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DISTRICT II

February 7, 2024

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You are hereby notified that the Court has entered the following opinion and order:

2023AP690 Wisconsin Manufacturers and Commerce, Inc. v. Village of Pewaukee (L.C. #2022CV515)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Wisconsin Manufacturers and Commerce, Inc. ("WMC") appeals from a judgment entered by the circuit court dismissing its claims against the Village of Pewaukee ("Village") relating to the Village's enactment of a "transportation user fee" ("TUF"). Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] Because we conclude that the TUF is an impermissible tax under our supreme court's decision in ***Wisconsin Property Taxpayers, Inc. v. Town of Buchanan***, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100, we reverse.

The Village enacted an ordinance to create a transportation utility in February 2021. According to the ordinance, the purpose and intent behind creating this utility was to "provide[] a sustainable source of funds for the maintenance, construction and reconstruction of transportation infrastructure under the jurisdiction of the Village." The utility is to spend money exclusively on pavement preservation, street and sidewalk construction or reconstruction, street lighting, traffic control, pedestrian facilities, storage for the equipment used for these purposes, and its own administration. To generate revenue for the utility, the ordinance provides that "[e]very developed property shall pay a Transportation User Fee"—the TUF at issue. The TUF is "comprised of a Base Fee and a Usage Fee." The base fee "is equal for all utility accounts" and is determined by dividing the total fixed base costs of the transportation system by the total number of utility accounts. The usage fee is determined by dividing the target budget for the aforementioned activities (exclusive of base costs) by the total number of estimated trips for all accounts and allocating to each account (based on its use category in the Institute of Traffic Engineers Manual) its proportional share.

WMC filed suit against the Village in April 2022, challenging the legality of the TUF. According to WMC, the TUF was not a fee but rather an illegal excise tax that lacked statutory

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

authority or an illegal property tax that violated the Uniformity Clause of the Wisconsin Constitution.[2] *See* ***City of Plymouth v. Elsner***, 28 Wis. 2d 102, 106-07, 135 N.W.2d 799 (1965) (holding that a monthly charge on each utility customer was illegal as either an excise tax or a property tax). The circuit court granted summary judgment in favor of the Village on March 9, 2023. It determined that "the TUF is a fee and not a tax," and as such, it is a legal mechanism for funding a transportation utility under WIS. STAT. § 66.0621. WMC filed this appeal, renewing the arguments it made before the circuit court.

We review a circuit court's grant of summary judgment de novo. ***Munger v. Seehafer***, 2016 WI App 89, ¶46, 372 Wis. 2d 749, 890 N.W.2d 22. Summary judgment is appropriate in the absence of any issue of material fact such that the moving party is entitled to judgment as a matter of law. ***Id.*** The legal question of whether a charge is a tax or a fee is also subject to de novo review. *See* ***Bentivenga v. City of Delavan***, 2014 WI App 118, ¶5, 358 Wis. 2d 610, 856 N.W.2d 546.

Our analysis is straightforward in light of ***Town of Buchanan***, 408 Wis. 2d 287, which our supreme court issued on June 29, 2023, just a few weeks after WMC filed its opening appellate brief. 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

[2] WMC also asserted that even if the TUF were to be considered a fee rather than a tax, it is *ultra vires* and illegal.

the Town." ***Id.*** All residential properties paid the same annual fee, while commercial properties paid a fee based on their size, type of business, and the number of trips they were estimated to take on municipal roads. ***Id.***, ¶4. 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.

The Village's efforts to distinguish ***Town of Buchanan*** and prevent its application to this case are not persuasive. First, 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 and quotes ***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. 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.

Next, the Village argues that ***Town of Buchanan*** is distinguishable because unlike the Town of Buchanan, villages have 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).

Finally, the Village argues that its TUF is a fee rather than a tax like the Town of Buchanan's because its permissible uses and its method for determining "estimated use" are more specific than the town's. Setting aside the scant evidence of any meaningful factual difference in either regard, the Village cites no support from ***Town of Buchanan*** or any other authority for the notion that any such differences have legal significance. Thus, we need not consider these arguments further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

We conclude that ***Town of Buchanan*** is controlling precedent under which the TUF at issue is indeed a tax rather than a fee. Because the Village does not dispute that the TUF at issue is illegal if it is deemed a tax, we reverse.

IT IS ORDERED that the judgment of the circuit court is summarily reversed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals