STATE OF WISCONSIN
SUPREME COURT

WISCONSIN MANUFACTURERS AND COMMERCE, INC.,

Plaintiff-Appellant,

Appeal No. 2023-AP-690

v.

VILLAGE OF PEWAUKEE,

Defendant-Respondent-Petitioner.

PETITION FOR REVIEW AND APPENDIX

Opinion of the Court of Appeals, District II, Opinion Recommended for Publication
Reversing a Final Judgment of the Circuit Court for Waukesha County
The Honorable Michael J. Aprahamian, Presiding
Circuit Court Case No. 22-CV-515

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(1) Is the Village of Pewaukee's Transportation User Fee (TUF) a fee that lawfully funds the services provided by the Village's utility or is it instead an unlawful tax?

> Answer by Circuit Court: **The charge is a lawful fee**.
> "Reviewing this and other authority against the Ordinance, the Court concludes that the TUF is a fee and not a tax. Although the funds generated by the TUF are described as revenue this does not mean that it is a tax or that its main purpose is to generate revenue. The term that the TUF uses to refer to the money that it collects is no more relevant to the analysis of whether it is a tax than the fact that the TUF is called a fee. The purpose of the charge and not the name of the charge determines whether it is a fee or a tax. What matters is whether the primary purpose of the TUF is to generate revenue for the government or if it is a charge related to the costs associated with a service that the Village provides." (Circuit Court decision, ¶ 56).
>
> Answer by Court of Appeals: **The charge is an unlawful tax**.
> "Our analysis is straightforward in light of *Town of Buchanan*, 408 Wis. 2d 287. This unanimous decision directly addressed the legality of a 'transportation utility fee' implemented by the Town of Buchanan. Like the TUF at issue here, the purpose of Buchanan's fee was to fund a transportation utility that would be responsible for funding 'safe and efficient transportation facilities within the Town.' *Id*., ¶3. Also like the Village, the Town of Buchanan sought to fund its utility with a fee imposed on '[e]very developed property within the Town.' *Id*. . . . The supreme court held that the funding mechanism for Buchanan's transportation utility was a tax. Id., ¶10. Thus, we must hold that the TUF at issue here is also a tax." (Appellate Court decision, ¶ 7).

(2) Did the Wisconsin Supreme Court decision in *Wisconsin Property Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100, wherein the parties stipulated that the Town's utility charge was a "tax," bind the court of appeals to hold that the Village of

Pewaukee's charge, although specifically designed as a user fee, was nonetheless an unlawful tax?

Answer by Circuit Court: **Not Answered**.
The circuit court's decision was issued on March 9, 2023; and the *Town of Buchanon* decision was released by the supreme court on June 29, 2023.

Answer by Court of Appeals: **The *Town of Buchanon* decision required that the court of appeals rule the Village of Pewaukee's TUF was an unlawful tax.**
"Because we conclude that the TUF is an impermissible tax under our supreme court's decision in *Town of Buchanan*, we reverse." (Appellate Court decision, ¶ 3).

(3) If the Village of Pewaukee's TUF is, in fact, a fee, is such a fee nonetheless preempted by state law?

Answer by Circuit Court: **No, the fee is not preempted**.
"Accordingly, under both the Anchor test and the test of paramountcy, the Court concludes that the TUF is not preempted by state law." (Circuit Court decision, ¶ 49).

Answer by Court of Appeals: **Having decided that the TUF is a tax, the court of appeals did not reach this issue.**

Procedural posture of the case.

The parties filed cross-motions for summary judgment. In a decision issued by the circuit court on March 9, 2023, the court found that the Village of Pewaukee TUF was a lawful fee not otherwise preempted by state law and dismissed the WMC lawsuit upon its merits.

WMC timely appealed. While this matter was on appeal, the Wisconsin Supreme Court released its decision in the *Town of Buchanon.* On February 7, 2024, the court of appeals issued a summary disposition that reversed the circuit court upon finding that the supreme court's decision in *Town of Buchanon* required that it rule that the TUF is an unlawful tax.

WMC moved the court to withdraw its summary disposition and reissue its decision as a formal opinion with recommendation for publication. WMC argued that the decision in this case is of statewide importance and wanted the case to be citable.

On March 5, 2024, the court of appeals granted the motion of WMC and withdrew its summary disposition. [1]

On March 13, 2024, the court of appeals issued its decision in a formal opinion finding that the Village's TUF is an unlawful tax, reversing the circuit court, and recommended its opinion for publication.

The Village of Pewaukee now seeks supreme court review in this matter via this Petition for Review. This Petition is timely pursuant to Wis. Stat. §§ 808.10(1) and 809.62 (1m)(a).

[1] When the court of appeals withdrew its summary disposition, that resolution became a legal nullity. *Wis. Stat. § 809.23*; Court of Appeals Note 1997: "As in the case of reconsideration of a Court of Appeals decision or opinion, withdrawal of an opinion renders that opinion a nullity."

Criteria for accepting review

The court has wide latitude, within its sound discretion, to grant review "when special and important reasons are presented." WIS. STAT. § 809.62(1r). In the non-exhaustive criteria that generally govern when review may be appropriate, this petition implicates §§ 809.62 (1r):

> (a) A real and significant question of federal or state constitutional law is presented.
> (b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.
> (c) A decision by the supreme court will help develop, clarify or harmonize the law, and
> 1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
> 2. The question presented is a novel one, the resolution of which will have statewide impact; or
> 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.
> (d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.
> (e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

A. The Petition raises a genuine issue of state constitutional law.

First, the issues presented here raise a real and significant question of state constitutional law. Specifically, the "Home Rule" provision of the Wisconsin Constitution, Article XI, Section 3. "Longstanding Wisconsin law supports the proposition that political subdivisions retain their ability to govern in the absence of state legislation." *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 29, 342 Wis. 2d 444, 820 N.W.2d 404. This "bedrock principle" was reinforced via constitutional amendment almost a century ago. *Id.*.

In creating its TUF, the Village acted pursuant to authority granted by Chapters 61 and 66 of the Wisconsin Statutes, including but not limited to Sections 61.34 and 66.0621. *Village of Pewaukee Ordinance §92.100(c)*. Wisconsin municipalities have broad authority to create, manage, and finance utilities. The Village's TUF is a financing mechanism that treats its street system and other transportation services like a utility. Under the TUF, residents and businesses are charged fees based on their use of the transportation system, analogous to how municipalities provide and pay for water, sewer, electric, and stormwater services.

In deciding that the Village's TUF was a tax, the court of appeals relied upon the supreme court's analysis of a funding mechanism enacted by a town – but towns do not possess home rule authority. The court of appeals got its analysis backwards: feeling bound by *Town of Buchanon* to start from the proposition that Pewaukee's fee was automatically a tax, the court of appeals found no significance in the Village's home rule authority.

"The Village does not explain, and we do not perceive, the relevance of this fact to the question of whether a charge is a fee or a tax; it can only arguably relate to the legality of a fee, since a village may not adopt a tax under its home rule authority. See *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965)." Rather than analyze the legality of Pewaukee's TUF as derivative of its home rule authority permitting the creation of a fee, the court of appeals went straight to the proposition that the charge was a tax and looked

backwards to determine whether home rule authority permitted the enactment of a tax.

This court must correct that error. *Buchanon* does not require an analysis under which the Village's TUF as a tax becomes a "given." Unlike *Buchanon,* this case does not proceed from a stipulation between the parties that the TUF is a tax. Unlike *Buchanon,* this case involves a municipality with home rule authority. Unlike *Buchanon,* the Village's TUF derives from state constitutional powers that were not under review in *Buchanon.*

This case raises a genuine issue of state constitutional law and should be accepted for review.

B. Review will establish policy within the court's authority.

As has been demonstrated in the court of appeals' interpretation of the language within *Town of Buchanon,* the courts below view *Buchanon* as establishing a judicial policy that all TUF's – whether enacted by towns, villages or cities - are automatically taxes instead of fees. That sweeping conclusion goes impermissibly far. It ignores the crucial importance of a village's home rule authority and risks rendering that authority meaningless. Yet that is what language such as "funds raised for utility districts under Wis. Stat. §66.0827 are property taxes" implies. *Buchanon,* 2023 WI 58, ¶2.

In *Buchanon,* the concurrence undertook a lengthy analysis of the circumstances under which special assessments differ from taxes. *Id.,* ¶¶ 44-50. However, no such analysis was undertaken as to the distinction between fees and

taxes. The concept of "use" versus an analysis of "benefit" was not undertaken in *Buchanon.*

The distinction, propriety and legality of municipal fees must be the subject of judicial review. With language in *Buchanon* that appears to subsume the important constitutional powers of cities and villages to finance the provision of services is at sharp odds with a policy that "funds raised for utility districts are property taxes."

Review in this case will afford the court an opportunity to review, revise and establish that municipalities have a legal and longstanding power to enact user fees to fund services provided to their citizens, without running afoul of a *de facto* characterization of such fees as property taxes.

C. Clarify or harmonize the law.

Review in this matter will permit the court to harmonize the Village's use of fees to fund its utilities and reiterate that municipal fees are a lawful exercise of home rule authority. In the state's early years, no statutes existed expressly authorizing cities and villages to own and operate water, sewer, and other common municipal utilities. Instead, municipalities relied on non-specific, broad police power authority to create and fund such now-familiar utilities.

Notably, the Wisconsin Supreme Court determined early on that Wisconsin municipalities do not need explicit statutory authority to create a municipally owned utility. In *Ellinwood v. City of Reedsburgh*, 91 Wis. 131, 64 N.W. 885 (1895), the Court held that:

> It is not necessary to seek for an express delegation of power to the city to build a waterworks and electric lighting plant in order to determine whether such power exists, for the general power in respect to police regulations, the preservation of the public health, and the general welfare includes the power to use the usual means of carrying out such power, which includes municipal water and lighting services.

Id. at 886. Similarly, a general grant of authority to act for the public health and general welfare is adequate legal authority today, for the Village to create, operate and finance through user charges its TUF.

Wisconsin villages are vested by the state legislature with broad general police powers. The grant of authority is provided to Wisconsin village boards by Wis. Stat. § 61.34, which provides:

> Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

Wis. Stat. § 61.34(1). The Legislature has directed courts to liberally construe this provision "in favor of the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages and the inhabitants thereof." Wis. Stat. § 61.34(5).

This grant of power to villages is substantial and give the governing body of a village "all the powers that the legislature could by any possibility confer upon it." *Hack v. City of Min. Point*, 203 Wis. 215, 233 N.W. 82 (1930). These provisions are sufficient on their face to authorize the village board to create the TUF.

The powers of home rule authority, fees, special assessments, and taxes must co-exist; any other interpretation renders one or more superfluous. The "rule" is home rule authority; the "exception" is when the state pre-empts that authority.

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." *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). In applying the above preemption tests to the Village's TUF, the state has not expressly prohibited the use of fees.

A home rule enactment is unenforceable only if it is expressly prohibited as a matter of statewide preemption. *City of Madison v. Reynolds*, 48 Wis. 2d 156, 160, 180 N.W.2d 7 (1970). The police powers under home rule authority are broad, and in our case Wis. Stat. §61.34 specifically extends them to the Village's management and control of streets and highways, unless expressly limited by other statute.

In *Black v. City of Milwaukee*, 396 Wis. 2d 272, 882 N.W.2d 333 (2016), the supreme court noted "[w]e have long recognized 'that the terms "local affairs" and "statewide concern" in the home rule amendment are problematically vague.'" *Id*.,

at 298. "As part of our statewide or local concern analysis, 'we have outlined three areas of legislative enactment: those that are (1) exclusively a statewide concern; (2) exclusively a local concern; or (3) a "mixed bag."' Id. And, ultimately, if a "legislative enactment touches on an issue that concerns both statewide and local government interests (a 'mixed bag')," then a court must determine whether the matter is 'primarily' or 'paramountly' a matter of statewide or local concern." Id., at 299 (internal citations omitted).

In our case, the purpose of the Village's TUF covers the cost to administer, manage, improve, update and repair the transportation network within the Village limits. The utility does not limit access, does not charge tolls or remove road availability, and does not "implicate" the road structure, access or use of the road system outside its boundaries. The TUF is "paramountly" designed to address local concerns as is expressly permitted by Wis. Stat. §61.34. Because there is no statute that prohibits the creation of a transportation utility fee, Pewaukee's TUF is not a prohibited home rule encroachment on an exclusive statewide concern.

Review of this matter will permit the court to harmonize the law controlling home rule authority, municipal fees and property taxation.

D. The court of appeals decision conflicts with *Bentivenga*.

As discussed above and elsewhere in this Petition, the court of appeals' decision does not undertake the analysis required by *Bentivenga v. City of Delevan*, 2014 WI App 118, 358 Wis. 2d 610, 856 N.W.2d 546 (2014). The court of appeals starts with a conclusion (as it felt it must under the *Buchanon* decision) – that the

Village TUF is a tax – and dismisses the Village's powers to construct a fee as immaterial. (Appellate opinion at ¶ 9).

In *Bentivenga v. City of Delavan*, the Wisconsin Court of Appeals explained the primary difference between a tax and fee as follows: A tax is an "enforced proportional contribution[ ] from persons and property" levied to support a government and its needs. *State ex rel. Bldg. Owners & Managers Ass'n v. Adamany*, 64 Wis.2d 280, 289, 219 N.W.2d 274 (1974) (citation omitted). The purpose, and not the name it is given, determines whether a government charge constitutes a tax. *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.,* 6 Wis.2d 299, 305–06, 94 N.W.2d 584 (1959).

"[T]he primary purpose of a tax is to obtain revenue for the government" as opposed to covering the expense of providing certain services or regulations. *City of River Falls v. St. Bridget's Catholic Church of River Falls*, 182 Wis.2d 436, 441–42, 513 N.W.2d 673 (Ct.App.1994). A "fee" imposed purely for revenue purposes is invalid absent permission from the state to the municipality to exact such a fee. *Milwaukee & Suburban Transp.*, 6 Wis.2d at 306, 94 N.W.2d 584.

The word "revenue" is a non-determinative noun. It can mean both "general revenue" (i.e. – property taxes) and it can also mean fees (i.e.- recovery of service fees). Thus, 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. What the Pewaukee's Utility does first is consult the engineering determination of the expenses that each user will generate in the provision of the Village utility's services

and thereafter sets fee rates to cover those expenses. *Pewaukee Ordinance §92.105(c)*. The fees here are charged to cover the costs of specific services provided. The fees are set at a rate reasonably estimated to cover the costs of the services and the Village maintains a separate budget and account for those transportation services. *Ordinance § 92.105(b)*. All revenue generated from the fees is used solely to fund the Transportation Utility in the performance of its duties, and none of the money is commingled with the Village's general fund. *Ordinance §92.102(b)*.

The Village's TUF is neither a property nor excise tax. The TUF is a fee, and it has a designated, specific use while the funds remain in a segregated account to prevent the comingling with the general revenue fund, thus keeping the distinction between fee and tax.

Accepting review of this matter will allow the court to rectify the conflict between the court of appeals' opinion and *Bentivenga.* Doing so will permit a correction of an error of law that imperils a fundamental constitutional right of the Village of Pewaukee.

E. Review of this case is important because special and important reasons of statewide concern are presented.

There can be no genuine dispute that the final, controlling decision in this case will settle an issue of statewide importance. This decision was so important to WMC that when the court of appeals initially issued its summary disposition, WMC brought a motion asking that the court withdraw its disposition and reissue its

decision as a written opinion and recommend publication. It would be, at best, disingenuous for WMC to oppose this petition, given its demonstrated position that the issues herein are important enough to warrant the court of appeals issuing a written opinion that can be cited as controlling law.

It is imperative that the supreme court accept review of this matter and offer direction and controlling law to both the municipalities and taxpayers of the state on the balance of law, precedent, home rule, tax levies, and legality of fees that municipalities enact under their home rule authorities vs. the arguments of entities like WMC that fees can only be enacted by specific, discrete statutory directive.

F. Without review of this case, the issues of municipal home rule authority will be the subject of repeat litigation.

The issue of municipalities' abilities to fund services through user fees that are created under home rule authority is a not-so-secret target of WMC's challenge to the Village's TUF in this case. Throughout the state, special interest organizations are targeting funding through home rule.

Make no mistake about it, the *Buchanon* case and the court of appeals' decision below are already being used by "tax advocates" to challenge municipal fees for other village services. While occurring after the court of appeals' decision and therefore not specifically part of the appellate record below, it is public record that, since the appellate decision in this case, WMC has served Notices of Claim and Claims upon the Village of Pewaukee asserting that its

Fire and EMS Fee is illegal, and against the Village of Dousman asserting that its Fire Protection Fees are illegal.[2]

Accordingly, review in this case will help establish that home rule authority for villages and cities is the "rule" in Wisconsin, and the "exception" occurs when the state specifically preempts that authority through statutory legislation – rather than the other way around. Supreme court review and a consequent opinion present an opportunity to inform litigants in those claims and help avoid repetitive appellate litigation of the issues.

Statement of facts and of the case.

This action arises from the Village of Pewaukee's creation of a Transportation Utility and the fee it charges to fund the maintenance, construction, and reconstruction of transportation infrastructure within the Village. The Village funds its utility through a user fee.

Wisconsin Manufacturers and Commerce, Inc. is a special interest advocate for a "business association" and has challenged the Village's TUF as an improper tax or, if the TUF is a fee, that it is improper because the fee is preempted by state law.

The Village's TUF is the product of its statutory Home Rule Authority, and WMC's challenge to the TUF attempts to abrogate that constitutional power of the Village. In June of 2023, the Wisconsin Supreme Court issued its decision in *Town*

[2] Copies of the Notices, which are public record, are included in the Petitioner's Appendix.

of Buchanan. The dispositive difference, though, is that as a town, Buchanon had no home rule authority. As such, the parties in *Buchanon* stipulated that the town's utility charge was a tax, with the town arguing that it had specific authority to charge the type of tax that funded its utility.

Thus, whether the utility charge was a fee or a tax was not before the supreme court in *Buchanon.* When the *Buchanon* decision was initially released, the court of appeals ordered the parties to supplement their briefing to analyze *Buchanon.*

Following the parties' analysis, the court observed, "the Village points out that the parties in *Town of Buchanan* did not dispute that the charge in that case was a tax on town residents . . . *Wieting Funeral Home of Chilton, Inc. v. Meridian Mutual Insurance Co.*, 2004 WI App 218, ¶14, 277 Wis. 2d 274, 690 N.W.2d 442: '[A]n opinion does not establish binding precedent for an issue if that issue was neither contested nor decided.' The Village is correct that the Town of Buchanan did not dispute that its transportation utility fee was, in fact, a tax. *Town of Buchanan*, 408 Wis. 2d 287, ¶10." Nevertheless, the court of appeals went on to hold that the supreme court's recitation that "[t]he parties are correct" in their stipulation effectively constituted a decision that all TUF charges are taxes; and, "[b]ecause we conclude that the TUF is an impermissible tax under our supreme court's decision in *Town of Buchanan*, we reverse." (Court of Appeals decision, ¶3).

A. Why the Village's TUF is a fee.

On February 2, 2021, the Village adopted Resolution No. 2021-02 creating Chapter 92 of the Village Code regarding a Transportation Utility/User Fee

(hereinafter "TUF"). The Ordinance identifies its purpose as protecting the general public welfare with "[t]imely maintenance, construction and reconstruction of the Village's transportation system ensures safe and efficient travel throughout the Village. A sound transportation system enhances livability, property values and economic vitality." Ordinance § 92.100(a). (R. 3, Ordinance attachment)[3] The Transportation Utility is under the supervision of the Village's legislative body, the Board. *Id.* § 92.100(d).

Two basic types of "fees" are authorized under the Ordinance. First, a "base fee" is imposed on all developed property to reflect the fact that all developed properties benefit from "access to the transportation system" of the Village and that all developed properties contribute in some way to the administrative costs, fixed capital, operating and maintenance costs that are not recoverable by the usage fee. *Id*. § 92.105(a)(1). Second, a "usage fee" that is determined by multiplying the number of trips assigned to the utility account by the per-trip rate. *Id*. § 92.105(a)(1).

For each utility account, the Village Engineer determines the category of use from the International Traffic Engineer's Manual that shall apply to each developed utility account. *Id.* § 92.105(c). The per-trip rate is determined by dividing the target budget by the total number of trips generated by all utility accounts. *Id.* §

[3] The Ordinance can be viewed online at: https://library.municode.com/wi/pewaukee/codes/code_of_ordinances?nodeId=PTIIMUCO_CH92TRUT

92.105(a)(2). The base fee and pre-trip rate are in an amount set forth by resolution of the Village Board. *Id.* § 92.105(b).

The Ordinance sets forth a collection procedure. The TUF is billed and collected quarterly "as part of the combined Village Utility billing which includes water, wastewater, and stormwater fees." *Id.* § 92.106(a). The Ordinance also sets forth a waiver of the "usage fee" in the case of vacancy. *Id.* § 92.107. Finally, the Ordinance sets forth an appeal procedure for the usage fee for properties where it is argued the fee is disproportionate. *Id.* § 92.108.

As the circuit court properly determined, "a municipality may levy a charge if the money generated by the charge is used to fund a service provided by the municipality. Because the Village may only use the funds generated by the TUF for road maintenance and the charges are reasonably related to the road use and the costs of road maintenance, the Court concludes that the TUF is a fee and not a tax." (Circuit Court decision, ¶63).

By reversing the circuit court, the court of appeals relied upon *dicta* within *Buchanon* and, in so doing, deprived the Village of Pewaukee of the home rule authority that the Wisconsin Constitution created[4], and that the State of Wisconsin assigned to Villages and Cities through Wis. Stat. §§ 61.34 and 66.0621. The court of appeals decision must be reversed.

[4] Wis. Const., Art. XI, sec. 3

Simply put, the supreme court must accept review of this case to make clear that cities and villages have the statutory power to create municipal fees that towns like Buchanon do not possess. Evaluating the Village of Pewaukee's TUF through reasoning more properly limited to the stipulated set of facts applicable to the Town of Buchanon was reversible error.

ARGUMENT

I. The Village of Pewaukee did not need explicit statutory authority to create a transportation user fee.

In addition to the statutory powers mentioned above, Wis. Stat. § 66.0627 provides authority for a municipality to charge property owners for municipal transportation-related services. Under § 66.0627(2), a municipal governing body may impose a special charge against real property for current services rendered by allocating all or part of the cost to the properties served. The statutory definition of "services" includes transportation maintenance activities like "street sprinkling, oiling and tarring, repair of sidewalks or curb and gutter." *Id*. The examples given are not meant to limit its application in any way, but merely to highlight possible uses. *Rusk v. City of Milwaukee*, 2007 WI App. 7, ¶ 17, 298 Wis. 2d 407. The fact that the entire transportation system is being maintained is sufficient to charge all property owners using the system a fee for current services rendered.

The fees the Village has imposed under its TUF do not constitute taxes, but fees for the services performed, or to be performed, by its Transportation Utility that will benefit the landowners of the Village in the proportion that they use the

services. The primary difference between a tax and a fee is the source of the municipality's power and most importantly, the municipality's purpose in imposing the charge.

In *Bentivenga v. City of Delavan*, the Wisconsin Court of Appeals explained the primary difference between a tax and fee as follows:

> The purpose, and not the name it is given, determines whether a government charge constitutes a tax. *City of Milwaukee v. Milwaukee & Suburban Transp. Corp*., 6 Wis.2d 299, 305–06, 94 N.W.2d 584 (1959). "[T]he primary purpose of a tax is to obtain revenue for the government" as opposed to covering the expense of providing certain services or regulation. *City of River Falls v. St. Bridget's Catholic Church of River Falls*, 182 Wis.2d 436, 441–42, 513 N.W.2d 673 (Ct.App.1994).

The Villages TUF is set at a rate reasonably estimated to cover the costs of the services and the Village created and maintains a separate budget for transportation. *Ordinance § 92.105(b)*. All revenue generated from the fees are used solely to fund the Transportation Utility in the performance of its duties, and none of the money is commingled with the Village's general fund. *Ordinance §92.102(b)*.

The purpose of the TUF is exclusively to help pay for the cost of a specific governmental service, street maintenance. The Village's TUF involves fees for a specific governmental service, street maintenance. *Ordinance §92.102(a)*. The TUF does not apply to undeveloped property (Id. § 92.104) and provides a waiver of the fee in the case of vacancy (*Id*. § 92.107). The TUF is based on the developed properties' direct and indirect uses of, or benefits derived from the use of, the transportation system. *Id*. §92.103(b). Further, the TUF can be paid by the "owner, occupant, business, or anyone designated by the owner." *Id*. §92.103(d).

II. The Village's TUF is not preempted by state law.

Although not addressed by the court of appeals, the issue of preemption or, as the circuit court called it, paramountcy – was an additional challenge to the Village's TUF raised by WMC in its appeal. Municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with but, rather, complement the state legislation. *Johnston v. City of Sheboygan*, 30 Wis. 2d 179, 184, 140, N.W.2d 247, 250 (1966). Moreover, the Court has a responsibility to uphold the validity of an ordinance if there is any reasonable basis for so doing. *Id*. at 185. As outlined below, the Village's ordinance is not in conflict with any state statute.

A. The Village's Transportation Utility Fee is not preempted by Wis. Stat. § 349.03(2).

Wis. Stat. § 349.03(2), protects the free use of all highways. No local authority may enact or enforce any traffic regulation in any manner excluding or prohibiting any motor vehicle from free use of all highways, except as authorized by specific statutes, "free use of all highways" means accessible to everyone. *City of Madison v. Reynolds*, 180 N.W.2d 7, 48 Wis.2d 156, 159 (1970).

Foremost, the TUF is not a traffic regulation making Wis. Stat. § 349.03(2) inapplicable. Moreover, the Ordinance is not contrary to any specific provision of the vehicle code and does not bar any member of the public from use or access to any street.

B. The Village's Transportation Utility Fee is Not Preempted by Statutes Authorizing Methods of Municipal Finance.

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." *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). In applying the above preemption tests to the Village's TUF, the state has not expressly prohibited transportation utilities.

Indeed, the state has not entered the field of municipal transportation finance other than to explicitly authorize certain methods of funding transportation infrastructure improvements such as through the levying of special assessments under Wis. Stat. § 66.0703, imposing special charges for current services under Wis. Stat. § 66.0627, and charging local vehicle registration fees under Wis. Stat. § 341.35. None of these grants of authority impliedly preempt municipal authority to create a TUF.

Instead, the statute authorizing charges for current services rendered expressly provides the "authority under this section is in addition to <u>any other method provided by law</u>." Wis. Stat. § 66.0627 (2) (emphasis added). The Village's TUF, like other forms of special charges, is not part of the Village's general property taxing process and is not a general tax on Village property owners. In that regard, the TUF not only shares a common legal basis with special assessments, but the Village's TUF has also structured the application of the user fee on a recognized

and accepted methodology. The fee is based upon the number of vehicle trips each property is projected to generate determined by the category of use within the ITE Manual. *Ordinance § 92.105(a)(2) and (c).*

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

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

In this case, the Village Utility usage fee rate is also based on the trip generation manual of the Institute of Traffic Engineers. Ordinance §92.105(a)(2). As such, the fee calculations is fairly and equitably apportioned among property owners based upon their use of the utility service.

III. The Supreme Court's decision in *Town of Buchanon* does not control whether the Village's TUF is a tax and not a fee.

The court of appeals determined that it was bound by the decision in *Town of Buchanon* to find that Pewaukee's TUF is an unlawful tax. While both the *Buchanon* case and ours focus on the funding of a Transportation Utility, the method

of funding is dispositively different and the *Buchanon* decision is not binding precedent on the nature of the Village's TUF. The error in the court of appeals' reliance upon *Buchanon* was its determination that its analysis was required to begin from an assumption that the TUF was a tax, and it only needed to determine whether the nature of the Village's enactment somehow made the tax lawful.

In *Buchanon*, the parties agreed that the town's utility charge was a tax. The question of whether the TUF was a fee or a tax was not even before the *Buchanon* court for review.

Because the parties in *Buchanon* stipulated that the TUF was a tax, the question of whether a utility charge, properly constructed, could be a permissible user fee instead, was not before the court and was not ruled upon as a dispositive issue in the decision. "[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.*, 277 Wis. 2d 274, para. 14. The Village of Pewaukee's utility fee is not identical to the Town of Buchanon's special/property tax. The *Buchanon* court's tax analysis, therefore, is not binding upon any review of Pewaukee's TUF.

The court of appeals pointed to the following sentence in the *Buchanon* opinion: "The parties are correct; the TUF is a tax because the Town imposed it on a class of residents for the purpose of generating revenue." *Buchanon,* 408 Wis. 2d at 296. Because of the parties' "correct" stipulation to the Town's TUF being a tax, neither the court in *Buchanon* nor the court of appeals here, analyzed the differences between a fee and a tax as a utility funding device.

In *Buchanon,* the court wasn't required to perform a thorough and retrospective analysis of "fee," and "tax," and "revenue," and "cost," and "utility district" because the issue was stipulated and not before the court for resolution. Here, the Village of Pewaukee does *not* stipulate that its TUF is a tax. The Village's TUF funded the cost of providing a service to those who use that service.

In *Buchanon*, the town sought to create and fund a utility **district** – not merely a utility - under Wis. Stat. § 66.0827. By operation of statute, "[t]he fund of each utility district shall be provided by taxation of the property in the district." *Wis. Stat. § 66.0827 (2)*. In *Buchanon,* the statute plainly dictated that the funding mechanism under review was to be a property tax. The *Buchanon* decision is an evaluation of taxing methods, not a binding precedent on the distinctions between a tax and a fee.

Pewaukee's TUF is distinct in both the powers that permit a village to create and fund a utility, as well as the statutory sections under which Pewaukee chose to fund its utility. Those fundamental differences make the holding in *Buchanon* inapplicable to our case.

CONCLUSION

This Petition meets the criteria for review because it implicates a significant issue of state constitutional law, review of which will clarify or harmonize the law, define or explain policy controlling review within this court's authority, and correct an erroneous decision by the court of appeals that failed to apply precedent. The

issues presented by this petition are of statewide concern and impact the fundamental operational powers of municipalities.

Substantively, review is warranted and necessary to provide guidance and clarity regarding the powers of cities and villages under home rule authority. That authority is under ongoing attack throughout the state, and a decision on the issues raised in this petition will help define controlling law and minimize duplicative litigation on other types of fees used to fund municipal services.

For all these reasons, the Village of Pewaukee respectfully asks the court to grant the Petition for Review and reverse the court of appeals.

Dated this 12th day of April, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that:

This brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,531 words.

Dated this 12th day of April. 2024.

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