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

REPLY BRIEF OF APPELLANT WISCONSIN MANUFACTURERS AND COMMERCE, INC.

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INTRODUCTION

Shortly after the briefing began in this appeal, our supreme court unanimously held that the Town of Buchanan's "transportation utility fee" ("TUF") was an unlawful property tax. *Wisconsin Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100. That sweeping decision left no wiggle room.

As explained in WMC's letter of supplemental authority, Pewaukee has no way around *Buchanan*. Because Pewaukee's "transportation user fee" ("TUF") is a property tax, it is illegal for three separate reasons: (1) it lacks statutory authority, (2) it is non-uniform, and (3) state law preempts it. This Court should reverse on any of these three grounds.[1]

ARGUMENT

I. Pewaukee's TUF is an illegal tax.

A. Pewaukee's TUF is a tax.

Pewaukee argues that the *Buchanan* court did not decide whether Buchanan's TUF was a tax because Buchanan had conceded the point. (Pewaukee's Br. 32-33.) Pewaukee is wrong. (WMC's Letter 1-3.) Pewaukee does not dispute that the supreme court's decision on a conceded issue can be binding precedent. (*See* WMC's Letter 2.) Pewaukee instead contends that the *Buchanan* court did not decide that Buchanan's TUF was a tax. But the court decided that issue, stating, "The parties are correct; the TUF is a tax because [Buchanan] imposed it on a class of residents for the purpose of generating revenue." *Buchanan*, 2023 WI 58, ¶ 10. That conclusion is precedential.

Perhaps sensing that *Buchanan* is precedential, Pewaukee argues that *Buchanan* is distinguishable for several reasons. Pewaukee is wrong again.

First, Pewaukee suggests that *Buchanan* is distinguishable because villages, unlike towns, have home-rule authority. (Pewaukee's Br. 33.) But Pewaukee does not develop an argument explaining why home-rule authority affects whether a TUF is a tax. This Court "will not address arguments that are not developed." *Techworks, LLC v. Wille*, 2009 WI App 101, ¶ 27, 318 Wis. 2d 488, 770 N.W.2d 727. Besides, Pewaukee's passing reference to home-rule

[1] This reply brief cites the top page numbers in Pewaukee's brief, which violates the pagination requirement in Wis. Stat. § 809.19(8)(bm).

authority puts the cart before the horse because a village may not adopt a tax under its home-rule authority. *Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965). Home-rule authority would become an issue *only* if this Court first determined that Pewaukee's TUF is a fee.

Second, Pewaukee argues that Buchanan's TUF funded a utility *district* under Wis. Stat. § 66.0827, whereas Pewaukee claims that its TUF funds a *utility* under other statutes. (Pewaukee's Br. 27-28.) But Pewaukee does not develop an argument explaining its novel view that an alleged enabling statute affects whether a TUF is a tax. An enabling statute is relevant to whether a government charge *is lawful*—but whether a charge *is a tax* hinges on the charge's purpose. *See Buchanan*, 2023 WI 58, ¶ 10. Nor does Pewaukee explain its perceived distinction between a utility and a utility district—or why that distinction affects whether a charge is a tax. To the contrary, "'[w]hether a municipality is acting as a public utility' has no bearing on 'whether a charge is a tax or a fee.'" (WMC's Br. 20 (quoting *Town of Hoard v. Clark County*, 2015 WI App 100, ¶ 14, 366 Wis. 2d 239, 873 N.W.2d 241).)

Third, without citing any authority, Pewaukee asserts that "[t]he definition of a fee is that it be a specific recovery of operation and management costs, rather than a generalized collection of revenue." (Pewaukee's Br. 34.) "Arguments unsupported by references to legal authority will not be considered." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

From that unfounded premise, Pewaukee argues that its TUF is a fee because its allowable expenditures are more limited than those under Buchanan's TUF ordinance. Pewaukee's argument is flawed for several reasons. For starters, Pewaukee wrongly assumes that Buchanan's TUF was a general revenue measure. Like Pewaukee, Buchanan "handled funds collected under the TUF separately and in addition to the general tax levy." *Buchanan*, 2023 WI 58, ¶ 5. Indeed, Buchanan's TUF was "paid annually to a specially designated account for transportation system maintenance and improvement." Town of Buchanan Ordinance § 482-1(A), https://ecode360.com/35478376. In addition, Pewaukee "mistakes factual background for holdings." *See Town of Hoard*, 2015 WI App 100, ¶ 14. The *Buchanan* court never suggested that the scope of allowable TUF expenditures was relevant to whether Buchanan's TUF was a tax. Finally, Pewaukee does

not explain why its TUF's scope is specific enough to be a fee while Buchanan's was too broad. After all, the scope of allowable expenditures under Pewaukee's TUF ordinance is quite broad (*see* R. 3:10), and Buchanan's TUF ordinance imposed limits on what it could fund, *see Buchanan*, 2023 WI 58, ¶ 3.

Fourth, Pewaukee relatedly argues that *Buchanan* is distinguishable because Pewaukee's TUF ordinance has a more-specific method for determining estimated use of the roads, including reliance on the Institute of Transportation Engineers ("ITE") manual. (Pewaukee's Br. 35.) But Pewaukee overlooks that Buchanan imposed specific methods by resolution, which relied on the ITE manual. *See* Town of Buchanan Resolution No. 2021-12, https://www.townofbuchanan.org/home/showpublisheddocument/663/637728253219300000. Pewaukee does not explain why its ordinance is more specific than this Buchanan resolution or why this specificity matters. The *Buchanan* court never suggested that Buchanan's concept of "estimated use" had any bearing on whether Buchanan's TUF was a tax. Pewaukee is again misstating the factual background from *Buchanan* and mistaking it for holdings.

Even without *Buchanan*, Pewaukee's TUF is a tax. (WMC's Br. 14-19.) Pewaukee incorrectly suggests that there is no distinction between proprietary and governmental functions because the supreme court abrogated that distinction in the government-immunity context. (Pewaukee's Br. 21.) But that distinction is alive and well in the tax-versus-fee context. (WMC's Br. 15-18.)

Pewaukee falsely suggests that the fee in *City of River Falls* funded a *governmental* function. (Pewaukee's Br. 21.) That charge was a fee because it funded a *proprietary* function. (WMC's Br. 16, 20.)

Perhaps realizing that revenue for a governmental function is a tax, Pewaukee argues that road maintenance can be a proprietary function. (Pewaukee's Br. 22.) But the *Matson* case that Pewaukee cites merely indicates that the government's relation to an injured person is proprietary if the government caused the injury by creating a nuisance or acting negligently. The present case does not involve the government's relation to an injured person.

Pewaukee accuses WMC of citing only "one, non-essential sentence" in one case to establish that road maintenance is a governmental function. (Pewaukee's Br. 22.) But WMC cited three cases for that well-settled rule.

(WMC's Br. 18, 20.) And this Court may not disregard supreme court language as non-essential (i.e., dicta). *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682.

Pewaukee's TUF funds a governmental function. A proprietary function serves "primarily private concerns," while a governmental function serves "the public good." *Save Elkhart Lake, Inc. v. Vill. of Elkhart Lake*, 181 Wis. 2d 778, 789, 512 N.W.2d 202 (Ct. App. 1993). Pewaukee's TUF funds village-wide road work, which serves the public good, not primarily private concerns. (*See* WMC's Br. 18-19.)

Tellingly, Pewaukee does not address WMC's argument that voluntariness and the derived benefit help distinguish a fee from a tax. "Unrefuted arguments are deemed conceded." *State v. Verhagen*, 2013 WI App 16, ¶ 38, 346 Wis. 2d 196, 827 N.W.2d 891.

Pewaukee instead devises its own test: "the analysis between tax and fee is whether the revenue goes to the general fund or is instead used to cover the expense of services provided." (Pewaukee's Br. 16.) The cases that Pewaukee cites for support (*Bentivenga* and *Milwaukee & Suburban*) do not hold that the tax-versus-fee distinction hinges on whether revenue goes into a general fund. (*See* Pewaukee's Br. 16, 21; WMC's Br. 21-24.) And Pewaukee's proffered test conflicts with *Buchanan*. The *Buchanan* court cited those two cases—and then it concluded that Buchanan's TUF, which *was separated* from the general tax levy, was a tax. *Buchanan*, 2023 WI 58, ¶¶ 5, 10.

Pewaukee hardly addresses the case law that WMC cited to show that earmarked charges in segregated accounts *can* be taxes. (*See* WMC's Br. 21.) Pewaukee falsely asserts that one of those cases (*Elsner*) did not involve a dispute over whether a segregated utility-account charge was a tax. (Pewaukee's Br. 16–17.) In *Elsner*, the city argued that the disputed charge was "a special assessment." *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 108, 135 N.W.2d 799 (1965). The court held that the charge was "not a special assessment," *id.* at 109, but instead was an excise tax or a general property tax, *id.* at 106–07.

Finally, Pewaukee suggests that the special-charges statute supports its view that its TUF is not a tax. (Pewaukee's Br. 15, 17, 30.) But Pewaukee has not responded to WMC's argument that this statute has no bearing on the tax-

versus-fee distinction. (WMC's Br. 19-20.) "Unrefuted arguments are deemed conceded." *Verhagen*, 2013 WI App 16, ¶ 38.

WMC does not understand Pewaukee to be arguing that its TUF is a special charge. After WMC explained why the TUF is not a special charge (R. 49:3-5), Pewaukee conceded the point (R. 65:24-25). If Pewaukee is implying otherwise, this Court should decline to consider that undeveloped argument. *See Techworks*, 2009 WI App 101, ¶ 27.

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

1. Pewaukee's TUF is illegal because it lacks clear and express statutory authority.

Pewaukee argues that the *Buchanan* court did *not* hold that "Wisconsin Statutes do not authorize municipalities to impose a TUF on property owners based on estimated use of the municipality's roads." (Pewaukee's Br. 35 (quoting *Buchanan*, 2023 WI 58, ¶ 2).) Pewaukee is wrong. The court used that quoted language when reciting Wisconsin Property Taxpayers' argument, and the court stated it "agree[d]" with that argument. *Buchanan*, 2023 WI 58, ¶ 2. The court's agreement on that point is precedential. And, regardless of whether that language is precedential, "a tax cannot be imposed without clear and express language for that purpose." *Id.* ¶ 11 (quoting *Elsner*, 28 Wis. 2d at 106).

Because Pewaukee does not dispute that its TUF is illegal *if it is a tax*, this Court need only conclude that the TUF is a tax in order to reverse.

2. Pewaukee's TUF is a non-uniform, unconstitutional property tax.

Pewaukee argues that *Buchanan* is not precedential on the Uniformity Clause issue and that the Uniformity Clause is inapplicable here because the TUF is a fee. (Pewaukee's Br. 36.)

Although the *Buchanan* majority opinion did not resolve the Uniformity Clause issue presented there, *Buchanan* still provides support for WMC's Uniformity Clause argument. (WMC's Letter 5-7.)

Even without *Buchanan*, Pewaukee's TUF violates the Uniformity Clause. (WMC's Br. 25-27.) Pewaukee has not developed an argument that its TUF satisfies the Uniformity Clause *if the TUF is a property tax* (which it is).

II. Three statutes preempt Pewaukee's TUF, whether it is a tax or a fee.

Pewaukee argues that Wis. Stat. § 349.03(2) does not apply here because the TUF is not a traffic regulation. (Pewaukee's Br. 29.) But this statute bars municipalities from imposing "tax and toll" on highways. (WMC's Br. 32 (quoting *City of Madison v. Reynolds*, 48 Wis. 2d 156, 159, 180 N.W.2d 7 (1970).) And because *Buchanan* confirms that Pewaukee's TUF is a property tax (*see* WMC's Letter 1-3), *Buchanan* reinforces that Pewaukee's TUF violates section 349.03(2).

Pewaukee argues that "the language concerning tolls [in *Reynolds*] was *dicta*." (Pewaukee's Br. 29.) This Court may not disregard supreme court language as dicta. *Zarder*, 2010 WI 35, ¶ 58.

Pewaukee contends that the TUF is not a toll because it does not create physical impediments. (Pewaukee's Br. 29-30.) That argument fails under *Reynolds* because the TUF imposes charges for use of the roads, and this statute prohibits such local charges. (WMC's Br. 32-34.)

Pewaukee claims that its TUF "is not charged for using the streets." (Pewaukee's Br. 28.) That premise is wrong because, as Pewaukee admits, the TUF is charged to cover the costs resulting from "use" of the streets. (Pewaukee's Br. 29.)

Pewaukee also argues that section 349.03(2) is inapplicable here because the TUF is not completely unavoidable. But most property owners in Pewaukee cannot avoid paying the TUF. And this statute bars typical local tolls although they are avoidable. (WMC's Br. 34.)

The levy limit statute (Wis. Stat. § 66.0602) and a property tax exemption statute (Wis. Stat. § 70.11) also preempt Pewaukee's TUF, regardless of whether it is a fee or a tax. (WMC's Br. 34–36.) *Buchanan* compels this conclusion. (WMC's Letter 4-5.)

Citing *Grace Episcopal Church*, Pewaukee argues that section 70.11 is inapplicable here because the TUF is not a property tax. Pewaukee is wrong for three reasons. First, the TUF is a property tax, not a special charge. Second, even if the TUF is a fee, it violates the spirit and purpose of section 70.11. (WMC's Br. 34-36.) Third, *Grace Episcopal Church* did not address a

preemption issue and thus sheds no light on whether this statute preempts the TUF.

Pewaukee argues that Wis. Stat. § 66.0602(3)(a) did not require it to reduce its levy limit to offset the TUF. (Pewaukee's Br. 31-32.) Pewaukee's discussion of section 66.0602(2m) and (3)(a) is irrelevant because WMC is not arguing that those subsections required a reduction in Pewaukee's levy limit. Instead, WMC argues that Pewaukee is using its TUF to effectively increase its levy limit, contrary to the purpose and spirit of subsection (2). Rather than directly addressing this argument, Pewaukee attacks an argument that WMC never made.

Finally, Pewaukee asserts that WMC's preemption arguments assume that the TUF is a tax. (Pewaukee's Br. 26.) But WMC has maintained that the TUF is preempted even if it is a home-rule fee. (WMC's Br. 32-38; WMC's Letter 4.) Pewaukee's discussion of home-rule authority is irrelevant to the preemption issue because these statutes lawfully can and do preempt home-rule authority. (Pewaukee's Br. 28-29; WMC's Br. 36-37.)

III. Pewaukee's TUF is *ultra vires* and illegal even if it is a fee.

Even if Pewaukee's TUF is a fee, it is illegal because it lacks statutory authorization and exceeds home-rule authority. (WMC's Br. 27-31.)

This Court need not consider those alternative arguments because *Buchanan* confirms that Pewaukee's TUF is a tax. (WMC's Letter 1-3.) And by not arguing otherwise, Pewaukee concedes that its TUF lacks statutory authorization and exceeds home-rule authority *if it is a tax* (which it is). (*See* WMC's Letter 3-4.)

Even if Pewaukee's TUF is a fee, it exceeds statutory and constitutional home-rule authority because (1) the TUF implicates the use of public streets, which is a matter of statewide concern; and (2) the TUF possesses sufficient attributes of a tax. (WMC's Br. 27-29.) Pewaukee does not seem to dispute this first point and thus concedes the issue. *See Verhagen*, 2013 WI App 16, ¶ 38. Any possible home-rule analysis ends there.

On the second point, Pewaukee argues that the charge in *Jordan* exceeded home-rule authority because it was a tax. (Pewaukee's Br. 23.) But the *Jordan* court held that the charge at issue there was a permissible

"equalization fee" under Wis. Stat. § 236.45, "not a property tax." *Jordan*, 28 Wis. 2d at 622. The court also held that the equalization fee did not violate the Uniformity Clause because "if a tax, [the equalization fee] partakes of the nature of an excise tax." *Id.* In other words, *if that fee were a tax*, it would be an excise tax rather than a property tax. The court did *not* hold that the fee was a tax. Because the fee *sufficiently resembled* a tax, though, it exceeded home-rule authority. *Id.* at 621. The same reasoning applies here if the TUF is a fee. (WMC's Br. 28-29.) Tellingly, Pewaukee does not argue that its TUF is distinguishable from the equalization fee in *Jordan*.

Pewaukee argues that municipalities previously operated water and sewer utilities without statutory authority. (Pewaukee's Br. 13.) But Pewaukee has not cited any case law holding that a municipality may impose a charge on its residents, without statutory authority, simply by calling the charge a "utility fee." Pewaukee suggests that *Ellinwood* supports that novel view (Pewaukee's Br. 14), but *Ellinwood* does not (WMC's Br. 29). Instead of developing a reasoned legal argument, Pewaukee calls WMC's view "nonsensical." (Pewaukee's Br. 23.) There is nothing nonsensical about requiring the legislature's approval for a municipal fee that sufficiently resembles a tax (as in *Jordan*) or otherwise implicates statewide concerns.

Despite arguing that its TUF needs no statutory authority, Pewaukee asserts that Wis. Stat. § 66.0621 authorizes its TUF. (Pewaukee's Br. 24-25.) Pewaukee's reliance on this statute is misplaced. Contrary to Pewaukee's assertion, WMC does not argue that this statute requires a village to finance a utility through the general fund or revenue bonds. A village may fund a utility with any lawful method, and authority to charge a fee comes from statutes other than section 66.0621. (WMC's Br. 30.) But no statute, including section 66.0621, authorizes a village to charge properties for their estimated road usage. (WMC's Br. 30-31.) *Accord Buchanan*, 2023 WI 58, ¶ 2.

Pewaukee has not shown otherwise. Pewaukee claims that "[t]he plain language of §66.0621(1) 'grants authority for municipalities to collect revenue to fund public utilities.'" (Pewaukee's Br. 24.) But that language appears nowhere in this statute. Even if that imaginary language were real, it would not authorize a TUF. (WMC's Br. 30.)

Pewaukee faults WMC for not citing authority holding that a village needs a statute to create a utility and a separate funding statute that "uses the words 'Transportation User Fee.'" (Pewaukee's Br. 25.) WMC is not advancing that argument. WMC argues that if Pewaukee's TUF is a fee, it exceeds home-rule authority and thus requires (but lacks) statutory authority.

CONCLUSION

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

Dated this 9th day of August 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 2,997 words.

Dated this 9th day of August 2023.

Electronically signed by

Scott E. Rosenow

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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 9th day of August 2023.

Electronically signed by

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