July 10, 2023

Samuel Christensen
Clerk of Wisconsin Court of Appeals
110 East Main Street, Suite 215
Madison, Wisconsin 53701-1688

**RE: Letter of supplemental authority in *Wisconsin Manufacturers and Commerce, Inc. v. Village of Pewaukee* (appeal number 2023AP690) (District II)**

Dear Mr. Christensen:

The plaintiff-appellant, Wisconsin Manufacturers and Commerce, Inc. ("WMC"), submits this letter of supplemental authority in the above-referenced case to discuss *Wisconsin Property Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58 (appeal number 2022AP1233) (June 29, 2023).[1]

*Buchanan* strongly supports WMC's argument that the defendant-respondent Village of Pewaukee's so-called "transportation user fee" or "TUF" is unlawful. In *Buchanan*, the Wisconsin Supreme Court unanimously held that the Town of Buchanan's so-called "transportation utility fee" or "TUF" is unlawful. The court's reasoning in *Buchanan* compels the conclusion that Pewaukee's TUF is unlawful, too.

Specifically, *Buchanan* strongly supports WMC's alternative arguments that Pewaukee's TUF (1) is a statutorily unauthorized and thus illegal tax, (2) is preempted by state statutes governing property taxation, and (3) violates the Wisconsin Constitution's Uniformity Clause. This Court should reverse on any of those three grounds.

## 1. *Buchanan* confirms that Pewaukee's TUF is a tax, not a fee

In this appeal, WMC argues that Pewaukee's TUF is a tax because its primary purpose is to raise revenue for the government. (WMC's Br. 14–24.) Similarly, in *Buchanan*, the supreme court held that the parties were correct to agree that Buchanan's TUF is a tax. *Buchanan*, 2023 WI 58, ¶ 10. That conclusion is binding precedent.

[1] A party may file a letter of supplemental authority "[i]f pertinent authorities decided after briefing come to the attention of a party." Wis. Stat. § 809.19(10). WMC filed its principal brief in this appeal two days before the supreme court decided *Buchanan*. Although the briefing in this appeal is not yet fully complete, WMC submits this letter because this Court generally does not consider "arguments first raised in a reply brief." *Hoskins v. Dodge Cnty.*, 2002 WI App 40, ¶ 29 n.8, 251 Wis. 2d 276, 642 N.W.2d 213. One reason for this rule is that an argument first raised in reply "deprives the respondent of the opportunity to make countering arguments." *Id.* Because WMC is submitting this letter now, the Village of Pewaukee may address *Buchanan* in its response brief and in a response to this letter. *See* Wis. Stat. § 809.19(3) & (11).

"A majority of the participating justices must agree on a particular point for it to be considered the opinion of the court." *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 719, 546 N.W.2d 140 (1996) (per curiam). "When an appellate court intentionally takes up, discusses and decides a question germane to a controversy, such a decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *State v. Holt*, 128 Wis. 2d 110, 123, 382 N.W.2d 679 (Ct. App. 1985).

Under those principles, the *Buchanan* court's conclusion that the TUF is a tax is binding precedent. All seven justices agreed that Buchanan's TUF is a tax. *See Buchanan*, 2023 WI 58, ¶ 10. The supreme court intentionally took up and decided that issue, which was germane to the case. The *Buchanan* court repeatedly referred to the TUF as a "property tax." *See, e.g., id.* ¶¶ 2, 14, 16–19, 21. For example, the court explained that "[b]ecause *a TUF is a property tax*, its funding through the establishment of a utility district must follow the procedures outlined in Chapter 70 of the Wisconsin Statutes." *Id.* ¶ 18 (emphasis added). The court held that because Buchanan's TUF is a property tax, it violates several statutes that govern property taxation. *See, e.g., id.* ¶¶ 19, 21, 31. None of those conclusions would have made sense if the TUF were not a property tax. The court's conclusion that the TUF is a tax is thus essential to the court's decision in *Buchanan*. That conclusion is a precedential holding, not dictum.

Besides, this Court "may not dismiss a statement from an opinion by [the supreme] court by concluding that it is dictum." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682. This Court would contravene *Zarder* if it were to disregard the *Buchanan* court's conclusion that the TUF is a tax.

Although Buchanan conceded that its TUF is a tax, that concession does not impair the precedential value of the supreme court's decision on that point. "[T]he only situation in which a holding based on a concession by [a party] may not have precedential value arises when the court provides *no rationale* or analysis of the subject of the concession and the subject of the concession is not disputed by the parties and is therefore not an issue before the court." *State v. Armstrong*, 223 Wis. 2d 331, 355 n.28, 588 N.W.2d 606 (1999) (emphasis added). More succinctly stated, "an opinion does not establish binding precedent for an issue if that issue was neither contested *nor decided*." *Silver Lake Sanitary Dist. v. Wisconsin Dep't of Nat. Res.*, 2000 WI App 19, ¶ 13, 232 Wis. 2d 217, 607 N.W.2d 50 (emphasis added). For example, the supreme court sometimes assumes, *without deciding*, that a party's concession is correct. *See, e.g., State v. Hunt*, 2014 WI 102, ¶ 42 n.11, 360 Wis. 2d 576, 851 N.W.2d 434.; *State v. Lopez*, 2014 WI 11, ¶ 3 n.2, 353 Wis. 2d 1, 843 N.W.2d 390. In that situation, the supreme court's opinion is not precedential regarding the adopted concession. *See State v. Jackson*, 2011 WI App 63, ¶ 14, 333 Wis. 2d 665, 799 N.W.2d 461. But when the supreme court decides an issue and provides a rationale, its decision on that point is binding precedent, even if a party conceded the point. *See Armstrong*, 223 Wis. 2d at 355 n.28.

In *Buchanan*, the supreme court did *not* adopt a concession, without deciding the issue, for the sake of argument. The supreme court explicitly *agreed* with Buchanan's concession and *concluded* that Buchanan's "TUF is a tax." *Buchanan*, 2023 WI 58, ¶ 10. The court provided a rationale for that conclusion: "[a] 'fee' imposed for the purpose of generating revenue for the municipality is a tax," and Buchanan's TUF is "imposed . . . on a class of residents for the purpose of generating revenue." *Id.* That reasoned conclusion is binding precedent, notwithstanding Buchanan's concession.

That holding applies here because Buchanan's TUF is indistinguishable from Pewaukee's TUF. Like Buchanan's, Pewaukee's TUF is "imposed . . . on a class of residents for the purpose of generating revenue." *See Buchanan*, 2023 WI 58, ¶ 10. Buchanan's TUF imposes a charge on all developed properties to fund road repair and related expenses. *Id.* ¶ 3. So does Pewaukee's TUF. (WMC's Br. 12.) Because both TUFs are identical in this respect, they are both property taxes. Indeed, both TUFs operate similarly. Buchanan's TUF imposes a flat fee on residential properties and imposes a variable fee on commercial properties based on a given property's estimated number of trips generated. *Buchanan*, 2023 WI 58, ¶ 4. Pewaukee's TUF is similar: it imposes on all developed properties a flat "base fee" and a "user fee" that varies based on estimated trips generated. (WMC's Br. 12–13.)[2] If it matters, Buchanan paid for road construction with property taxes before it adopted a TUF. *Buchanan*, 2023 WI 58, ¶ 5. The same is true of Pewaukee. (WMC's Br. 11 (citing R. 3:18); *see also* R. 41:19.)

In short, Pewaukee's TUF is a tax for the same reasons that Buchanan's TUF is a tax. This point was well-supported by longstanding precedent even before *Buchanan* was decided. (*See* WMC's Br. 14–24.) *Buchanan* confirms this point. The circuit court was wrong to hold that Pewaukee's TUF is a fee rather than a tax. In *Buchanan*, even Buchanan acknowledged that its TUF is a tax, and the supreme court unanimously agreed. Pewaukee's TUF is a tax, too.

### 2. *Buchanan* confirms that Pewaukee's TUF is statutorily unauthorized and thus unlawful

In this appeal, WMC argues that Pewaukee's TUF is unlawful because it is a tax without statutory authority. (WMC's Br. 24–25.) *Buchanan* compels this conclusion, too.

As WMC noted, a tax is unlawful unless it has clear and express statutory authority. (WMC's Br. 24–25.) The supreme court made the same point in *Buchanan*, 2023 WI 58, ¶ 11.

[2] The *Buchanan* court did not draw any legal distinction between the flat fee and the variable fee, instead holding that the entire TUF is a tax. *See Wisconsin Property Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, ¶¶ 10, 13. And the court struck down the entire TUF; it did not uphold the variable fee or flat fee. *See, e.g., id.* ¶¶ 18–19, 21, 32.

And, crucially, the supreme court agreed with the challenger's argument that "Wisconsin Statutes do not authorize municipalities to impose a TUF on property owners based on estimated use of the municipality's roads." *Id.* ¶ 2. There is no way for Pewaukee to get around that holding. Indeed, as WMC has noted, neither Pewaukee nor the circuit court has suggested that the TUF is lawful *if it is a tax*. (R. 49:2–3; WMC's Br. 25 n.8.) Because *Buchanan* confirms that Pewaukee's TUF is a tax, as explained above, it also confirms that Pewaukee's TUF is unlawful because it has no statutory basis.

*Buchanan* eliminates the circuit court's reliance on home-rule authority as a basis for Pewaukee's TUF. WMC argues on appeal that the circuit court wrongly held that Pewaukee's home-rule authority allowed it to adopt a TUF. (WMC's Br. 27–30.) Central to that holding was the circuit court's determination that Pewaukee's TUF is a fee rather than a tax. (*See* R. 55:14–18.) However, *Buchanan* shows that Pewaukee's TUF is a tax—and a village may not adopt a tax under its home-rule authority. *Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621, 625, 137 N.W.2d 442 (1965). Instead, a municipality may adopt a tax only if it is clearly and expressly authorized by statute. *Buchanan*, 2023 WI 58, ¶ 11; *see also Jordan*, 28 Wis. 2d at 621.

For similar reasons, *Buchanan* supports WMC's argument that Wis. Stat. § 66.0621 does not authorize Pewaukee's TUF. (*See* WMC's Br. 30–31.) The circuit court stated that Wis. Stat. § 66.0621(5) authorizes Pewaukee to adopt "a user fee," including a TUF. (R. 55:10.) Besides being a misinterpretation of this statute (*see* WMC's Br. 30–31), that holding rested on the circuit court's flawed premise that the TUF is a user fee. As just explained, Pewaukee's TUF is a tax under *Buchanan*, not a user fee.

In short, the circuit court wrongly upheld Pewaukee's TUF by deeming it a fee. *Buchanan* confirms that "a TUF is a property tax." *Buchanan*, 2023 WI 58, ¶ 18. And the Wisconsin Statutes do not authorize a TUF. *See id.* ¶ 2. Just like Buchanan's TUF, Pewaukee's TUF is *ultra vires* and unlawful.

### 3. *Buchanan* confirms that Pewaukee's TUF violates two state statutes

Although this Court may reverse the circuit court's decision simply by holding that Pewaukee's TUF is a statutorily unauthorized tax, it may also address WMC's preemption arguments in the alternative. As relevant here, WMC argues on appeal that the levy limit statute (Wis. Stat. § 66.0602) and a property tax exemption statute (Wis. Stat. § 70.11) preempt Pewaukee's TUF. (WMC's Br. 34–36.) Although WMC assumed *arguendo* that the TUF is a fee when making this preemption argument, WMC also contended that these statutes preempt the TUF if it "is a property tax (which it is)." (WMC's Br. 36 (quoting R. 41:21 n.6).) *Buchanan* supports WMC's preemption arguments, too.

In *Buchanan*, the supreme court held that the levy limit statute applied to Buchanan's TUF and that the TUF violated this statute. *Buchanan*, 2023 WI 58, ¶¶ 22–31.

Pewaukee's TUF suffers from the same fatal flaw. The levy limit statute applies to Pewaukee's TUF because, as explained above, Pewaukee's TUF is materially indistinguishable from Buchanan's TUF. And like Buchanan, Pewaukee is using its TUF to exceed its levy limit. (*See* R. 41:19.) According to Pewaukee's 2021 levy limit worksheet, Pewaukee's allowable levy increase for 2022 was at most $75,340.12. (*See* R. 3:37.)[3] In its 2022 approved budget, Pewaukee ostensibly increased its property tax levy by at least $30,000.[4] Pewaukee's 2022 budget, however, shifted $57,300 in "street maintenance" costs and $10,800 in "traffic control" costs to its transportation utility fund.[5] Pewaukee is thus using the TUF to exceed its 2022 levy limit by at least $22,000. Just like Buchanan's TUF, Pewaukee's TUF violates the levy limit statute.

Both TUFs also violate Wis. Stat. § 70.11. In *Buchanan*, the supreme court explained that Buchanan "imposes the TUF upon all developed properties in the district, regardless of their tax-exempt status. The law does not give [Buchanan] any authority to impose a property tax on tax-exempt properties within the municipality." *Buchanan*, 2023 WI 58, ¶ 19. Pewaukee's TUF likewise "does not provide exceptions for properties that are statutorily exempt from property taxes." (WMC's Br. 35.) Section 70.11 thus preempts Pewaukee's TUF.

### 4. *Buchanan* shows that Pewaukee's TUF violates the Uniformity Clause

In this appeal, WMC argues that Pewaukee's TUF violates the Uniformity Clause in Article VIII, section 1 of the Wisconsin Constitution if the TUF is a property tax. (WMC's Br. 25–27.) This Court need not reach this alternative argument because it may simply conclude that Pewaukee's TUF is a statutorily unauthorized tax, per *Buchanan*.

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[3] Section A, Line 1 of the levy limit worksheet states that Pewaukee's 2021 actual levy was $5,169,769, which apparently includes $30,655.12 of personal property aid. (R. 3:37.) Subtracting the personal property aid yields a 2021 actual levy of $5,139,113.88. The levy limit worksheet also states that Pewaukee's 2022 allowable levy was $5,214,454. (R. 3:37.) The difference between the 2022 allowable levy and the 2021 actual levy is $75,340.12.

[4] In November 2021, Pewaukee adopted a 2022 budget with $3,961,906 of general property taxes. Village of Pewaukee 2022 Adopted Budget, at 2 (Nov. 16, 2021), https://www.villageofpewaukee.com/Data/Sites/38/media/for-residents/treasurer/budgets/genfund-budget-2022-adopted-11.16.2021.pdf. By contrast, Pewaukee's 2021 budget had $3,918,300.82 of approved general property taxes and $3,931,676.51 of actual general property taxes as of September 30, 2021. *Id.* The difference between the 2022 levy and the 2021 levy is thus either $43,605.18 or $30,229.49. WMC uses the lower number here, which is more favorable to Pewaukee.

[5] Village of Pewaukee 2022 Adopted Budget, at 10 (Nov. 16, 2021), https://www.villageofpewaukee.com/Data/Sites/38/media/for-residents/treasurer/budgets/genfund-budget-2022-adopted-11.16.2021.pdf.

Nevertheless, *Buchanan* supports WMC's Uniformity Clause argument, too. Although the majority opinion in *Buchanan* did not resolve the Uniformity Clause issue presented there, *see Buchanan*, 2023 WI 58, ¶ 2, *Buchanan* still strongly suggests that Pewaukee's TUF violates the Uniformity Clause. The Uniformity Clause requires property taxes to be allocated proportionally based on property value. (WMC's Br. 25.) As relevant here, the *Buchanan* court held that "a TUF is a property tax," and Buchanan's TUF is unlawful because it is not based on property value as required by Wis. Stat. ch. 70. *Buchanan*, 2023 WI 58, ¶ 18. There is no material distinction here between ch. 70 and the Uniformity Clause: both require property taxes to be based on property value. A TUF violates the Uniformity Clause for the same reason it violates ch. 70: it is not based on property value.

Justice Rebecca Grassl Bradley's concurrence supports this conclusion. Joined by Justice Patience Drake Roggensack, Justice Bradley argued that Buchanan's TUF violates the Uniformity Clause. *Buchanan*, 2023 WI 58, ¶¶ 36–49 (R. G. Bradley, J., concurring). No justice disagreed with that conclusion.

To be sure, the Uniformity Clause does not apply to special assessments because they are levied "against the property specially benefited in proportion to the benefits conferred." *Duncan Dev. Corp. v. Crestview Sanitary Dist.*, 22 Wis. 2d 258, 264, 125 N.W.2d 617 (1964). "A special assessment differs from a general tax in that it is imposed to pay for an improvement which benefits specific property within the political division imposing it." *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 108, 135 N.W.2d 799 (1965).

But Pewaukee conceded that its TUF is not a special assessment. (R. 65:24–25.) The circuit court did not disagree with that concession, which is correct for two reasons relevant here. (*See* R. 49:6–7.)

First, a special assessment funds an improvement that "is made *primarily* for the accommodation and convenience of inhabitants of a particular area in the community whose property receives a special benefit from the improvement." *CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶ 36, 380 Wis. 2d 399, 909 N.W.2d 136 (citation omitted). Such a special benefit must provide "an uncommon advantage to a property differing in kind, rather than in degree, from the benefits enjoyed by the general public." *Id.* ¶ 37 (citation omitted). A TUF fails that requirement because it funds roadwork throughout a municipality; a property owner is required to pay a TUF even if the TUF does not fund roadwork near that person's property. *See Buchanan*, 2023 WI 58, ¶¶ 46–48 (R. G. Bradley, J., concurring). A TUF "is based not on the individualized benefits of the particular improvement, but on estimated use of the municipality's roads." *Id.* ¶ 48. Absent individualized benefits, a TUF is a general property tax rather than a special assessment.

Second, "a 'special assessment' is defined as a *one-time* charge levied exclusively against properties 'specially' benefiting from a *particular* improvement." *In re Grede Foundries, Inc.*, 651 F.3d 786, 795 (7th Cir. 2011) (emphases added). Special assessments thus do not

apply to recurring expenses. *See CED Properties*, 2018 WI 24, ¶ 40. A TUF, by contrast, is a recurring charge to fund ongoing road maintenance. *See Buchanan*, 2023 WI 58, ¶¶ 46, 49 (R. G. Bradley, J., concurring); *see also* Village of Pewaukee Ordinance § 92.106(a).

Tellingly, neither Pewaukee nor the circuit court has suggested that the Uniformity Clause is inapplicable or satisfied *if the TUF is a property tax*. Instead, Pewaukee and the circuit court avoided the Uniformity Clause by deeming the TUF a user fee rather than a property tax. But *Buchanan* confirms that "a TUF is a property tax." *Buchanan*, 2023 WI 58, ¶ 18. That holding strongly supports WMC's argument that the Uniformity Clause applies to and invalidates Pewaukee's TUF.

In short, Pewaukee's TUF violates the Uniformity Clause. The Uniformity Clause applies to Pewaukee's TUF because it is a property tax, not a special assessment. And the TUF violates the Uniformity Clause because the TUF is not based on property value. (WMC's Br. 25–27.)

* * *

To summarize, *Buchanan* strongly supports WMC's alternative arguments that Pewaukee's TUF (1) is a statutorily unauthorized and thus illegal tax, (2) is preempted by state statutes governing property taxation, and (3) violates the Wisconsin Constitution's Uniformity Clause. This Court should reverse on any of those three grounds.

Respectfully submitted,

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