No. 2023AP690

In the Wisconsin Supreme Court

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

v.

VILLAGE OF PEWAUKEE,
Defendant-Respondent-Petitioner.

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

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Apparently, the Village of Pewaukee is unhappy that this Court unanimously struck down municipalities' use of "transportation utility fees" (TUFs) in *Wisconsin Property Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100. But that displeasure is not a reason for this Court to reconsider the issue it resolved in *Town of Buchanan*. That recent decision was correct, and the court of appeals simply applied it here. Like Buchanan, Pewaukee needs to find a lawful way to raise revenue for street repair. This Court should deny the petition for review.

ARGUMENT

This Court should deny the petition for review.

A. This case is a straightforward application of this Court's recent, unanimous decision in *Town of Buchanan*.

In *Town of Buchanan*, this Court unanimously agreed with the argument that "Wisconsin Statutes do not authorize municipalities to impose a TUF on property owners based on estimated use of the municipality's roads." *Town of Buchanan*, 2023 WI 58, ¶ 2. The Court held that, despite being labeled a fee, the town's TUF was a property tax. *Id.* ¶¶ 10, 18. As a property tax, the town's TUF was unlawful for several reasons: it was not calculated based on property value, it applied to tax-exempt property, and it exceeded the levy limit in Wis. Stat. § 66.0602. *Id.* ¶¶ 18–19, 22–31.

Here, the court of appeals simply held that Pewaukee's "TUF is an impermissible tax under our supreme court's decision in *Town of Buchanan*." (Pet.-App. 102 ¶ 3.) The court explained that its "analysis is straightforward in light of *Town of Buchanan*." (Pet.-App. 104 ¶ 7.) Notably, Pewaukee did "not dispute that the TUF at issue is illegal if it is deemed a tax." (Pet.-App. 106 ¶ 11.) The court of appeals correctly and succinctly rejected Pewaukee's arguments for circumventing *Town of Buchanan*.

First, the court correctly noted that this Court in *Town of Buchanan* had "explicitly held" that the town's TUF was a tax. (Pet.-App.

105 ¶ 8.) The court noted that "[a]n opinion does not establish binding precedent for an issue if that issue was neither contested nor decided." (Pet.-App. 105 ¶ 8 (quoting *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).) The court then correctly noted that this Court in *Town of Buchanan* had decided that the town's TUF was a tax: "the court explicitly held that '[t]he parties are correct' on this issue, citing case law . . . to explain its conclusion that 'the TUF is a tax because the Town imposed it on a class of residents for the purpose of generating revenue.'" (Pet.-App. 105 ¶ 8 (quoting *Town of Buchanan*, 2023 WI 58, ¶10).)

Second, the court of appeals correctly held that municipal home-rule authority was legally irrelevant here because "a village may not adopt a tax under its home rule authority." (Pet.-App. 105 ¶ 9 (citing *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965)).) That principle is correct. As this Court recently explained, municipalities "may only enact the types of taxes authorized by the legislature." *Town of Buchanan*, 2023 WI 58, ¶ 11 (citing *Blue Top Motel, Inc. v. City of Stevens Point*, 107 Wis. 2d 392, 395, 320 N.W.2d 172 (1982) (citing *Jordan*, 28 Wis. 2d at 621)). That rule is a limitation on municipal home-rule authority. *Jordan*, 28 Wis. 2d at 621; *N. Cent. Conservancy Tr., Inc. v. Town of Harrison*, 2023 WI App 64, ¶ 37, 410 Wis. 2d 284, 1 N.W.3d 707.

Third and finally, the court of appeals correctly held that Pewaukee's TUF was indistinguishable from the TUF in *Town of Buchanan*. (Pet.-App. 104–06 ¶¶ 7, 10.) The court noted that Pewaukee's argument rested on "scant evidence" and lacked citation to legal authority. (Pet.-App. 106 ¶ 10.) Pewaukee's undeveloped argument does not merit this Court's review.

In short, this Court generally does not review a decision that involved "merely the application of well-settled principles to the factual situation." Wis. Stat. § 809.62(1r)(c)1. The court of appeals here applied this Court's unanimous *Town of Buchanan* decision to Pewaukee.

B. Despite being published, the court of appeals opinion broke no new ground.

Initially, the court of appeals issued a summary disposition in this case. At first blush, a summary disposition made sense here because this case is a "straightforward" application of *Town of Buchanan*. (Pet.-App. 104 ¶ 7.)

Still, Wisconsin Manufacturers and Commerce Inc. (WMC) filed a motion requesting the court of appeals to withdraw its summary disposition and issue an authored opinion recommended for publication. *See* Wis. Stat. § (Rule) 809.23(4)(c). In its motion, WMC argued that a published court of appeals opinion was warranted here because several municipalities were flouting this Court's recent, unanimous decision in *Town of Buchanan*. As explained in that motion, even after this Court decided *Town of Buchanan*, municipalities were either continuing to enforce their TUFs or considering adopting TUFs. The court of appeals granted WMC's motion and issued an opinion that was recommended for publication. The opinion was ordered published on April 24.

This published court of appeals opinion should adequately show that the *Town of Buchanan* decision applies outside the Town of Buchanan. There is nothing for this Court to add. This Court's primary function is to "implement the statewide development of the law." *State v. Mosley*, 102 Wis. 2d 636, 665, 307 N.W.2d 200 (1981). This Court already developed this area of the law in *Town of Buchanan*.

Pewaukee urges this Court to "correct" an alleged "error" in the court of appeals decision. (Pet. 10.)[1] But the court of appeals correctly decided this case, as just explained. And even if the court of appeals erred (it did not), "mere error correction [is] inappropriate for [this Court's] review." *State v. Wantland*, 2014 WI 58, ¶ 2 n.3, 355 Wis. 2d 135, 848 N.W.2d 810.

[1] Pewaukee's petition for review does not use "sequential numbering starting at '1' on the cover" as required by Wis. Stat. § 809.19(8)(bm). When citing the petition for review, this response cites the court-stamped number at the top of the page.

C. There is no reason to second-guess this Court's unanimous decision in *Town of Buchanan*.

This Court was correct when it unanimously held that the TUF in *Town of Buchanan* was a property tax. *See Town of Buchanan*, 2023 WI 58, ¶¶ 10, 17–18. The petition for review here provides no reason to doubt that holding.

"The purpose, and not the name it is given, determines whether a government charge constitutes a tax." *Town of Buchanan*, 2023 WI 58, ¶ 10 (quoting *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶ 6, 358 Wis. 2d 610, 856 N.W.2d 546 (citing *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d 299, 305–06, 94 N.W.2d 584 (1959))). "A 'fee' imposed for the purpose of generating revenue for the municipality is a tax, and without legislative permission it is unlawful." *Id.* (citing *Bentivenga*, 2014 WI App 118, ¶ 11 (citing *Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d at 306)). In other words, a tax's primary purpose "is to obtain revenue for the government." *Bentivenga*, 2014 WI App 118, ¶ 6 (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)).

A tax is "[a]ny 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*." *Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d at 304 (emphases added) (citation omitted). Restated slightly, "[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 (emphases added). "A municipality acts in its governmental capacity when its primary objective is health, safety and the public good." *Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 181 Wis. 2d 778, 789, 512 N.W.2d 202 (Ct. App. 1993).

By contrast, a fee for municipal services is imposed "in the city's proprietary capacity," not "in the exercise of its sovereign power delegated to it by the state." *See City of De Pere v. PSC*, 266 Wis. 319,

325, 63 N.W.2d 764 (1954). Such a charge is "a voluntary fee 'in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society.'" *See id.* at 328 (citation omitted). "A municipality acts in its proprietary capacity when engaging in business with primarily private concerns, even if some elements are governmental." *Save Elkhart Lake*, 181 Wis. 2d at 789.

So a municipality imposes a tax in its governmental capacity for the public's general benefit, whereas a municipality imposes a fee for services in its proprietary capacity for a private benefit. *See, e.g.*, *City of De Pere*, 266 Wis. at 325 (holding a water-connection charge imposed "in the city's proprietary capacity" was a fee); *City of River Falls*, 182 Wis. 2d at 442–43 (holding a water-utility charge was "a fee, not a tax," because its purpose was "a proprietary function, not a governmental function"); *Bargo Foods North Inc. v. DOR*, 141 Wis. 2d 589, 597–98 & n.5, 415 N.W.2d 581 (Ct. App. 1987) (holding a county airport's user charge was a fee rather than a tax because operation of the airport "is a proprietary function"; distinguishing *Milwaukee & Suburban Transp. Corp.*, which involved "control of streets," "a governmental function").

Here, Pewaukee's TUF is a tax, just like the Town of Buchanan's TUF. Pewaukee's TUF is involuntarily imposed on all developed property within the village to pay for road repair and related expenses. "Maintenance 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). Road repair benefits the public generally, including out-of-towners who drive through Pewaukee without paying the TUF. Pewaukee's TUF "is a tax" because it "exact[s]" money to pay for "governmental functions" of "general benefit." *See Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d at 304 (citation omitted). Pewaukee's TUF is *not* a "voluntary" fee 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).

Against all this precedent, Pewaukee argues that cities' and villages' home-rule authority is relevant to whether a municipal charge is a tax or a fee. (Pet. 9–10.) But Pewaukee cites no legal authority for that odd notion, and none of the cases discussed above supports it.

In short, this Court was correct in *Town of Buchanan* when it unanimously held that the town's TUF was a tax. And the court of appeals was correct to apply that holding here.

D. Pewaukee's arguments are borderline frivolous, and some are forfeited.

Pewaukee suggests that *Town of Buchanan* is distinguishable here because that case did not involve a village, and villages have "home rule authority." (Pet. 10.) But, as explained above, home-rule authority is irrelevant to whether a charge is a tax or a fee—and villages may not rely on home-rule authority for enacting taxes that are not explicitly authorized by statute.

Nothing in *Town of Buchanan* suggests that this decision is limited to towns (or to the Town of Buchanan specifically). Instead, this Court correctly agreed with the argument that "Wisconsin Statutes do not authorize *municipalities* to impose a TUF on property owners based on estimated use of the municipality's roads." *Town of Buchanan*, 2023 WI 58, ¶ 2 (emphasis added). Citing cases involving a *city* and a *village*, this Court noted that "cities" and "towns 'have no inherent power to tax. [Towns] may only enact the types of taxes authorized by the legislature.'" *Id.* ¶ 11 (alteration in original) (citations omitted). Pewaukee has no way around *Town of Buchanan*.

Pewaukee asserts that its TUF "is not identical to the Town of Buchanon's" (*sic*). (Pet. 27.) But Pewaukee does not explain why it thinks its TUF is materially distinguishable from Buchanan's. The court of appeals indicated that this argument had no legal or factual basis. (Pet.-App. 105–06 ¶ 10.) Pewaukee has provided no basis for this argument in its petition for review, either. And this sort of fact-specific dispute is not worthy of this Court's review.

Pewaukee suggests that a municipal charge is a fee rather than a tax if it is earmarked for specific projects. (Pet. 15.) But Pewaukee cites

no authority for that proposition, which is wrong. 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). In *Town of Buchanan*, for example, this Court held that a TUF was an unlawful tax even though the town "handled funds collected under the TUF separately and in addition to the general tax levy in 2021." *Town of Buchanan*, 2023 WI 58, ¶ 5. Similarly, in *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 135 N.W.2d 799 (1965), this Court struck down a city's monthly charge on utility bills that was earmarked for certain projects, holding that the charge was an unlawful tax rather than a special assessment.

Pewaukee argues that the court of appeals decision below conflicts with *Bentivenga*, but it does not explain how. (Pet. 14–15.) This Court favorably cited *Bentivenga* when it held that Buchanan's "TUF is a tax." *Town of Buchanan*, 2023 WI 58, ¶ 10. *Bentivenga* does not conflict with *Town of Buchanan* or with the court of appeals decision below. If Pewaukee is suggesting that *Bentivenga* held that an earmarked charge is a fee, it is wrong.

If anything, *Bentivenga* undercuts Pewaukee's argument that home-rule authority is somehow relevant to the tax–fee distinction. In *Bentivenga*, the court held that a city's "fee in lieu of room tax" was an unlawful tax—and the court did not mention home-rule authority at all. *Bentivenga*, 2014 WI App 118, ¶ 11.

Pewaukee notes that WMC served notices of claim on the Villages of Dousman and Pewaukee, challenging the validity of their "fire-protection fees." (Pet. 17–18.) Those notices of claim have nothing to do with this case. Pewaukee and Dousman are imposing annual, village-wide "fire-protection fees" as special charges on all real property. Special charges cannot be imposed that way to fund fire protection. *Town of Janesville v. Rock Cnty.*, 153 Wis. 2d 538, 546–47, 451 N.W.2d 436 (Ct. App. 1989).

The present case, by contrast, does not involve a special charge. In the circuit court, WMC explained that the TUF is neither a special charge nor a special assessment. (R. 49:3–7.) Pewaukee then conceded this point. (R. 65:24–25.) Although Pewaukee argues to the contrary now, its argument is forfeited. "Arguments raised for the first time on appeal are generally deemed forfeited." *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 83, 350 Wis. 2d 554, 835 N.W.2d 160 (citation omitted).

Pewaukee's argument is also meritless and confusing. Right after asserting that it "did not need explicit statutory authority to create a transportation user fee," Pewaukee argues that the special-charge statute (Wis. Stat. § 66.0627) authorizes its TUF. (Pet. 22 (formatting altered).) Pewaukee confusingly also claims that its TUF "shares a common legal basis with special assessments." (Pet. 25.) But a special charge and a special assessment are two "distinct things." *CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶ 40 n.17, 380 Wis. 2d 399, 909 N.W.2d 136. Pewaukee's TUF is neither of those things, as it correctly conceded in the circuit court.

* * *

This Court's review is not warranted here because this case is a straightforward application of this Court's recent, unanimous decision in *Town of Buchanan*. There is no reason to second-guess the soundness of that decision.[2]

[2] Pursuant to Wis. Stat. § 809.62(3)(d), WMC notes that there are two alternative grounds for invalidating Pewaukee's TUF. First, the TUF is unlawful because it lacks statutory authority even if it is a fee rather than a tax. Second, the TUF is preempted by several statutes even if it is a fee. WMC raised these alternative arguments in the court of appeals. (WMC's Ct. App. Br. 27–37.) The court of appeals did not address these arguments because it concluded that Pewaukee's TUF is an impermissible tax under *Town of Buchanan*. (*See* Pet.-App. 102–03 ¶¶ 3, 5 n.4.)

Pursuant to Wis. Stat. § 809.62(3)(b), WMC notes that the petition for review has a possible defect that might prevent this Court from reaching the merits if it grants review: the petition appears to be untimely. "Except as provided in sub. (2) and [Wis. Stat. §§] 809.32(5) and 809.62(1m), [a] petition for review shall be filed in [this Court] within 30 days of the date of the decision of the court of appeals." Wis. Stat. § 808.10(1). Although the court of appeals withdrew and reissued its opinion under

CONCLUSION

This Court should deny the petition for review.

Dated this 26th day of April 2024.

Electronically signed by

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Wis. Stat. § 809.23(4)(c), the statutes do not exempt this scenario from the general 30-day time limit for filing a petition for review. *See* Wis. Stat. §§ 808.10, 809.62(1m).

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 2,972 words.

Dated this 26th day of April 2024.

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 Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 26th day of April 2024.

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