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DISTRICT II

July 9, 2025

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

2024AP864

Village of Union Grove v. Racine County Board of Drainage
Commissioners (L.C. #2023CV1056)

Before Neubauer, Grogan, 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).

The Village of Union Grove (Village) appeals from an order of the circuit court affirming an assessment levied against it by the Racine County Board of Drainage Commissioners (Board). At issue is a drainage district's authority under WIS. STAT. § 88.64 (2023-24)¹ to assess an upstream municipality for the costs of maintaining a drain

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

attributable to an increased water flow from lands within that municipality. 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. We summarily reverse.

The parties do not dispute the facts pertinent to this appeal. The Village is a municipality with lands upstream from drains the Board manages. For many years prior to the start of a maintenance project related to dredging in the drainage district, the Village had agreed to voluntarily pay a set amount toward maintaining the drains. In 2022, the Board began the process necessary to levy a greater assessment against the Village related to drain maintenance.

As part of the process mandated by Wisconsin statute, the Board hired an engineer to compile a report related to the maintenance project. After holding a hearing, and over the Village's many objections, the Board issued an assessment against the Village of \$1,164,800 to be paid over five years. The Village's assessment would account for approximately one third of the three-million dollar, five-year budget for the district's maintenance project. The Board indicated that "[i]n conjunction with the hearing, the Board engineer produced a report in compliance with WIS. STAT. § 88.64," and further stated that "[t]he Village produced no engineering report or expertise in response." Based on the engineer's report, the Board concluded that the assessment against the Village was justified to cover drain-maintenance costs resulting from water flow from Village lands.

The Village requested review of the Board's assessment order by the State Drainage Engineer. After the State engineer completed his review and affirmed the order, the Board affirmed the assessment. The Village then filed an action for certiorari review under WIS. STAT. §§ 88.09 and 88.64(7) with the circuit court, as well as seeking declaratory and injunctive relief. The court affirmed the Board's assessment order against the Village on certiorari review. The Village appeals.

On certiorari, we review the actions of the Board, not the circuit court. *Fee v. Board of Rev. of Florence*, 2003 WI App 17, ¶11, 259 Wis. 2d 868, 657 N.W.2d 112 (2002); *see also Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21. Our review is limited to whether the Board (1) kept within its jurisdiction; (2) acted according to law; (3) acted arbitrarily, oppressively, or unreasonably; and (4) supported its decision with substantial evidence. *Whitecaps Homes, Inc. v. Kenosha Cnty. Bd. of Rev.*, 212 Wis. 2d 714, 720, 569 N.W.2d 714 (Ct. App. 1997).

At issue in this case is whether the Board acted according to law, which is a question of law we review de novo. *See Lloyd v. Board of Rev. of Stoughton*, 179 Wis. 2d 33, 36, 505 N.W.2d 465 (Ct. App. 1993). Resolving this question requires us to interpret WIS. STAT. § 88.64, which is also a matter of law we review independently. *See Tetra Tech*, 382 Wis. 2d 496, ¶84; *State v. Jensen*, 2010 WI 38, ¶8, 324 Wis. 2d 586, 782 N.W.2d 415. When interpreting a statute, our analysis begins with the statutory text. *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning." *Id.*

As previously stated, the issue before us on appeal is the extent of a drainage district's authority under WIS. STAT. § 88.64 to impose costs of maintaining drainage systems on upstream municipalities. Section 88.64(2) reads:

A drainage board may assess a municipality with territory upstream from any drain for any costs of enlarging or maintaining the drain that are attributable to increased water flow from land within the municipality. If the drainage board assesses a portion of the costs of enlarging or maintaining a drain against a municipality, the drainage board shall use the procedure under this section.

WISCONSIN STAT. § 88.64(3) assists in determining what costs are “attributable to increased water flow from the land within the municipality.” It reads as follows:

The drainage board shall obtain a report prepared by a professional engineer who is selected from the list specified in [WIS. STAT. §]88.21(5). The report shall include all of the following:

- (a) The construction and costs that are necessary to restore the drain so that it conveys the same amount of water as when most recently constructed or enlarged.
- (b) The construction and costs that are necessary to enlarge the drain to convey the flow of water from any land in the drainage district or upstream from the drainage district that has been newly drained since the drain was most recently constructed or enlarged.
- (c) The construction and costs that are necessary to enlarge the drain to convey the flow of surface water from upstream sources that represents an increase in flow since the drain was most recently constructed or enlarged.
- (d) Of the increased flow identified in par. (c), the amount of that flow that is attributable to each municipality with territory in the watershed above the drain, based proportionally on all of the following:

1. The increased flow into the drain from impermeable surfaces such as roads, parking lots or roofs since the drain was most recently constructed or enlarged, whether or not the impermeable surfaces are within the watershed.

2. The increased flow into the drain from the discharge of wastewater from a sewage treatment plant since the drain was most recently constructed or enlarged, whether or not the source of the wastewater is within the watershed.

(e) The maintenance costs that are attributable to the flow of surface water from upstream sources that represents an increase in flow since the drain was most recently constructed or enlarged.

Our analysis of the issue presented here centers on the requirements of WIS. STAT. § 88.64 and whether the Board’s assessment complied with the requirements of that statute. The Board argues on appeal that “[b]y inviting the State Drainage Engineer to review the Board’s order,” the Village has “triggered the deference afforded to state agencies for their technical expertise.” Despite the Board’s firm conviction, however, we disagree with its statement as to our standard of review and afford no deference to its interpretation of the statute in question. *See* WIS. STAT. § 227.10(2g); *see also Tetra Tech*, 382 Wis. 2d 496, ¶84.

“Errors of law should be corrected by the court on certiorari and the failure to make an assessment on the statutory basis is an error of law.” *State ex rel. Peter Ogden Fam. Tr. of 2008 v. Board of Rev. for Town of Delafield*, 2018 WI App 26, ¶5, 381 Wis. 2d 161, 911 N.W.2d 653 (citation omitted). “If we ‘find[] upon the undisputed evidence before the [B]oard that the assessment has not been fixed upon the statutory basis, the assessment should be set aside.’” *Id.* (citations omitted). Because we agree

with the Village that the Board failed to act according to law in issuing an incomplete engineering report, thereby making the assessment unlawful, we reverse.

The controlling statutory language at issue here is clear. The municipality can be assessed for the “costs of enlarging or maintaining the drain that are attributable to increased water flow from land within the municipality.” *See* WIS. STAT. § 88.64(2). Put simply, the costs assessed against the municipality must be directly linked to the increased water flow coming from within the municipality. If the increased water flow leads to the need for maintenance, the portion of the maintenance resulting from the municipality’s increased water flow is the municipality’s responsibility. Conversely, if there are required maintenance costs that are entirely unassociated with the municipality’s increased water flow, those costs are not assessable against that municipality. If the drainage district demonstrates that factor and it is clear from a statutorily-compliant engineering report that there is a link between the cost of enlarging or maintaining and the municipality’s waterflow, then the drainage district must follow the specific procedures set forth in § 88.64 in order to actually assess those costs.

Subsection (3) of WIS. STAT. § 88.64 requires a drainage board to obtain an engineering report which “shall include all of the” items listed in § 88.64(3)(a)-(e). Those items, set forth in full above, relate to the construction and costs necessary to restore, enlarge, and maintain the drain. The Board concedes that the engineering report at issue in this case failed to include “all of the” items enumerated in subsection (3). However, the parties dispute whether the required engineering report must include all the items listed in § 88.64(3)(a)-(e) even if the costs being assessed are labeled as maintenance costs.

The Village argues that a report must include all of the information specified by statute to form a valid basis to levy an assessment, while the Board maintains that a report need only include that information that is relevant to the proposed project for which the municipality may be assessed. We agree with the Village and conclude based on the plain language of the statute that an engineering report must contain all of the statutorily-enumerated information in order to confer authority on a drainage district to assess costs against an upstream municipality.

WISCONSIN STAT. § 88.64(3) requires that the engineering report “shall include all of the” information set forth in the statute. We presume “shall” to be mandatory in the context of this statute. *See, e.g., State v. Olson*, 2019 WI App 61, ¶12, 389 Wis. 2d 257, 936 N.W.2d 178 (explaining that “[t]he word ‘shall’ is presumed mandatory when it appears in a statute”). Since “shall” is mandatory, and “all” means “all,” it is unnecessary to examine the intent of the legislature. *See Banuelos v. Univ. of Wisconsin Hosps. & Clinics Auth.*, 2023 WI 25, ¶16, 406 Wis. 2d 439, 988 N.W.2d 627.

Based upon our reading of the statute, we reject the Board’s argument that the engineering report it based the Village’s assessment on was statutorily compliant because it needed only to address those items directly related to the maintenance project. Though some of the statutorily-required information is seemingly unrelated to maintenance, a plain reading of the statute makes it clear that an engineering report must address *all* of the information in order to assess costs against an upstream municipality. To that end, the Board’s argument fails because the report here did not comply with the statutory requirements; through its failure to abide by the controlling statute, the Board forfeited its authority to levy the challenged assessment against the Village.

Even assuming, for the sake of argument, that we were to accept the Board's assertion that WIS. STAT. § 88.64(3)(a)-(d) are not applicable for a maintenance project, the engineering report still fails because it does not meet the requirement of § 88.64(3)(e) regarding maintenance costs. Section 88.64(3)(e) requires "[t]he maintenance costs that are attributable to the flow of surface water from upstream sources that represents an increase in flow since the drain was most recently constructed or enlarged." The report here (1) does not specify maintenance costs, (2) does not identify the increase in flow since the drain was last constructed or enlarged, and (3) does not indicate what maintenance costs are attributable to the flow of surface water from the Village that represents an increase in flow since the drain was last constructed or enlarged. Because § 88.64(2) says, as relevant, that the costs of maintaining the drain must be attributable to increased water flow, the report is deficient on this ground as well.

Our ruling today is not meant to imply that the Board cannot assess the Village for shouldering some of the costs; however, the Board needs to strictly comply with the requirements of WIS. STAT. § 88.64 before it can do so. There is no doubt that the engineering report that the Board here based its assessment on failed to contain all of the statutorily-required information, as the Board concedes.² Without full compliance with the statute, the Board is without authority to levy an assessment against the Village.

² Interestingly, the Dissent also concedes that the Board did not comply with the applicable statute and that its engineer's report was statutorily incomplete. (Dissent at 10, 12). The Dissent, however, brushes that statutory non-compliance aside, referring to it as a "harmless omission" and declaring it "a fruitless exercise" by the Majority to require statutory compliance. (*Id.* at 11, 12 n.5). In other words, the Dissent chides the majority for making the Board comply with the law. The legislature establishes the law; however complex, complicated, hoop-filled, or

(continued)

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court affirming the Board’s order is summarily reversed. *See* WIS. STAT. RULE 809.21.

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

NEUBAUER, J. (*dissenting*). I would affirm the circuit court’s order and uphold the Racine County Board of Drainage Commissioners’ (Board) assessment against the Village of Union Grove (Union Grove). Pursuant to WIS. STAT. § 88.64(2), “[a] drainage board may assess a municipality with territory upstream from any drain for any costs of enlarging or maintaining the drain that are attributable to increased water flow from land within the municipality.” The Board’s assessment is for maintenance costs to dredge the sediment in the West Branch of the Root River Canal downstream from Union Grove, the Village of Yorkville, and the Village of Raymond.³ Squarely in line with the statute, the Board assessed Union Grove, a municipality upstream from the canal, for a share of maintenance costs (the dredging project’s costs) attributable to—i.e., caused by—

foolhardy statutes may be (in the court’s view), we may not take it upon ourselves to advocate for or thoroughly excuse non-compliance. *See Tomczak v. Bailey*, 218 Wis. 2d 245, 264-65, 578 N.W.2d 166 (1998); *Joyce v. County of Dunn*, 192 Wis. 2d 699, 708, 531 N.W.2d 628 (Ct. App. 1995) (“The wisdom of a legislative act is not subject to judicial scrutiny.”); *see also Trump v. CASA, Inc.*, 606 U.S., 2025 WL 1773631, *14 (June 27, 2025) (stating the courts are not “an imperial Judiciary.”).

³ Union Grove explains that the “primary goal and expense” of the dredging project “involves removing the natural build-up of sediment, silt, earth, and debris from a body of water that occurs over time. Agricultural runoff creates substantial sediment build-up.” The dredging project also includes mowing, debrushing, and spraying.

increased water flow from land within Union Grove. The assessment is based on the engineer's report calculating each municipality's percentage of the total amount of water that flows through the drains of the Yorkville-Raymond Drainage District (District) and that percentage approximates each municipality's contribution of sediment that is carried by the water each has discharged into the Root River Canal for decades. Union Grove's annual contribution to the tune of hundreds of millions of gallons of wastewater has increased in recent years.⁴

Nonetheless, the majority concludes that the Board's assessment is void despite the fact that Union Grove's share of water discharged into the District drains has increased over many decades and it is undisputed that its water has caused sediment build-up that now requires dredging. While the engineer's calculations are detailed and complicated, compliance with the assessment statute, WIS. STAT. § 88.64, is straightforward.

Moreover, contrary to the majority's decision, the assessment is valid despite the fact that the engineer's report considered by the Board did not address indisputably inapplicable provisions in WIS. STAT. § 88.64(3). The report contains the information and analysis required for maintenance cost assessments under § 88.64(3)(e). Because the assessment complies with the law, is not arbitrary or oppressive, and is supported by substantial evidence, I respectfully dissent.

⁴ For the period from 2011 to 2020 for which the engineer obtained flow data, Union Grove discharged almost 400 million gallons of treated wastewater annually into the canal.

I. The assessment is not void because the engineer's report did not include irrelevant information.

First, the majority reverses the order because, in its view, the engineer's report upon which the Board based the assessment does not contain all of the information required under WIS. STAT. § 88.64(3)(a)-(e). However, all but one of those paragraphs do not apply to this assessment. It makes no sense to invalidate the Board's assessment because the engineer's report did not identify inapplicable statutory provisions and state that the report contains no information responsive to them. I can think of no better example of a harmless omission: the absence of such a statement has no impact whatsoever on the merits of the Board's assessment. Union Grove suffered no prejudice from the absence of this information.

As the majority observes, WIS. STAT. § 88.64(3) requires a drainage board to procure an engineering report when it seeks to levy an assessment on an upstream municipality for "costs of enlarging or maintaining" drains through which water from the municipality flows. Sec. 88.64(2). The statute states that the report "shall include all of" the information identified in five lettered paragraphs that follow. Sec. 88.64(3). Each of those paragraphs addresses a unique category of information, but only one is applicable here: paragraph (e), which addresses information about "*maintenance* costs that are attributable to the flow of surface water from upstream sources that represents an increase

in flow since the drain was most recently constructed or enlarged.” Sec. 88.64(3)(e) (emphasis added).⁵

In this case, the Board seeks to assess Union Grove for maintenance costs. The order approving the assessment describes the costs at issue as being “for maintenance of the subject drains” and the circuit court specifically found “that the project purpose is not restoration, but is maintenance.” The majority does not disturb that finding, and no party contends that any of the costs are intended to enlarge any drains the Board manages. Accordingly, information about the specific project and associated costs covered by the assessment is responsive to only WIS. STAT. § 88.64(3)(e).

Here, we are reviewing the Board’s order for error, and the issue is whether the Board complied with WIS. STAT. § 88.64(2), which provides that “[a] drainage board may assess a municipality with territory upstream from any drain for any costs of enlarging or maintaining the drain that are attributable to increased water flow from land within the municipality.” As explained herein, the Board’s order complies with the statute. The fact that the engineer did not state that paragraphs (a)-(d) of WIS. STAT. § 88.64(3) are inapplicable did not impact the Board’s assessment. The obvious purpose of WIS. STAT. § 88.64(3) is to ensure that an assessment is supported by the opinion and analysis of a qualified expert concerning the costs that are caused by water flow from the municipality.

⁵ Paragraph (a) of WIS. STAT. § 88.64(3) concerns information about “construction and costs that are necessary to *restore* the drain so that it conveys the same amount of water as when most recently constructed or enlarged.” Sec. 88.64(3)(a) (emphasis added). Paragraphs (b), (c), and (d) require certain information about “construction and costs that are necessary to *enlarge*” drains. Sec. 88.64(3)(b)-(d) (emphasis added). It will be a fruitless exercise to require the Board to have the engineer add in a statement that these provisions are inapplicable on remand, but that is the likely result of the majority’s decision.

The engineer's report here satisfies that purpose by addressing the applicable category of costs. Not surprisingly, neither Union Grove nor the majority points to any caselaw holding that the absence of irrelevant information in the engineer's report renders the Board's assessment void.

II. The Board properly assessed Union Grove under WIS. STAT. § 88.64(2), which authorized the drainage board to assess “a municipality with territory upstream from any drain” for the costs of maintaining the Root River Canal that are “attributable to increased water flow from land within the municipality.”

Turning to the second ground upon which the majority rests its decision, WIS. STAT. § 88.64(3)(e) requires an engineer's report to address “maintenance costs that are attributable to the flow of surface water from upstream sources that represents an increase in flow since the drain was most recently constructed or enlarged.” Here, the engineer provided the Board with its report along with documentation specifying budgeted and planned costs for maintenance of the drains. Union Grove produced no engineering report or expertise in response.⁶ The engineer's report provides a basis for allocating these costs to Union Grove and the other municipalities, which are upstream sources of water flow into the District's drains, including the Root River Canal.

The land within present day Yorkville, Raymond, and Union Grove is and always has been upstream from the Root River, which drains into Lake Michigan. These municipalities have been discharging runoff and accompanying sediment into the District drains for decades, including into the West Branch of the Root River Canal. The

⁶ The statute afforded Union Grove the opportunity to provide its own engineering analysis while the District was considering the engineer's report's recommendations. *See* WIS. STAT. § 88.64(4).

engineer's report analyzes Union Grove's share of the water flow that causes the sediment build-up that necessitates the dredging costs.

Specifically, the report examines two sources of water that flows from Union Grove through the District's drains to arrive at Union Grove's allocation of the maintenance costs: (1) stormwater runoff and (2) treated wastewater from a sewerage treatment plant in Union Grove that is discharged into the West Branch of the Root River Canal.⁷ The Board then used the engineer's allocation calculation as a basis for determining the amount of the assessment, reasoning that the "maintenance costs that are attributable to the flow of surface water from" Union Grove can be calculated with reference to the percentage of total water flow through the District's drains that is attributable to it. *See* WIS. STAT. § 88.64(3)(e). Again, the costs to dredge that are attributable to—i.e., caused by—the flow of water from each municipality into the Root River Canal is based on each municipality's respective contribution of water that carries sediment downstream.

With respect to WIS. STAT. § 88.64(3)(e)'s requirement that the engineer's report address maintenance costs "that are attributable to the flow of surface water from

⁷ With respect to wastewater, the report calculates that treated wastewater from the plant constitutes 32.86% of the total average annual water flow through the District. The remaining 67.14% of the total is attributable to stormwater runoff. As to that source, the report calculates estimated runoff from Union Grove, Yorkville, and Raymond and allocates to Union Grove 5.2% of the total runoff that flows through the District's drainage system. The report concludes by combining the percentage of total runoff attributable to wastewater from Union Grove (32.86%) and its portion of the stormwater runoff handled by the District (5.2% of 67.14%, or 3.5%) to arrive at a total allocation to Union Grove of 36.4%. Neither Union Grove nor the majority challenge the engineer's methodology or calculations establishing its share of the water discharge.

upstream sources that represents an increase in flow since the drain was most recently constructed or enlarged,” water flow from Union Grove has been coursing through the District’s drains for decades. As Union Grove acknowledges, the dredging project removes sediment from a body of water—the Root River Canal. There are no facts to suggest that the river canal was constructed, and there are no facts to show the river canal has been enlarged. Union Grove contends that the engineer’s report needed to show that some portion of the costs to dredge sediment in the Root River Canal is attributable to an increase in the municipality’s water flow over a specific period of time. But here, the report reflects a reasonable determination that the “increase in flow” was one hundred percent—from the baseline of zero to the current volumes measured in the report—given that Union Grove has been contributing sediment to the Root River Canal for decades, its water flow has increased over time, and there are no facts to show that the canal has been enlarged.⁸

In the end, it appears that Union Grove and the majority believe that the engineer should have employed a different methodology to apportion subsets of the costs to dredge sediment that has accumulated over decades to specific volumes of wastewater from each municipality during specific periods of time. However, neither shows that would be feasible as it pertains to a downstream river and its sediment.

⁸ Significantly, the report treats all three municipalities the same—allocating to each a portion of the dredging costs with reference to its share of the total water flow in the District and using a baseline of zero to reflect the “increase” in surface water flow. Neither Yorkville nor Raymond challenges the assessment.

Moreover, again, we are reviewing the Board's order, and WIS. STAT. § 88.64(2), the statute authorizing the assessment, does not require a baseline of construction or enlargement. Though the engineer's report is intended to provide information that could be useful in assessing maintenance costs caused by increased water flow over a defined period of time, such information may not be applicable, as is the case here. The Board employed an accepted and credible methodology, not to mention the only logical approach given the facts at issue, to allocate costs to dredge sediment caused by the municipalities' water discharge based on one hundred percent of each municipality's respective flow of water into the Root River Canal.⁹ The Board's decision was not arbitrary or oppressive, and the evidence of record substantiated its decision. *See State ex rel. Bruskewitz v. City of Madison*, 2001 WI App 233, ¶11, 248 Wis. 2d 297, 635 N.W.2d 797.

III. Conclusion

Union Grove has not shown that the engineer's report fails to follow the law. It merely disagrees with the methodology chosen by the Board and approved by the State Drainage Engineer, pursuant to WIS. STAT. § 88.64(6), to address the increase in surface water that caused the District to incur the sediment dredging costs. Notably, neither Union Grove nor the majority challenge that engineer's methodology or calculations to

⁹ Union Grove criticizes the engineer for equating the "costs" to dredge with the "benefits" each municipality will receive. The costs each municipality will incur will indeed provide the benefit of ensuring that the canal continues to provide an efficient and effective drain for their wastewater. The Board determined that the cost and the benefit are synonymous, basing each on the three municipalities' share of the discharge of water/sediment into the river. Again, Union Grove does not challenge the methodology or calculations establishing its share of water flow that contributed to the sediment in the river.

determine each municipality's respective share of wastewater discharged into the Root River. They do not dispute that wastewater carries sediment which causes the dredging costs, nor do they challenge the allocation based on an amount that approximates each municipality's contributions over the decades. The Board followed the law when it assessed Union Grove for the costs of dredging the Root River Canal attributable to its volume of water flow. The engineer's report complies with WIS. STAT. § 88.64(3)(e), and I see no legal error in the Board's use of the engineer's analysis to calculate the amount to be assessed to Union Grove.

Samuel A. Christensen
Clerk of Court of Appeals