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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2022-AP-1233
Circuit Court Case No. 2021-CV-712

Wisconsin Property Taxpayers, Inc.,

Plaintiff-Respondent,

v.

Town of Buchanan,

Defendant-Appellant.

APPEAL FROM FINAL ORDER AND JUDGMENT
DATED JUNE 27, 2022, OF THE OUTAGAMIE
COUNTY CIRCUIT COURT, CASE NO. 2021-CV-712,
THE HONORABLE MARK J. MCGINNIS, PRESIDING

REPLY BRIEF OF DEFENDANT – APPELLANT

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ARGUMENT

WPT's assertions and arguments are shallow, circular and at times contradictory. They fail to acknowledge Section 66.0827 in its entirety. Of course Section 66.0827 authorizes a "taxation of property" in the district. An originalist, textualist or strict constructionist could not reach any other conclusion. Not only does it authorize funding of public improvements by a taxation of property, it mandates taxation of property. "The fund of each utility district shall be provided by the taxation of the property in the district." This taxation of property is a "special tax." It is not a general property tax or a special assessment. If this statutory provision only authorized a general property tax or special assessment it would have no useful purpose whatsoever because the Town already has that authority elsewhere.

I. THE "TAXATION OF PROPERTY" BY THE UTILITY DISTRICT CANNOT, AS A MATTER OF LAW, BE A GENERAL PROPERTY TAX.

A utility district under Section 66.0827 is not a "taxation jurisdiction" for general property tax purposes. Chapter 70, "General Property Taxes" states that a "taxation district means a town, village or city in which general property taxes are levied and collected."

WPT states: "Importantly, the statute [66.0827] provides only two methods for funding improvements in a utility district: 'special assessments,' and general property taxes." WPT is flat out wrong as a matter of law.

Not only does a utility district lack the authority to impose a general property tax, the method in §66.0827 for creating a fund for public improvements by a taxation of the property in the district is completely different in substance and procedure from the general property tax. Section 66.0827(2) provides that the fund is based upon an annual estimate by the department in charge of public works in cities and villages and by the town chairperson in towns, filed by October 1. Chapters 70 and 74, Wis. Stats., set out in detail procedures for general property taxes.

It is not clear if WPT has ever read Section 66.0827 in its entirety. Nevertheless, WPT assertions have no support whatsoever in the plain meaning of Section 66.0827.

II. THE UTILITY DISTRICT CANNOT, AS A MATTER OF LAW, SPECIAL ASSESS PROPERTY IN THE DISTRICT.

The WPT mistake on general property taxes is repeated on special assessments. The “district fund” could not be based on special assessments. Section 66.0703 Wis. Stats., on special assessments, does not authorize a utility district to levy special assessments. Section 66.0703(1) provides in relevant part that “any city, town or village may, by resolution of its governing body, levy and collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal work or improvement.”

Moreover, §66.0827 only authorizes a utility district to pay the cost of a public work “not paid for by special assessment.” A special assessment can not be part of a district fund to pay the cost of public improvements.

The language of §66.0827 also indicates a distinction from special assessments. The district fund provided by the taxation of property is based on an “annual estimate.” Special assessments have fixed amounts on a project-by-project basis. They do not have annual estimates.

III. WHY HAVE SECTION 66.0827 IN THE FIRST INSTANCE IF A UTILITY DISTRICT’S TAXATION OF PROPERTY IN THE DISTRICT WAS MERELY A GENERAL PROPERTY TAX OR A SPECIAL ASSESSMENT?

At page 17 of its Brief, WPT argues that Section 66.0827’s reference to “taxation of property” should not be interpreted as a different type of property tax, but instead as authorizing a municipality to use ordinary general property taxes to fund public improvements in a utility district.

The WPT argument makes no sense. What advantage would there be to create a utility district and establish and administer a utility district fund to pay for the cost of public improvements if the cost could only be funded by the general property tax and/or special assessments? A statute should be construed so that no work or clause shall be rendered surplusage. *State v. Martin*, 162 Wis. 2d 883, 894, 470 N.W.2d 900 (1991).

The legislature clearly intended that the taxation of the property in the district was an alternative or compliment to the general property tax and/or special assessments. The WPT interpretation would make Section 66.0827 in its entirety, merely surplusage.

IV. A UTILITY TAXATION ON PROPERTY IS NOT A SPECIAL ASSESSMENT BUT HAS SOME CHARACTERISTICS IN COMMON WITH A SPECIAL ASSESSMENT.

While the Town Utility taxation on property in the district is not a special assessment, it does share some characteristics of a special assessment. A special assessment is a form of taxation on property. (See Town Appellant's Brief at pp. 26 – 28). *Dalrymple v. Milwaukee*, 53 Wis. 178, 185, 10 N.W. 141 (1881) (“The only distinction between the two forms is, that general taxation is based upon value and subject to the constitutional rule of uniformity, while assessments are not.”) A special assessment is also a funding mechanism for the cost of public improvements like a utility tax on property.

A Utility District taxation on property is different from a special assessment in that it is an annual recurring tax on property instead of a one time tax on property. A special assessment is limited to a highly localized public improvement with a localized benefit. A utility taxation on property can have a wider community reach.

Neither the enabling authority for a special assessment (Section 66.0703) nor the enabling authority for a utility taxation of property (Section 66.0827) dictates any specific basis for the tax. Section 66.0703(1)(b) requires an assessment to be on a reasonable basis. So does the Constitution. So would a utility tax on property.

At page 5 of its Brief, WPT asserts that there is no statutory authority for a tax specifically based on a properties' predicted use of the road system. The Town agrees. However,

Wisconsin Courts have determined that so-called “predicted use of the road system” is a reasonable and equitable basis for a special assessment. In *Park Ave. Plaza v. City of Mequon*, 2008 WI App 39, ¶30 (See Town Appellant Brief at page 29): the Court stated: “(t)he City used the trip generation methodology to apportion costs; more specifically, the City based the assessment on ‘theoretical’ vehicle trips per day. . . .” The Court concluded this method fairly and equitably apportioned the assessment among properties.

Here, the Town used the exact same methodology for its taxation of property in the district. The district methodology supports uniformity and is fair and equitable.

V. JUST AS A SPECIAL ASSESSMENT DOES NOT COUNT AGAINST THE GENERAL PROPERTY TAX LEVY LIMIT, NEITHER DOES A UTILITY DISTRICT TAXATION ON PROPERTY.

WPT argues that a utility district taxation of property is not listed as an express exception to the general property tax levy limit under Section 66.0602(3) Wis. Stats. For that reason, any funds obtained by a utility district taxation of property count against the general property tax levy. (WPT Brief at p. 15.)

However, funds raised by special assessment, which by nature is an exercise of property taxation are also not listed as an express exception to the general property tax levy limit under Section 66.0602(3). Special assessments do not count against the general property tax levy limit. WPT provides no explanation whatsoever as to how this can be.

It is the Town's position that because both special assessment and utility taxation of property focus on public improvements and both confer benefits to property, the former directed to a local benefit and the latter to a broader community benefit, neither is subject to the general property tax levy limit.

VI. A UTILITY TAX ON PROPERTY IS A SPECIAL TAX IN THE WISCONSIN TAXATION SCHEME.

WPT argues that the Town "cites nothing to support the idea that there are different kinds of property taxes some of which are not subject to the levy limit." (WPT Brief at p. 17). The Town disagrees.

As noted in the Town Brief at pp. 33 – 34, Section 61.46(2) Wis. Stats., authorizes a highway tax and Section 61.47 authorizes a street and sidewalk improvement tax. WPT does not acknowledge these statutory tax authorizations. They along with the utility taxation of property fit within the statutory definition of special tax – any amount entered in the tax roll which is not a general property tax, special assessment, or special charge. Section 74.01(1) Wis. Stats.

The Town notes that these special taxes all relate to public improvements. All require a separate fund account. None are for a "service". None are subject to the statutory levy limit.

CONCLUSION

Section 66.0827 is a straightforward unambiguous statutory provision. Of course it authorizes the taxation of property to fund public improvements. It says exactly that. It has its own procedures specific to the funding of public

improvements apart from the general property tax and special assessments. It is a complimentary alternative to the general property tax and special assessments. It has to be so otherwise it would have no usefulness. This Court is obligated to interpret 66.0827 within the plain meaning of its written words.

Dated this 27th day of October, 2022.

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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. The length of this brief is 1511 words.

Dated: October 27, 2022

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