 Cal. Rptr. 3d 642 (2008); *Bolt v. City of Lansing*, 459 Mich. 152, 162, 587 N.W.2d 264 (1998); *City of Port Orange*, 650 So. 2d at 3.

[6] This principle is also well established outside Wisconsin. *See, e.g.*, *Heartland Apartment*, 306 Kan. at 14–15; *Denver St.*, 462 Mass. at 652; *Bolt*, 459 Mich. at 165; *City of Port Orange*, 650 So. 2d at 3.

charge supports "a proprietary rather than a governmental function." *See Bargo*, 141 Wis. 2d at 597 & n.5.

Crucially, all the Wisconsin case law that has held a charge was a fee for services rather than a tax—*Bargo*, *City of De Pere*, *City of River Falls*, and *Town of Hoard v. Clark County*, 2015 WI App 100, 366 Wis. 2d 239, 873 N.W.2d 241—involved a proprietary service. In cases that involved a governmental function rather than a proprietary service—*Milwaukee & Suburban* and *Bentivenga*—the courts held that the charge was a tax. The circuit court overlooked this important distinction.

2. The TUF's purpose shows it is a tax.

Pewaukee's TUF is a tax for several reasons. Perhaps most significantly, Pewaukee is imposing the TUF in its governmental capacity. The TUF funds street repair and maintenance, and it is "well established" that "repair and maintenance of highways constitute a governmental function." *Lickert v. Harp*, 213 Wis. 614, 616, 252 N.W. 296 (1934). Those functions are thus not a proprietary service.

The TUF's involuntary nature also supports the conclusion that it is a tax. Owners of developed property in Pewaukee must pay the TUF even if they do not request the road work that the TUF funds. Other courts have held that TUFs like Pewaukee's were taxes because they were involuntary. *See, e.g.*, *Heartland Apartment Ass'n, Inc. v. City of Mission*, 306 Kan. 2, 15, 392 P.3d 98 (2017) (holding "the TUF is not voluntary, which is a requirement for a fee"); *Covell v. City of Seattle*, 127 Wash. 2d 874, 884–85, 905 P.2d 324 (1995) (holding a TUF was a tax rather than a fee for services because it "cannot be avoided"); *State v. City of Port Orange*, 650 So. 2d 1, 4 (Fla. 1994) (holding a TUF was a tax because it was "a mandatory charge"); *Brewster v. City of Pocatello*, 115 Idaho 502, 505, 768 P.2d 765 (1988) (holding a TUF was a tax and noting "a tax is a forced contribution").

The nature of the derived benefit also shows that Pewaukee's TUF is a tax. The TUF does *not* bestow on the payer a benefit "not shared by other members of society." *See City of De Pere*, 266 Wis. at 328 (citation omitted). People who do not pay the TUF—such as renters who have no utility account in their names or non-Pewaukee residents who drive through the Village—benefit from the road work that the TUF funds. By funding street maintenance

and related projects throughout a community, a TUF provides a benefit "of a general nature." *See Heartland Apartment*, 306 Kan. at 15; *accord Covell*, 127 Wash. 2d at 891 (noting that Seattle's TUF was "levied against property owners to accomplish the public benefit of improving streets"). This general benefit shows that Pewaukee's TUF is a tax.

In short, because Pewaukee's TUF "exact[s]" money to pay for "governmental functions" of "general benefit," it "is a tax." *See Milwaukee & Suburban*, 6 Wis. 2d at 304 (citation omitted). Stated differently, the TUF is *not* a "voluntary" charge for a "proprietary" service that "bestow[s] upon [the payers] a benefit not shared by other members of society." *See City of De Pere*, 266 Wis. at 325, 328 (citation omitted). The TUF is a tax, not a fee for proprietary municipal services.

3. The circuit court wrongly held the TUF is a fee for services.

The circuit court's decision is unprecedented. No Wisconsin appellate court has ever held that a charge for a *governmental* function was a fee for services. Pewaukee's TUF funds "[m]aintenance of streets," which "is a governmental function." *See Francke*, 12 Wis. 2d at 576. The circuit court erred by holding the TUF is not a tax.

a. The special-charges statute does not suggest the TUF is a fee.

The circuit court suggested that some of the TUF's funds go toward functions that are "services" under the special-charges statute, Wis. Stat. § 66.0627(1)(c).[7] (R. 55:17.) That statute is inapposite for three reasons.

First, the TUF is indisputably *not* a special charge. (R. 65:24.) Wisconsin Stat. § 66.0627's definition of "services" can help distinguish a property tax from a special charge, *see generally Grace Episcopal Church v. City of Madison*, 129 Wis. 2d 331, 385 N.W.2d 200 (Ct. App. 1986) (predecessor statute), but no case law applies that statutory definition to distinguish taxes from fees. Rather, the distinction between taxes and fees hinges on the primary-purpose test. *Town of Hoard*, 2015 WI App 100, ¶ 14. If a charge is a fee under that test, then a court may need to consider whether section 66.0627 or another

[7] The circuit court cited Wis. Stat. § 66.067, a non-existent statute. The court likely meant to cite Wis. Stat. § 66.0627.

statute authorizes the fee. *See id.* ¶¶ 2 n.1, 15–16; *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶¶ 15–16, 298 Wis. 2d 407, 727 N.W.2d 358. The circuit court thus erred by considering section 66.0627 when determining whether the TUF is a tax.

Second, if the circuit court implied that the items of street maintenance in Wis. Stat. § 66.0627(1)(c) are proprietary services, it was wrong because "[m]aintenance of streets is a governmental function." *Francke v. City of W. Bend*, 12 Wis. 2d 574, 576, 107 N.W.2d 500 (1961). This rule is "well settled." *Crowley v. Clark Cnty.*, 219 Wis. 76, 82, 261 N.W. 221 (1935).

Third, road construction and similar infrastructure improvements are not services under Wis. Stat. § 66.0627(1)(c). *See CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶ 40, 380 Wis. 2d 399, 909 N.W.2d 136. The TUF's stated purpose is to fund "transportation infrastructure." Ordinance § 92.100(a). The TUF may fund various infrastructure projects including "street construction and/or reconstruction," "construction or reconstruction" of sidewalks and traffic-control signals, and "structures used for the storage, maintenance and repair of operational equipment." Ordinance § 92.102(a). So, even if the special-charges statute were relevant here, it would not help Pewaukee because the TUF funds infrastructure improvements.

In short, the primary-purpose test, not the special-charges statute, determines whether Pewaukee's TUF is a tax or a fee.

b. *City of River Falls* highlights why the TUF is a tax.

The circuit court cited *City of River Falls* to support its conclusion that the TUF is a fee (R. 55:18), but that case shows why the TUF is a tax. This Court in *City of River Falls* held that a city's water-storage charge for firefighting was "a fee, not a tax," because it involved "a proprietary function, not a governmental function." 182 Wis. 2d at 443. By contrast, Pewaukee's TUF funds street maintenance, "a governmental function." *See Francke*, 12 Wis. 2d at 576.

That Pewaukee created a utility to levy the TUF does not matter, contrary to the circuit court's apparent reasoning. (R. 55:18.) "[W]hether a municipality is acting as a public utility" has no bearing on "whether a charge is a tax or a fee." *Town of Hoard*, 2015 WI App 100, ¶ 14.

c. *Bentivenga* also shows why the TUF is a tax.

The circuit court further reasoned that, because the tax in *Bentivenga* was *not* earmarked for a specific purpose, the TUF is a fee because it *is* earmarked. (R. 55:18.) "The rules of logic do not work this way. This is the logical fallacy of denying the antecedent." *State v. Wiedmeyer*, 2016 WI App 46, ¶ 10, 370 Wis. 2d 187, 881 N.W.2d 805 (Hagedorn, J.). In other words, it is "dubious logic" to conclude that a charge is a tax "only if it is just like the [charge] at issue in" *Bentivenga*. *See United States v. Knights*, 534 U.S. 112, 117 (2001) (rejecting similar logic).

A governmental charge is not a fee simply because it is earmarked for specific purposes. When determining whether a charge is a tax or a fee, the distinction between "a separate fund rather than the general treasury . . . is a distinction without a difference" because "a tax 'earmarked for a particular purpose is hardly unusual.'" *Kathrein v. City of Evanston*, 752 F.3d 680, 687 (7th Cir. 2014) (citation omitted). Indeed, Wisconsin law authorizes many earmarked taxes. *See, e.g.*, Wis. Stat. §§ 61.46(2), 66.0827(2), 62.18(16). Earmarked taxes "shall be treated as trust funds dedicated to the purpose for which they were appropriated." *See Immega v. City of Elkhorn*, 253 Wis. 282, 293, 34 N.W.2d 101 (1948). As explained below in section I.B., the utility-account charges in *Elsner* went into a separate account to fund specific projects, and our supreme court held they were an illegal tax rather than a special assessment. *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 103–04, 106–07, 109, 135 N.W.2d 799 (1965). Pewaukee cannot avoid the conclusion that its TUF is a tax simply by earmarking it for specific purposes.

Indeed, in striking down TUFs like Pewaukee's, courts have held that "depositing charges into a special fund was not enough to transform a tax into a fee." *Covell*, 127 Wash. 2d at 888. Otherwise, "virtually all of what now are considered 'taxes' could be transmuted into 'user fees' by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a 'police fee.'" *Id.* (quoting *United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993)). The Kansas Supreme Court raised the same concern when holding a TUF like Pewaukee's was an illegal tax. *Heartland Apartment*, 306 Kan. at 17–18.

Besides incorrectly relying on the TUF's earmarked nature, the circuit court overlooked that the tax in *Bentivenga* was *not* imposed in the city's "proprietary capacity." *Bentivenga*, 2014 WI App 118, ¶ 8. As just explained, the TUF is not imposed in Pewaukee's proprietary capacity, either. Because the TUF is a forced payment to fund governmental functions of general benefit, it is a tax.

d. The circuit court incorrectly focused on the relationship between the TUF's revenue and costs, essentially holding that any earmarked tax is a fee.

In holding the TUF is a fee for services, the circuit court stated that "[t]here is a direct relationship between the anticipated costs needed to maintain and repair the roads, the [property] owners' use, and the fee charged to the owners." (R. 55:18.) The circuit court distinguished *Milwaukee & Suburban* because the transportation tax in that case "bore no relationship to the City's costs of regulation." (R. 55:18.)

That reasoning is flawed for three separate reasons: it ignores important language in *Milwaukee & Suburban*, incorrectly assumes that an earmarked charge is necessarily a fee, and relies on a tangential relationship between the TUF's revenue and expenditures.

First, when briefly addressing *Milwaukee & Suburban*, the circuit court overlooked a crucial statement of law: "Any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax." *Milwaukee & Suburban*, 6 Wis. 2d at 304 (citation omitted). Pewaukee's TUF fits that definition for the reasons stated above, so it is a tax.

Second, a governmental charge is not a fee simply because it is directly related to some earmarked cost. In *Milwaukee & Suburban*, the supreme court merely stated that "a charge of a fixed sum which bears *no relation* to the cost of inspection and which is payable into the general revenue of the state *is a tax*." 6 Wis. 2d at 306 (citation omitted) (emphases added). The circuit court's reasoning wrongly assumes that the converse is true—*i.e.*, that a charge is *not* a tax if the charge's revenue does *not* exceed some earmarked cost. The court once again committed "the logical fallacy of denying the antecedent." *See*

Wiedmeyer, 2016 WI App 46, ¶ 10 (Hagedorn, J.). This type of fallacious reasoning conflates a necessary condition with a sufficient condition. *See id.* ¶ 10 & n.7.

A direct relationship between a governmental charge and associated costs is a necessary, but not sufficient, condition for the charge to be a valid fee. Absent such a relationship, a fee is unlawful. *Edgerton Contractors*, 2010 WI App 45, ¶¶ 16–17. Even when a charge is directly related to some cost, it is a tax if it lacks "another essential characteristic of a fee," such as voluntariness or a unique benefit to the payer. *See Emerson College v. City of Boston*, 391 Mass. 415, 425–26, 462 N.E.2d 1098 (1984); *see also, e.g.*, *Heartland Apartment*, 306 Kan. at 15 (holding an earmarked TUF was a tax because it was "not voluntary, which is a requirement for a fee"). So, if a charge fits the definition of a tax, a reasonable relationship between the charge and some cost cannot alone transform the tax into a fee. *See, e.g.*, *Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 807, 264 P.3d 907 (2011). Here, Pewaukee's TUF is a tax because it fits the definition of a tax, regardless of whether it satisfies the "direct relationship" requirement for a fee to be valid. The circuit court's flawed logic would transform any tax into a fee if it is earmarked for specific expenses.

Third, even if the relationship between revenue and costs were relevant here, the TUF's charges are not directly related to services rendered. A municipal fee must be "directly attributable" to "the services rendered by the [c]ity." *See Milwaukee & Suburban*, 6 Wis. 2d at 308. The TUF fails that test. As an initial matter, a TUF does not render services because its charges "are not individually determined and cannot be avoided," *Covell*, 127 Wash. 2d at 884–85, and because a TUF is assessed against properties rather than motorists who are using the roads, *Heartland Apartment*, 306 Kan. at 15. Even if a TUF could be characterized as rendering services, "the direct relationship between the charges and the benefits received by those who pay them is missing." *Covell*, 127 Wash. 2d at 888. Because a municipality's TUF benefits "nonresidents" who travel there "without paying the utility charge," "the relationship between the charge and the benefits accruing to those [who] pay them is tangential indeed." *Id.* at 888–89.

All that reasoning applies here. Pewaukee's TUF charges are not individually determined, cannot be avoided, and do not apply to motorists

using the roads. Instead, the TUF is imposed on all developed properties and varies based on how they are categorized. *See* Ordinance §§ 92.103(a), 92.105(a)(2), 92.105(c). The TUF funds street maintenance and similar functions that will benefit nonresidents who travel to or through Pewaukee without paying the TUF. *See* Ordinance § 92.102. Pewaukee's TUF revenue is thus *not* directly related to the cost of any service rendered. A contrary view would allow the government to transform any tax into a fee by earmarking it for some general purpose, such as road construction.

The circuit court's view of the law has no logical stopping point. If a village may fund street maintenance by creating a "utility fee" and earmarking it for that purpose, then a village may fund any governmental function with limitless fees. The law does not work that way.

In short, the circuit court was wrong to reason that the TUF is a fee simply because its revenue is earmarked for (and thus related to) certain expenses.

* * *

The TUF "is a tax" because it is exacted to fund "the cost of maintaining governmental functions" of "general benefit." *See Milwaukee & Suburban*, 6 Wis. 2d at 304 (citation omitted). It is not a fee for a proprietary service.

B. Because Pewaukee's TUF is a tax, it is unlawful.

After concluding the TUF is a tax, this Court should follow the supreme court's two-pronged approach from *Elsner*. In *Elsner*, the court held that a city's utility-account charge was an excise tax or a property tax, and either way it was unlawful. If it was an excise tax, it lacked statutory authority. And if it was a property tax, it was non-uniform. Pewaukee's TUF is illegal for the same reasons.

1. If the TUF is an excise tax, it is illegal because it lacks clear and express statutory authority.

"In Wisconsin, municipalities have no inherent powers." *Nw. Properties v. Outagamie Cty.*, 223 Wis. 2d 483, 487, 589 N.W.2d 683 (Ct. App. 1998). Villages in Wisconsin "can only resort to the types of taxes that the legislature has authorized them to use." *Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965). "[A] tax cannot be imposed without clear and express language for that purpose, and where ambiguity and doubt exist, it

must be resolved in favor of the person upon whom it is sought to impose the tax." *Elsner*, 28 Wis. 2d at 106.

Elsner is highly instructive here. In *Elsner*, a city adopted an ordinance that imposed a monthly charge on each residential and commercial utility customer. *Id.* at 103–04. All revenue collected pursuant to that charge went into "a separate account" and funded "the industrial expansion and growth of industry and new industries in the [city]." *Id.* (citation omitted). Our supreme court held that the charge was an excise tax or a general property tax, and either way it was unlawful. *Id.* at 106–07. The court reasoned that, if the charge was an excise tax, it was illegal because it lacked statutory or constitutional authorization. *Id.* A city has no legal authority to levy "an excise tax to be added to public utility bills." *Id.* at 107.

The same conclusion applies here. Pewaukee's TUF is a tax because its primary purpose is to raise revenue for the government, as explained above. And because no statute authorizes a village to impose a tax on a public utility bill, *see id.*, Pewaukee's TUF is illegal if it is an excise tax.[8]

2. If the TUF is a property tax, it is non-uniform and thus unconstitutional.

"Article VIII, section 1 of the Wisconsin Constitution requires that the method or mode of taxing real property must be applied uniformly to all classes of property within the tax district." *U.S. Oil*, 2011 WI App 4, ¶ 23 (footnote omitted). "The purpose of the Uniformity Clause is to ensure the tax burden is allocated proportionally to the value of each person's property." *Milewski v. Town of Dover*, 2017 WI 79, ¶ 47, 377 Wis. 2d 38, 899 N.W.2d 303. The Uniformity Clause requires "a uniform tax rate." *Id.* ¶ 48.

Here, both components of Pewaukee's TUF—the "base fee" and "usage fee"—are non-uniform under those principles. If the TUF is a property tax rather than an excise tax, it violates the Uniformity Clause.

First, the TUF's base fee violates the Uniformity Clause. The base fee "is equal for all utility accounts" and "is determined by dividing the total amount of fixed base costs by the total number of utility accounts." Ordinance

[8] The circuit court did *not* suggest that the TUF has statutory authorization *if it is a tax*.

§ 92.105(a)(1). In February 2021, for example, the Village of Pewaukee adopted an annual base fee of $15.74 for every utility account. (R. 3:6.) That tax is not uniform.

The supreme court in *Elsner* held that a flat-dollar-amount property tax like Pewaukee's base fee was unconstitutional. It explained that "[t]he tax imposed by the instant ordinance violates the constitutional requirement of uniformity because 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." *Elsner*, 28 Wis. 2d at 107. It further explained that "[t]his same disregard of value occurs with respect to the tax imposed on commercial properties having electrical service meters" because each commercial property was required to pay a $1 monthly charge. *Id.*

Pewaukee's base fee has the same fatal flaw. Every developed property in Pewaukee is required to pay the same base fee regardless of the property's value. Under the Ordinance, two properties would be required to pay the same base fee even if they have very different assessed values. This flat-dollar-amount property tax violates the Uniformity Clause under *Elsner* because it is not based on a property's assessed value and a uniform tax rate.

Second, the TUF's usage fee also violates the Uniformity Clause. Again, the Uniformity Clause requires property taxes to be based on a property's assessed value and a uniform tax rate. *Milewski*, 2017 WI 79, ¶¶ 47–48. A tax is non-uniform if "taxpayers owning equally valuable property will ultimately be paying disproportionate amounts of real estate taxes." *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 412, 288 N.W.2d 85 (1980) (citation omitted). Pewaukee's usage fee is based on the estimated "trips generated" at any given category of property. Ordinance §§ 92.102(a), 92.105(a)(1)–(c). If one property's amount of estimated trips generated is ten times higher than that of an equally valuable property, the former property would be required to pay a usage fee ten times higher than the other property. *See id.* The property with more estimated trips generated would thus be subjected to a higher effective tax rate. The usage fee violates the Uniformity Clause because it is not based on assessed value and a uniform tax rate.

* * *

Pewaukee's TUF is an illegal tax. It is a tax because its primary purpose is to raise revenue for governmental functions. If it is an excise tax, it is unlawful because it lacks "clear and express" statutory authorization. *See Elsner*, 28 Wis. 2d at 106. And if it is a property tax, it is unconstitutional because it is non-uniform.

II. Pewaukee's TUF is *ultra vires* and illegal even if it is a fee rather than a tax.

A. Municipal fees generally require express statutory authority.

Municipalities "have only such powers as are expressly granted to them by the legislature and such others as are necessary and convenient to the exercise of the powers expressly granted." *City of Madison v. Tolzmann*, 7 Wis. 2d 570, 573, 97 N.W.2d 513 (1959). To be lawful, a municipal fee needs either "express" statutory authorization or "implied authority" under the Wisconsin Constitution's "home-rule amendment" that applies to "matters of local affairs." *See id.* at 573–74. A municipality may enact a fee under its home-rule power if the fee regulates "a local affair," *see Johnston v. City of Sheboygan*, 30 Wis. 2d 179, 186, 140 N.W.2d 247 (1966), but not if the fee implicates "a matter of state-wide concern," *see Tolzmann*, 7 Wis. 2d at 576.

The circuit court cited home-rule authority and Wis. Stat. § 66.0621 to support its conclusion that Pewaukee's TUF is a permissible fee. Neither of those sources allows the TUF.

B. Home-rule authority does not allow the TUF.

Villages may not rely on their home-rule authority to adopt fees like Pewaukee's TUF, for two separate reasons.

First, the TUF implicates the use of public streets, which is a matter of statewide concern. "It is beyond question, the state has absolute control of streets and highways and a city has no inherent power over them. Aside from its police or regulatory power, the only power a city has over the use of the streets must be delegated to it by the state." *City of Madison v. Reynolds*, 48 Wis. 2d 156, 158, 180 N.W.2d 7 (1970) (citing *Milwaukee & Suburban*, 6 Wis. 2d at 302).

A municipality thus lacks the authority to charge a fee for the use of public streets. In *Milwaukee & Suburban*, the Wisconsin Supreme Court held

that Milwaukee lacked authority to impose an annual $10 per-seat fee on trolleys. Although the court mainly reasoned that the fee was really a tax because its purpose was to generate revenue for the government, 6 Wis. 2d at 308, the court also emphasized that "the control of highways is primarily a state duty": "[T]he legislature, representing the people at large, possesses full and paramount power over all highways, streets, and alleys in the state." *Id.* at 309 (citations omitted). The court concluded that "[t]he only power the City has over the use of the streets, aside from its regulatory or police power, must be delegated to it by the state." *Id.* at 313. For the $10 per-seat charge to be lawful, it "must be as a tax authorized by the state for revenue." *Id.*

Pewaukee's TUF is thus illegal and exceeds home-rule authority if it is a fee for using the streets, as the Ordinance characterizes it. The Ordinance charges a "base fee" for every utility customer's "access to the transportation system." Ordinance § 92.105(a)(1). The Ordinance also charges a "usage fee" that is based on a property's estimated use of the roads. Ordinance § 92.105(a)(2). Specifically, the usage fee charges a "per-trip rate" of $1.28. (R. 3:42.) The Ordinance recognizes that it "requires those who make the greatest *use* of the Village transportation system [to be] the most responsible for the cost of said system." Ordinance § 92.100(b) (emphasis added). So if the TUF is a fee on using the streets, as the Ordinance claims it is, then it falls outside Pewaukee's home-rule authority.

Second, a fee "cannot be grounded upon the home-rule amendment" if it "possesses sufficient attributes of a tax," regardless of whether it is technically a tax. *See Jordan*, 28 Wis. 2d at 621.

In *Jordan*, a village ordinance required real estate sub-dividers to pay "an equalization fee in lieu of dedicating land." *Id.* at 610. Revenue from that fee went into two non-lapsing funds that provided money for schools and development of park and recreation area. *Id.* at 611. The Wisconsin Supreme Court held that "even though the equalization fee requirement provision can be sustained as a reasonable exercise of the police power, it is unconstitutional unless authorized by the legislature." *Jordan*, 28 Wis. 2d at 621. The court reasoned that the fee "possesses *sufficient attributes of a tax* so that it cannot be grounded upon the home-rule amendment, sec. 3, art. XI of the Wisconsin constitution." *Id.* (emphasis added). Although "villages and cities have wide powers to tax for the general welfare" under their statutory and constitutional

home-rule power, "they can only resort to the types of taxes that the legislature has authorized them to use." *Id.* The court ultimately held that Wis. Stat. § 236.45 authorized the equalization fee, which was *not* a property tax because it was "imposed on the transaction of obtaining approval of the plat." *Id.* at 621–22.

Like the fee in *Jordan*, Pewaukee's TUF "cannot be grounded upon the home-rule" authority because it "possesses sufficient attributes of a tax." *See Jordan*, 28 Wis. 2d at 621. Like the fee in *Jordan*, the TUF goes into a separate account earmarked for specific purposes. Ordinance § 92.102. Neither fee is part of a regulatory scheme, such as a licensing fee. The TUF more closely resembles a property tax than the fee in *Jordan* did because the TUF is imposed on developed property, not on a specific transaction like in *Jordan*. Ordinance § 92.103(a). Because the fee in *Jordan* sufficiently resembled a tax to fall outside home-rule authority, the same is true of Pewaukee's TUF.

Although WMC heavily relied on *Jordan* below, the circuit court did not address *Jordan*. Instead, in concluding that villages may "create" transportation utilities, the circuit court cited the Wisconsin Constitution's home-rule amendment (article XI, § 3) and the statutory grant of home-rule authority for villages (Wis. Stat. § 61.34). (R. 55:8.) The court stated that *Ellinwood v. City of Reedsburgh*, 91 Wis. 131, 133, 64 N.W. 885 (1895), "held that an express delegation of power to build a waterworks or other utility is not necessary." (R. 55:8.)

But WMC does not dispute that villages may *create* utilities or build and repair transportation infrastructure.

Instead, this lawsuit challenges a village's authority to adopt new taxes or fees—and *Ellinwood* said nothing about that topic. The city in *Ellinwood* funded the construction projects at issue there by "borrow[ing] money and issu[ing] bonds." 91 Wis. at 136. "[A]n opinion does not establish binding precedent for an issue if that issue was neither contested nor decided." *Wieting Funeral Home of Chilton, Inc. v. Meridian Mut. Ins. Co.*, 2004 WI App 218, ¶ 14, 277 Wis. 2d 274, 690 N.W.2d 442 (citation omitted). *Ellinwood* is not precedential on whether a municipality may adopt a utility fee without statutory authority.

Besides, a TUF is not analogous to a water utility's user fees because a TUF is not based on any user's consumption of a particular commodity. *See, e.g.*, *Heartland Apartment*, 306 Kan. at 15; *Brewster*, 115 Idaho at 505.

C. Wisconsin Stat. § 66.0621 does not authorize the TUF.

The circuit court also cited Wis. Stat. § 66.0621(5) to support its conclusion that villages have "broad authority to create and operate utilities." (R. 55:9.) Again, WMC does not dispute that villages may create and operate utilities. As WMC noted in the circuit court, for example, villages may create utility districts under Wis. Stat. § 66.0827 to fund street repair. (R. 41:22.) WMC instead challenges Pewaukee's method of *funding* its transportation utility *with a TUF*.

When the circuit court briefly addressed funding authority, it stated that Wis. Stat. § 66.0621(1) "grants authority for municipalities to collect revenue to fund public utilities." (R. 55:9.) But subsection (1) does not authorize any funding mechanism. Such authorizations are found later, in subsections (3) and (5). Subsection (1) just defines "[p]ublic utility" to mean "any revenue producing facility or enterprise . . ." and then defines "[r]evenue" to mean "all moneys received from any source by a public utility and all rentals and fees . . . ." Wis. Stat. § 66.0621(1)(b) & (c). Those definitions are not an express grant of power to charge a fee, such as a fee on developed properties for their estimated traffic generated. At most, section 66.0621(1) shows that Pewaukee's transportation utility might be a "public utility" under this statute if the TUF is a fee. The question thus becomes whether this statute authorizes a public utility to charge a fee like the TUF, and the answer is "no."

This statute provides that a municipality "may" finance a public utility with "the general fund," "municipal obligations, including revenue bonds," "shares of stock," and "any other lawful methods of paying obligations." Wis. Stat. § 66.0621(3) & (5). The "other lawful methods" language preserves funding methods that are authorized by other statutes, such as Wis. Stat. §§ 66.0821(3) and 196.03(1).

Section 66.0621 does not authorize the TUF because the TUF does not use the general fund, municipal obligations, or shares of stock. If the TUF relies on any other lawful funding method, that authority must come from a different statute.

The circuit court seemed to recognize that Wis. Stat. § 66.0621(1) does not actually authorize any funding mechanisms, which likely explains why the court circled back to subsection (5). Specifically, the court stated that "a municipality may use 'any other lawful methods of paying obligations' for any public utility, which would include a user fee. Wis. Stat. § 66.0621(5)." (R. 55:10.) But subsection (5) does not explicitly authorize a "user fee," and the court never identified which other statute authorizes a "user fee" like the TUF—because none exists. No statute authorizes a village to charge developed properties a "fee" based on their estimated traffic generated.

If section 66.0621 were as broad as the circuit court views it, municipalities could fund virtually all their functions with limitless "utility fees." After all, public utilities broadly include such things as "swimming pools, tennis courts, parks, playgrounds, golf links, bathing beaches, bathhouses," "child care centers," and "any other necessary public works projects undertaken by a municipality." Wis. Stat. § 66.0621(1)(b). Under the circuit court's reasoning, a municipality may charge all property owners a "golf course utility fee," "tennis court utility fee," and "public works utility fee." That breathtaking, unprecedented view of this statute would allow municipalities to easily circumvent revenue limits, including the property tax limits discussed below in section III. The legislature did not intend that absurd result when it enacted this statute.

* * *

Pewaukee's TUF is *ultra vires* and illegal. Under *Jordan*, 28 Wis. 2d at 621, Pewaukee's TUF requires explicit statutory authority because it "possesses sufficient attributes of a tax," even if it is really a fee. Likewise, *Milwaukee & Suburban*, 6 Wis. 2d at 313, requires Pewaukee's TUF to have explicit statutory authority if it is a charge on the use of public roads—as the Ordinance characterizes the TUF. No statute explicitly authorizes the TUF.

The circuit court rejected the notion that Pewaukee needs "explicit" authority "to create a transportation utility." (R. 55:10.) But WMC disputes Pewaukee's authority to *fund* a utility *with a TUF*, not a village's authority to *create* a utility. The TUF requires explicit statutory authority but has none.

III. State law preempts Pewaukee's TUF even if it is a fee adopted under home-rule authority.

A. State law may preempt a local ordinance.

"An ordinance is preempted when any of the following four tests are satisfied: (1) the legislature has expressly withdrawn the power of the municipality to act, (2) the ordinance logically conflicts with state legislation, (3) the ordinance defeats the purpose of state legislation, or (4) the ordinance violates the spirit of state legislation." *Scenic Pit LLC v. Vill. of Richfield*, 2017 WI App 49, ¶ 8, 377 Wis. 2d 280, 900 N.W.2d 84 (citing *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984)). The first and third tests are self-explanatory. An ordinance violates the second test if it "attempt[s] to authorize . . . what the legislature has forbidden, . . . [or] forbid[s] what the legislature has expressly licensed, authorized, or required." *Metro. Milwaukee Ass'n of Com., Inc. v. City of Milwaukee*, 2011 WI App 45, ¶ 84, 332 Wis. 2d 459, 798 N.W.2d 287 (alterations in original) (citation omitted). Under the fourth test, an ordinance violates the spirit of state law if it "runs counter" to "a complex and comprehensive statutory structure." *Lake Beulah Mgmt. Dist. v. Vill. of E. Troy*, 2011 WI 55, ¶ 19, 335 Wis. 2d 92, 799 N.W.2d 787 (citation omitted).

Here, two statutory schemes preempt Pewaukee's TUF even if it is really a fee: (1) a statute that protects the free use of all highways, and (2) two statutes limiting property taxation. The free-use statute preempts the TUF under all four *Anchor* tests, and the TUF defeats the purpose and violates the spirit of the two tax statutes.

B. The TUF is preempted by Wis. Stat. § 349.03(2), which protects the free use of all highways.

State law generally bars local governments from restricting "the free use of all highways." Wis. Stat. § 349.03(2). The phrase "'free use of all highways' mean[s] accessible to everyone and . . . could also without any inconsistency mean without payment of a toll." *Reynolds*, 48 Wis. 2d at 159. "Whether the phrase 'free use of all highways' means free from tax and toll or unobstructed and accessible to everyone, it is expressed." *Id.*

Wisconsin Stat. § 349.03(2) preempts Pewaukee's TUF under the first two *Anchor* tests. This statute expressly withdraws a local government's ability

to impose charges for the use of the highways, which is what the TUF purports to do. Specifically, the TUF's "base fee" is for every utility customer's "access to the transportation system," and the TUF's "usage fee" is tied to a property's estimated use of the roads. Ordinance § 92.105(a)(1) & (a)(2). Also, the Ordinance is logically inconsistent with this statute because the Ordinance attempts to require what the statute forbids: local charges on the use of the highways.

Under the third and fourth *Anchor* tests, the Ordinance defeats the purpose and violates the spirit of Wis. Stat. § 349.03(2). As of 2021, the TUF had a "per-trip rate" usage fee of $1.28, plus an annual base fee of $15.74 for every utility account. (R. 3:6.) Pewaukee would plainly violate this statute if it charged its residents $1.28 for each actual "trip" they made from their home and back. Pewaukee cannot lawfully circumvent section 349.03(2) by charging properties (rather than drivers) for their estimated (rather than actual) use of the highways. This statute's restriction on local charges would be largely meaningless if local governments could impose charges like Pewaukee's TUF.

The circuit court wrongly dismissed this statute by once again misstating the nature of this lawsuit. It reasoned that "there is no statutory prohibition against a village creating a transportation utility, and villages have home rule authority under the Constitution as well as statutory authority under § 66.0621(5) to create utilities to regulate and provide services for the general welfare." (R. 55:11.) Again, WMC does *not* argue that Pewaukee cannot *create* a utility to regulate or provide services. Rather, WMC challenges Pewaukee's TUF because it imposes a monetary charge on properties' estimated use of the roads. Wisconsin Stat. § 349.03(2) bars municipalities from imposing such a charge.

The circuit court recognized that "[i]f the TUF is viewed as a quasi-toll system, it arguably conflicts with § 349.03(2) because it impedes the 'free use' of highways stipulated in that statute." (R. 55:12.) Yet the court determined that the TUF is not "anything close to a toll" because it is imposed on properties based on their estimated use of the roads. (R. 55:12.) The court also stated that the TUF involves "no restrictive element" and "no barriers that physically impede the 'free use' of roadways." (R. 55:12.) That reasoning is flawed for three reasons.

First, the absence of a restrictive element or physical impediment is not dispositive under Wis. Stat. § 349.03(2). This subsection's plain language is not limited to impediments to accessibility; it also applies to taxes and tolls. *See Reynolds*, 48 Wis. 2d at 159.

Second, the circuit court focused too narrowly on pay tolls. Again, this statute "means free from *tax and toll* or unobstructed and accessible to everyone." *See id.* (emphasis added). That understanding logically applies to fees, too. After all, the statutory language does not use the words "tax" and "toll," so there is no textual reason to exclude fees from this statute's reach.

Third, even if section 349.03(2) bars local tolls but no other types of charges, it still preempts the TUF. The TUF is effectively a pay toll even if, as the circuit court stated, it is not a "typical" toll. (R. 55:12.) In striking down a TUF like Pewaukee's, the Florida Supreme Court explained that a TUF "convert[s] the roads and the municipality into a toll road system, with only owners of developed property in the city required to pay the tolls." *City of Port Orange*, 650 So. 2d at 4; *see also Brewster*, 115 Idaho at 505.

If anything, Pewaukee's TUF violates section 349.03(2) even more seriously than a typical toll would. The "use of a toll road is *voluntary*; a motorist can choose an alternative route or even an alternative mode of transportation, such as walking. In contrast, the TUF cannot be avoided by the owner of developed property." *Heartland Apartment*, 306 Kan. at 15–16. Because section 349.03(2) bars municipalities from imposing a pay toll that people could choose to avoid, it also bars them from imposing an *unavoidable* charge on the use of the roads. Any other conclusion would violate this statute's spirit and purpose of banning local governments from imposing a charge on the use of the roads.

In short, Wis. Stat. § 349.03(2) preempts Pewaukee's TUF.

C. Statutes that restrict property taxation also preempt the TUF.

State laws on property taxation also preempt Pewaukee's TUF even if it is a fee rather than a tax. Two lengthy, complex statutes restrict property taxes in ways relevant here. The TUF violates the spirit and defeats the purpose of those state laws.

One lengthy statute exempts dozens of types of property from having to pay property taxes, including property owned by the government, churches, schools, and other nonprofit entities. *See generally* Wis. Stat. § 70.11. This statute reflects the legislature's view that taxing certain types of property is inappropriate.

Pewaukee's TUF circumvents those statutory restrictions because it does not provide exceptions for properties that are statutorily exempt from property taxes. *See* Ordinance §§ 92.103, 92.104. One Pewaukee Board member displayed an awareness that the TUF would circumvent property tax exemptions, saying that the transportation "utility will help recoup fees and costs as the school doesn't currently pay property taxes but they will be contributing to this utility." (R. 3:18.)

Another complex statute imposes "a limit on the amount a governmental subdivision may increase its property tax levy in a given year." *Brown Cnty. v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 23, 400 Wis. 2d 781, 971 N.W.2d 491. Under this statute, municipalities may not increase their levy beyond net new construction, with certain exceptions. Wis. Stat. § 66.0602(1)(d) & (2)(a). One exception allows voters to approve a referendum to increase the levy limit. Wis. Stat. § 66.0602(4). The plain purpose of this statute is to restrict municipalities' ability to increase property taxes.

The TUF essentially raises property taxes without holding a referendum or satisfying any other exception in Wis. Stat. § 66.0602. At the meeting where Pewaukee adopted the TUF, a person from an engineering firm told the Village Board that "the levy limits" are one of the "reasons to consider a [transportation] user charge." (R. 3:17.) At that same meeting, a Village Board member suggested that Pewaukee could avoid levy limits by shifting certain costs to "the Transportation Utility." (R. 3:18.)

Even more troubling, the Village Attorney suggested that the TUF would have no legal limits. When two residents expressed concerns about Pewaukee "raising taxes each year in the Transportation Utility" and "skyrocketing" charges above the levy limit, the Village Attorney suggested that the only recourse against TUF increases would be to vote against Village Board members at the "ballot box." (R. 3:19.) But property tax increases have legal limits, not just political limits. Pewaukee residents, for example, may vote for

or against a referendum to increase the levy limit. Wis. Stat. § 66.0602(4). Voting incumbent trustees out of office is not supposed to be Pewaukee residents' only protection against skyrocketing municipal charges.

If a village may enact a TUF like Pewaukee's, the restrictions on property taxation in Wis. Stat. §§ 66.0602 and 70.11 would be largely meaningless. If Pewaukee's TUF were lawful, a village could use "utility fees" to fund virtually any governmental function, easily circumventing the statutory limits on property taxation.

In short, Pewaukee's TUF is preempted under the third and fourth *Anchor* tests because it defeats the purpose and violates the spirit of Wis. Stat. §§ 66.0602 and 70.11.

The circuit court did not discuss these two statutes although WMC had relied on them. (*See* R. 41:18–21.) Instead, the court suggested that it would address these statutes in a later section of its written decision, but it never did. (R. 55:11 n.4.) The court possibly assumed that these statutes would not preempt the TUF if it was a fee rather than a tax.

But WMC made clear that this preemption argument "does not hinge on whether Pewaukee's TUF is a property tax." (R. 41:21 n.6.) As WMC explained, "If [the TUF] is a property tax (which it is), then it violates Wis. Stat. §§ 66.0602 and 70.11 and is preempted under the first *Anchor* test. Assuming *arguendo* the TUF is not a property tax, it is preempted under the third and fourth *Anchor* tests." (R. 41:21 n.6.) In other words, the TUF violates the spirit and purpose of these two statutes if it is a fee.

D. Home-rule authority does not affect the preemption analysis here.

The circuit court concluded that the TUF "is primarily a matter of local concern and not preempted by state law." (R. 55:14.) The court cited villages' home-rule authority to maintain streets and fund their services with utilities. (R. 55:14.)

As an initial matter, the circuit court had no need to conduct that home-rule analysis because it concluded that no statutes preempted the TUF. That type of home-rule analysis applies only if a statute would preempt a local ordinance. *See Black v. City of Milwaukee*, 2016 WI 47, ¶ 29, 369 Wis. 2d 272, 882 N.W.2d 333. If a statute would preempt an ordinance, the preemption can

be unconstitutional under the home-rule amendment if the statute involves a local concern. *Id.*

The circuit court thus effectively held that Wis. Stat. § 349.03(2) is unconstitutional if it preempts the TUF. That conclusion is untenable.

Despite local home-rule authority, "the Legislature has the power to statutorily override the city's or village's law if the state statute touches upon a matter of statewide concern or if the state statute uniformly affects every city or village." *Black*, 2016 WI 47, ¶ 2. An ordinance is lawfully preempted under either of those scenarios. *Id.* ¶ 26.

When determining whether the legislature has lawfully overridden local control, a court must first determine "whether the statute concerns a matter of primarily statewide or primarily local concern." *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 101, 358 Wis. 2d 1, 851 N.W.2d 337. "If the statute concerns a matter of primarily statewide interest, the home rule amendment is not implicated and our analysis ends." *Id.* "If, however, the statute concerns a matter of primarily local affairs, the reviewing court then examines whether the statute satisfies the uniformity requirement." *Id.* A statute is uniform if it facially applies to any city or village. *Black*, 2016 WI 47, ¶ 7.

Wisconsin Stat. § 349.03(2) can lawfully trump home-rule authority because this statute involves a matter of statewide concern—free use of the roads. *Reynolds*, 48 Wis. 2d at 158–60. The circuit court seemed to recognize this point but then shifted its focus to whether *the TUF* primarily involves a local concern. (R. 55:14.) Whether *the TUF* is primarily a local or statewide concern is irrelevant. The home-rule preemption analysis considers whether *the statute* primarily affects statewide or local concerns. *Madison Teachers*, 2014 WI 99, ¶ 101. The supreme court in *Reynolds* held that section 349.03(2) overrides home-rule authority. Any home-rule "analysis ends" there. *See Madison Teachers*, 2014 WI 99, ¶ 101.

Although the circuit court did not discuss Wis. Stat. §§ 70.11 and 66.0602, these statutes can also trump home-rule authority. These statutes involve property taxes, and taxation is a matter "of statewide concern." *Elsner*, 28 Wis. 2d at 106. The home-rule "analysis ends" there. *See Madison Teachers*, 2014 WI 99, ¶ 101. These two statutes lawfully can (and do) preempt the TUF.

* * *

State law preempts Pewaukee's TUF because it violates the statutory right to free use of public roads and violates the purpose and spirit of statutory limits on property taxation.

CONCLUSION

This Court should reverse the circuit court's judgment and remand with instructions to grant WMC's motion for summary judgment.

Dated this 27th day of June 2023.

Electronically signed by
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of the relevant portions of this brief is 10,940 words.

Dated this 27th day of June 2023.

Electronically signed by

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of June 2023.

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