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STATE OF WISCONSIN
SUPREME COURT

APPEAL No. 2023AP690

WISCONSIN MANUFACTURERS AND COMMERCE, INC,

Plaintiff-Appellant,

v.

VILLAGE OF PEWAUKEE

Defendant-Respondent-Petitioner.

Petition for Review of a Decision by the Court of Appeals, District II, Reversing a Final Judgement of the Waukesha County Circuit Court, Case No. 2022CV515, The Honorable Michael J. Aprahamian, Presiding.

# LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR REVIEW

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The League of Wisconsin Municipalities ("League") is a non-profit, non-partisan association of cities and villages whose current membership consists of 189 of Wisconsin's 190 cities and 403 of Wisconsin's 417 villages. The League is following this case closely and seeks to participate as amicus because it involves issues important to our members. The League urges this Court to grant the Village's petition to review to clarify that *Wisconsin Property Taxpayers, Inc. v. Town of Buchanan,* 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100, is not controlling precedent for this case, to reaffirm municipalities' broad home rule powers, and to explain the proper analysis for distinguishing between fees and taxes. This case presents a novel question of law that will have a statewide impact on Wisconsin municipalities. Moreover, this case presents an opportunity for this Court to clarify and harmonize the body of case law that focuses on whether a municipal charge is a fee or tax, which is confusing and difficult to apply. In this brief, the term "municipality" is used to refer only to Wisconsin cities and villages.

### I. THIS COURT'S DECISION IN *TOWN OF BUCHANAN* CREATED CONFUSION BY INCLUDING AN INCOMPLETE SUMMARY OF A LEGAL ISSUE THAT WAS NOT BEFORE THIS COURT.

The Court of Appeals mistakenly believed its decision in this case was "straightforward in light of *Town of Buchanan.*" *Wisconsin Mfr. and Com., Inc. v. Village of Pewaukee*, 2024 WI App 23, ¶ 7. In that unanimous decision authored by Justice Rebecca Grassl Bradley, this Court ruled that the Town of Buchanan's Transportation Utility Fee ("TUF") was an unlawful tax. *Wisconsin Property Taxpayers, Inc. v. Town of Buchanan,* 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100. The parties agreed that the Town's fee was a tax, so the only question before this Court was whether the Town's tax was legally implemented. *Id.* ¶ 10. Even though the issue was not disputed, this Court remarked that the parties were "correct" that the fee was a tax because it was "imposed . . . on a class of residents

for the purpose of generating revenue." *Id.* Although true in a general sense, this statement gave the Court of Appeals the incorrect impression that the Village of Pewaukee's TUF must be a tax too.

> 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. But it is wrong in arguing that the supreme court did not decide this issue. On the contrary, the court explicitly held that "[t]he parties are correct" on this issue, citing case law including *Bentivenga*, 358 Wis. 2d 610, 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." *Town of Buchanan*, 408 Wis. 2d 287, ¶ 10. *Village of Pewaukee*, 2024 WI App 23, ¶ 8.

This Court's statement in *Town of Buchanan* obfuscates the real reason the Town's TUF was a tax. The TUF was not a tax because it was imposed for the purpose of generating revenue, it was a tax because the Town was relying on taxation authority – specifically Wis. Stat. § 66.0827. *Town of Buchanan*, 408 Wis. 2d 287, ¶ 10; *See* Wis. Stat. § 66.0827(2) ("The fund. . . shall be provided by taxation of the property."). That is presumably why the Town agreed the TUF was a tax and why the question of whether it was a tax was not in contention. Because the parties agreed that the Town's TUF was a tax, this Court's statement that the parties were "correct" to agree to this addressed an issue that was not before it. In other jurisdictions, this Court's statement may have been labeled as "dicta" and disregarded by lower courts, but lower courts in Wisconsin are restricted in their ability to make these types of determinations. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, 324 Wis. 2d 325, 782 N.W.2d 682. Accordingly, only this Court can clarify this issue.

This Court's statement in *Town of Buchanan* is also an incomplete summary of Wisconsin case law. The Court of Appeals attributed that statement to *Bentivenga v. City of Delavan. Village of Pewaukee*, 2024 WI App 23, ¶ 8. *Bentivenga* involved a fee charged by the City of Delavan to the owners of a particular condominium unit in the municipality. *Bentivenga v. City of Delavan*, 2014 WI App 118, 358 Wis. 2d

610, 856 N.W.2d 546. The fee was part of an agreement with the developer and was not based on any specific expense incurred by the City–the fee was simply charged to generate revenue that the City could use for any purpose. *Id.* ¶¶ 1-3. The Court of Appeals in *Bentivenga* ruled that the fee was a tax citing, among other cases, *City of River Falls v. St. Bridget's Catholic Church of River Falls,* which held that "the primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities." *Id.* ¶ 6, citing *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). This distinction between fees and taxes is not mentioned at all by this Court in *Town of Buchanan* because it wasn't at issue. *See Town of Buchanan*, 408 Wis. 2d 287. However, the Court of Appeals' failure to consider this distinction in the immediate case is deeply problematic because the question of whether the Village of Pewaukee's TUF is a tax or a fee is a core point of contention. If Pewaukee's TUF is deemed a tax, the Village has already conceded that it would be illegal. *Village of Pewaukee*, 2024 WI App 23, ¶ 11.

The League urges this Court to grant the Village's petition for review to correct the misleading statement in *Town of Buchanan.* Not all TUFs are alike. They can be structured in multiple ways and implemented using different sources of authority. However, under the Court of Appeals' decision in this case, all TUFs would be illegal.

## II. MISAPPLYING *TOWN OF BUCHANAN* TO THIS CASE IMPROPERLY INFRINGES ON MUNICIPAL HOME RULE AUTHORITY.

By misapplying *Town of Buchanan* as controlling precedent, the Court of Appeals improperly curtailed the expansive statutory home rule authority the Legislature has vested in Wisconsin municipalities. Municipalities possess two sources of home rule authority, constitutional and statutory. At its simplest, "home

rule" is authority delegated to or vested in municipalities that allows them to govern locally without state authorization. Constitutional home rule authority is not at issue in this case because no charter ordinance was used pursuant to Wis. Stat. § 66.0101. *Gloudeman v. City of St. Francis*, 143 Wis. 2d 780, 788, 422 N.W.2d 864 (Ct. App. 1988). Statutory home rule, however, is at issue.

Statutory home rule is distinct from constitutional home rule – it is not limited to local affairs and government. Wisconsin Stat. § 61.34(1) and § 62.11(5) grant statutory home rule authority to villages and cities, respectively. This authority gives governing bodies management and control of the municipality's property, finances, highways, streets, navigable waters, and the public service. Wis. Stat. §§ 61.34(1) and 62.11(5). It empowers governing bodies to act for the municipality's government and good order; for its commercial benefit; and for the public health, safety, and welfare. *Id.* Municipalities may carry out these powers by license, regulation, suppression, borrowing money, tax levy, appropriation, fine . . . and other necessary or convenient means. *Id.*

The Legislature has explicitly stated that statutory home rule authority "shall be liberally construed in favor of the rights, powers and privileges of [municipalities] to promote the general welfare, peace, good order and prosperity of such [municipalities] and the inhabitants thereof." Wis. Stat. §§ 61.34(5) and 62.04. The powers conferred are in addition to all other grants, and the statutes explicitly provide they shall be limited only by express language. Wis. Stat. §§ 62.11(5) and 61.34(1). However, this Court has recognized that local ordinances may also be preempted other than by express language. *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). Incorrectly applying *Town of Buchanan* as controlling precedent in the immediate case disregards the Legislature's directive to liberally construe home rule authority and improperly avoids answering the necessary question of whether a TUF, as implemented by the Village, is a legal fee authorized under home rule authority.

Misapplying *Town of Buchanan* to this case also diminishes municipalities' ability to govern locally and choose the best way to provide and pay for services in their community. Municipalities play a crucial role in the state's transportation network, and they incur significant expense doing so. There are multiple funding mechanisms available to municipalities to recoup the cost of providing this service, and home rule authority allows them to select the best option for their community. The most obvious funding mechanism is the property tax levy. The property tax generates revenue for a municipality that can be used for various purposes, including financing road construction and maintenance. Municipalities may also finance road projects via special assessment. Special assessments may be used "as a complete alternative to all other methods provided by law" to pay for all or any part of the costs of a road project that confers special benefits on adjacent properties. Wis. Stat. § 66.0703(1). And municipalities may charge residents a fee using municipal home rule authority to recover the costs of services it provides. *City of River Falls*, 182 Wis. 2d at 441-42. Wisconsin Stat. §§ 66.0602 (negative adjustment to levy) and 66.0628 (municipal fees must bear reasonable relationship to cost of service) recognize municipalities' authority to charge fees that don't have explicit statutory authorization.

Applying *Town of Buchanan* as precedent to this case, which contemplates an entirely different legal question as discussed in Section I above, inappropriately restricts municipalities' authority to impose fees. It also hampers their ability to find creative ways to best meet their residents' needs. By implementing a TUF, a municipality can recover costs for transportation services in a way that is more equitable than specially assessing property owners, many of whom are residential property owners already bearing a disproportionate share of the tax burden. The Village's TUF recovers the costs of maintaining roads in a manner proportionate to the amount of wear and tear developed properties generate. Properties that use and benefit from the roads more, pay a proportionally larger fee and properties that use

and benefit from the roads less, pay a proportionally smaller fee. These are precisely the type of decisions that should be made at the local level.

## III. THIS CASE PRESENTS AN OPPORTUNITY TO CLARIFY THE PROPER TEST FOR DISTINGUISHING BETWEEN TAXES AND FEES.

Granting review in this case will also allow this Court to clarify and harmonize the body of case law relied on to determine whether a municipal charge is a fee or a tax, which is confusing and difficult to apply. When reviewing the pertinent cases, the proper test for distinguishing between a fee and a tax is unclear. Case law appears to establish a two-prong analysis considering: 1) the source of the municipality's power for imposing the charge and 2) the municipality's purpose for imposing the charge. *See, e.g., City of Milwaukee v. Milwaukee Suburban Transport Corp.*, 6 Wis. 2d 299, 308, 94 N.W.2d 584 (1959); *Town of Buchanan*, 2023 WI 58, ¶ 10.

The purpose prong appears to matter a great deal. *Town of Buchanan*, 2023 WI 58, ¶ 10. ("The purpose, and not the name it is given, determines whether a government charge constitutes a tax . . . A 'fee' imposed for the purpose of generating revenue for the municipality is a tax, and without legislative permission it is unlawful.") (internal citation omitted). Yet, most of the confusion in case law stems from attempts to identify a charge's purpose. Wisconsin courts have examined various factors when identifying a charge's purpose – e.g., the source of authority for the charge, whether the charge is for a governmental or proprietary function, the voluntary or involuntary nature of the charge, and the charge's proportionality. The resulting analysis appears to be akin to a totality of the circumstances test; however, case law does not adequately clarify which factors must be considered, when a given factor is present, and how much weight each factor should be given.

In some instances, whether a charge is voluntary has been pertinent to the analysis. For example, in *City of De Pere v. Public Service Commission*, this Court stated the voluntary nature of a city's charge for connecting to the water main was support for it being a fee rather than a tax or assessment. *City of De Pere v. Pub. Serv. Comm'n,* 266 Wis. 319, 326, 63 N.W.2d 764 (1954). However, in *City of River Falls,* the seemingly involuntary nature of the city's charge for storing and providing water for public fire protection services did not prevent this Court from deeming the charge a legal fee. *City of River Falls*, 182 Wis. 2d at 442-43. Additionally, in *Bentivenga*, the Court of Appeals did not appear to factor whether the City of Delavan's fee charged to condo owners who did not rent their units was voluntary into its analysis. *Bentivenga*, 2014 WI App 118.

In other instances, whether a charge is for a "governmental" or "proprietary" function has been considered when determining whether the charge is a fee or tax. For example, in *City of River Falls*, this Court emphasized the fact that providing and storing water for public fire protection services was a proprietary function rather than a governmental function when concluding the charge was a fee. *City of River Falls*, 182 Wis. 2d at 442-43. In *City of De Pere,* this Court also contemplated the proprietary nature of the charge for connecting to the water main. *City of De Pere,* 266 Wis. at 325. However, the Court of Appeals gave short thrift to the City of Delavan's argument that its charge was imposed in its proprietary capacity in *Bentivenga*. *Bentivenga*, 2014 WI App, ¶ 8. While the court's reasoning may be understandable given the facts in that case, this case still leaves one wondering when factors should be considered or disregarded. Finally, in *City of Milwaukee*, this Court did consider whether Milwaukee's charge for trackless trolleys was a governmental function or a charge issued under its police power. *City of Milwaukee*, 6 Wis. 2d at 304-06. Yet, that factor ostensibly was not included in the basis for this Court's decision. *Id.* at 308 (stating that the deciding factors were the city's taxation authority, the large fee amounts, and the city's failure to show the fees bore a relation to or approximated the city's expenses).

The result of these cases is perplexing. It is difficult for municipalities to predict whether a court would hold they have properly structured a charge as a fee or conclude it is a tax. The League urges this Court to grant review and take this opportunity to clarify the proper test for determining whether a municipal charge is a tax or fee. Such guidance will provide clarity to municipalities and lower courts alike.

## IV. CONCLUSION

By improperly applying *Town of Buchanan* as controlling precedent, the Court of Appeals failed to consider the true question before it – is Pewaukee's TUF a valid fee enacted under home rule authority or is it a tax administered without the requisite statutory authority. The court's mistaken reliance on *Town of Buchanan* was largely due to a single confusing sentence in the *Town of Buchanan* opinion, which highlights the confusing nature of the applicable case law. Furthermore, this mistaken reliance inappropriately infringes on municipal home rule authority. The League urges this Court to grant the Village's petition to review to address these issues.

Respectfully submitted April 26, 2024.

League of Wisconsin Municipalities

By: Electronically signed by Maria Davis
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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,672 words.

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

Dated: April 26, 2024

Electronically signed by Maria Davis