COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2886 **Cir. Ct. No. 2007CV44**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

THE SADDLE RIDGE CORPORATION,

PLAINTIFF-RESPONDENT,

V.

BOARD OF REVIEW FOR TOWN OF PACIFIC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: JAMES EVENSON, Judge. *Affirmed and cause remanded with directions.*

Before Dykman, P.J. Higginbotham and Bridge, JJ

¶1 HIGGINBOTHAM, J. This case arises from Saddle Ridge Corporation's challenge of a property tax assessment against it for vacant land

within three condominium projects reserved for development of forty-one recorded but unbuilt units.[1] The Board of Review for the Town of Pacific upheld the assessment, and the circuit court reversed the Board's decision on certiorari review. Saddle Ridge contends that it was improperly assessed for the vacant land reserved for development because it does not own the land under the terms of the condominium declarations. The Board argues that its assessment was valid because ownership for tax assessment purposes is properly determined under the beneficial ownership test, and asserts that Saddle Ridge is the beneficial owner of the land in question. Thus, the issues as framed by the appellant[2] are what is the

[1] The parties refer to the property in question variously as "lots" and "parcels." We believe the phrase "vacant land reserved for development" more accurately describes the property, which is plainly *not* a parcel within the meaning of the Act. The Act defines parcel as a unit together with its percentage undivided interest in the common elements. WIS. STAT. § 703.21(1) (2007-08). We conclude in this opinion that the property in question is a common element of the condominium projects. *See infra*, ¶11.

[2] The dissent declares that we have been "[l]ed astray by the Town of Pacific's briefs," and faults us for "start[ing] down the wrong road" as a result. Dissent, ¶24. Then, over the course of the next twenty-four paragraphs, the dissent does nothing less than relitigate the case for the appellant. A court that addresses the arguments actually made by the appellant is not "led astray" by the briefs; it is performing its traditional function in our adversarial system. *See* ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶110, __ Wis. 2d __, 767 N.W.2d 898 (Bradley, J. concurring in part, dissenting in part) ("A court generally relies on the parties to frame the issues on review."); ***Waushara County v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (appellate courts will not ordinarily consider issues that are not raised on appeal).

The dissent also maintains that oral argument or supplemental briefing should have been ordered in this case to permit the Town to develop new arguments along the lines advanced by the dissent. Dissent, ¶36. But oral argument or supplemental briefing was never appropriate in this case because the Town conceded that the owners of the existing units were the legal owners of the land in question. *See infra*, ¶8. It therefore forfeited the right to make the arguments in favor of legal ownership proposed by the dissent. Ordering oral argument or supplemental briefing under these circumstances would have amounted to giving one party a "do over" to the detriment of the other.

Moreover, the dissent's assertion that we address issues "finessed or undeveloped by Saddle Ridge" is simply wrong. Dissent, ¶29. Saddle Ridge devoted fully nine pages of its brief to the issues of ownership under the statutes and condominium declarations that the dissent calls "finessed or undeveloped." And finally, the dissent suggests that this opinion should not have been recommended for publication because both parties agreed that publication was unnecessary.
(continued)

proper test to determine ownership for tax assessment purposes of land reserved for unbuilt units in a partially developed condominium project, and, applying that test, who owns the land.

¶2 We conclude that the beneficial ownership test is inappropriate for determining ownership of vacant land reserved for development within a condominium. We further conclude that vacant land reserved for development within a partially developed condominium project is a common element of the condominium, ownership of which is determined under the condominium declaration. Because Saddle Ridge was not an owner of the land in question under the condominium declarations, we conclude that the assessment was invalid. Accordingly, we affirm the circuit court's order reversing the Board's decision and remand to the circuit court with instructions to remand to the Town of Pacific Board of Review for further proceedings consistent with this opinion.

BACKGROUND

¶3 Saddle Ridge is the developer of three condominiums in the Town of Pacific, Saddle Ridge Condominium ("SR"), Saddle Ridge Estates Condominium ("SRE"), and The Forest at Swan Lake Condominium ("The Forest"). In 2006, most of the units in the condominiums were completed and owned by individual owners. However, forty-one declared units which were to be built on vacant land within the condominium developments remained unbuilt.

Dissent, ¶¶26, 28 and n.3. As the dissent knows, the court, not the parties, decides whether an opinion is to be published. As the dissent also knows, this case meets our standards for publication. *See* WIS. STAT. RULE 809.23 (2007-08).

¶4 The Town notified Saddle Ridge that it would assess the vacant land as forty-one separate "tax parcels." The Town assessed the "parcels" at $32,000 each. The prior year, the Town had assessed the "parcels" at $5,000 each. Saddle Ridge objected to the 2006 assessment before the Town of Pacific Board of Review, arguing that it did not own the vacant land. Saddle Ridge contended that the individual owners of the built units were the proper owners of the land, citing the terms of the condominium declarations, as well as relevant statutes and provisions of the Property Assessment Manual for Wisconsin Assessors. Following a hearing, the Board of Review voted in a tie, thereby upholding the assessment.

¶5 Saddle Ridge sought certiorari review in the circuit court. The court reversed the Board's decision and remanded to the Board to enter an order vacating the assessment, concluding that Saddle Ridge was improperly assessed because the land reserved for the unbuilt units was owned by the individual owners of the built units under the terms of the condominium declarations. Additional facts are provided as necessary in the discussion section.

STANDARD OF REVIEW

¶6 On certiorari review under WIS. STAT. § 70.47(13) (2007-08),[3] we review the decision of the board of review and not that of the circuit court. ***Mineral Point Valley Ltd. P'ship v. Board of Review***, 2004 WI App 158, ¶5, 275 Wis. 2d 784, 686 N.W.2d 697. "[J]udicial review by certiorari … of a board of

[3] WISCONSIN STAT. § 70.47(13) establishes the procedures for certiorari review of an assessment decision of a board of review. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

review's determination is limited strictly to the record…." ***State ex rel. Hemker v. Huggett***, 114 Wis. 2d 320, 323, 338 N.W.2d 335 (Ct. App. 1983). Our review examines

> (1) whether the board acted within its jurisdiction; (2) whether the board acted according to law; (3) whether the board's action was arbitrary, oppressive or unreasonable, representing its will rather than its judgment; and (4) whether the evidence was such that the board might reasonably make the order or determination in question.

Nankin v. Village of Shorewood, 2001 WI 92, ¶20, 245 Wis. 2d 86, 630 N.W.2d 141 (citation omitted). Although we will uphold a board of review's assessment decision if it is supported by any reasonable view of the evidence, ***Mineral Point Valley Ltd. Partnership***, 275 Wis. 2d 784, ¶5, we review its legal conclusions de novo. *See* ***State ex rel. Geipel v. City of Milwaukee***, 68 Wis. 2d 726, 731-32, 229 N.W.2d 585 (1975). If we find an error that renders the assessment void, we must remand to the board for further proceedings. ***Nankin***, 245 Wis. 2d 86, ¶21.

¶7 The issue before us is what is the proper test to apply in determining who owns for purposes of tax assessment land in a partially built condominium development reserved for declared but unbuilt units. This is a legal question that we decide independently of the Board, while benefiting from the analyses of the Board and the circuit court.[4] *See* ***Loth v. City of Milwaukee***, 2008 WI 129, ¶10, 315 Wis. 2d 35, 758 N.W.2d 766.

[4] The dissent faults us for not more thoroughly engaging the record made before the Town of Pacific Board of Review. Dissent, ¶27. But the case as briefed does not turn on the factual determinations of the Board of Review. The case as briefed presents a question of law: Did the Board apply the proper test in determining ownership of the property at issue? As the dissent is aware, the Board's decision is owed no deference when the issue on appeal is whether it applied the proper legal standard. Whether the Board relied on the law of Narnia or any other jurisdiction real or imagined, *see* dissent ¶27, our review of whether it applied the correct legal (continued)

DISCUSSION

¶8 Saddle Ridge argues that the Board erred in assessing it for the vacant land reserved for development because under the condominium declarations it is not the owner of the land. The Board essentially concedes that Saddle Ridge is not the legal or title owner of the land in question by the terms of the condominium declaration. Rather, it asserts that the proper test of ownership for tax assessment purposes is not legal or title ownership, but beneficial ownership.

¶9 Courts have traditionally applied the so-called beneficial ownership test when a tax exempt entity such as a public university or municipality holds paper title to a property but has transferred at least some of the sticks in the proverbial bundle of rights to a taxable entity. *See, e.g.* ***Milwaukee Reg'l Med. Ctr., Inc. v. City of Wauwatosa***, 2007 WI 101, ¶¶4-5, 304 Wis. 2d 53, 735 N.W.2d 156; ***Mitchell Aero, Inc. v. City of Milwaukee***, 42 Wis. 2d 656, 660, 168 N.W.2d 183 (1969). The Board asserts that the beneficial ownership test applies in taxation cases as well as the above-referenced exemption cases, citing the following language in ***State ex rel. Wisconsin University Building Corp. v. Bareis***, 257 Wis. 497, 505, 44 N.W.2d 259 (1950): "*taxation or exemption* depends not upon the legal title but on the status of the owner of the beneficial interest in the property." (Emphasis added); *see also* ***Gebhardt v. City of West Allis***, 89 Wis. 2d 103, 108, 278 N.W.2d 465 (1979) (stating that "ownership of … property for purposes of the general property tax is to be distinguished from legal

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standard is de novo. *See* ***Nankin v. Village of Shorewood***, 2001 WI 92, ¶20, 245 Wis. 2d 86, 630 N.W.2d 141 (citation omitted).

title."). The Board contends that Saddle Ridge is the beneficial owner of the vacant land under this test, and that the assessment is therefore valid. We reject the Board's argument.[5]

¶10 We conclude that imposing a common law test of ownership for tax assessment purposes would be inappropriate in the condominium context because the legislature has adopted a comprehensive statutory scheme that addresses condominium ownership rights, the Condominium Ownership Act ("Act"), chapter 703 of the Wisconsin statutes. As discussed below, this scheme explicitly provides that ownership of the type of property at issue here—a common element of the condominium, see ¶12 below—is determined under the terms of the declaration creating the condominium, see ¶¶13 and 16 below, and further provides that taxation of common elements is based on the ownership arrangement established in the declaration, see ¶13 below.

¶11 We begin by reviewing the pertinent parts of the statutory scheme. A condominium is established by recording a condominium declaration with the register of deeds where the property is located. WIS. STAT. § 703.07. The condominium declaration is the instrument by which the property becomes subject to the Condominium Ownership Act. WIS. STAT. § 703.02(8).

¶12 The Act creates two specific ownership forms associated with the condominium, the "unit" and the "common elements." ***ABKA Ltd. P'ship v.***

[5] We express no view regarding whether, in other contexts, the above-cited language in ***State ex rel. Wisconsin University Building Corp. v. Bareis***, 257 Wis. 497, 505, 44 N.W.2d 259 (1950), and ***Gebhardt v. City of West Allis***, 89 Wis. 2d 103, 108, 278 N.W.2d 465 (1979), might be read to provide that the beneficial ownership test applies to tax assessment cases as well as tax exemption cases. We hold only that, in this context, ownership is determined by the specific terms of the condominium declaration pursuant to the Condominium Ownership Act.

DNR, 2002 WI 106, ¶33, 255 Wis. 2d 486, 648 N.W.2d 854. The "unit" is "a part of a condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space or one or more rooms or enclosed spaces located on one or more floors, or parts thereof, in a building." WIS. STAT. § 703.02(15). The "common elements" are "all of a condominium except its units." Section 703.02(2). In light of the statutory definitions of "unit" and "common elements," we observe that the vacant land reserved for development here is plainly a common element of the condominiums.

¶13 The Act contains the following provisions relating to the ownership of the common elements. Pursuant to WIS. STAT. § 703.13(1), every unit owner holds an "undivided interest" in the common elements equal to that set forth in the condominium declaration. The percentage interest in the common elements of each unit is established in the condominium declaration. WIS. STAT. § 703.09(1)(e). A unit, together with its undivided interest in the common elements, constitutes real property. WIS. STAT. § 703.04.

¶14 For purposes of assessment and taxation, each unit and its percentage undivided interest in the common elements constitutes a separate parcel. WIS. STAT. § 703.21(1). "Neither the building, the property nor any of the common elements shall be deemed to be a parcel separate from the unit." ***Id.***

¶15 As the foregoing review of the relevant provisions makes clear, the legislature, by adopting the Act, enacted a comprehensive legislative scheme under which condominium ownership rights are determined. By setting forth ownership rights deliberately and completely in the Act, the legislature has left no room for the courts to impose a common law test of condominium ownership.

Accordingly, we conclude that the beneficial ownership test is inappropriate for determining ownership in this context.

¶16 Rather, we conclude that, for purposes of taxation and assessment, ownership of the common elements of a condominium, including vacant land reserved for development, is determined by the terms of the condominium declaration, pursuant to WIS. STAT. §§ 703.13(1), 703.09(1)(e) and 703.21(1) discussed in ¶¶13 and 14 above. We observe that this conclusion is consistent with the following guidelines for assessing common elements of a condominium created by the Wisconsin Department of Revenue, which are adapted from the relevant statutes:

> When performing the assessments, the assessor must determine the market value of each individual unit in the condominium project, including its share of the common elements.
>
> The assessor should look at the condominium declaration first as it will usually detail what are common elements and how these elements are allocated to each individual unit.

1 PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS at 8-48 (rev. Dec. 2005).

¶17 Turning to the present case, we examine the condominium declarations to determine ownership of the common elements, including the vacant land in question. The SRE condominium declaration, which is substantially similar to the Forest and SR declarations, includes the following provisions for calculating the percentage ownership of the common elements for each unit:

> Each unit owner shall own an undivided interest in the common areas and facilities and limited common areas as a tenant in common with all other unit owners….

> The percentage of such undivided interest in the common areas and facilities and limited common areas relating to each unit and its owner for all purposes, including proportionate payment of common expenses, shall be determined by dividing the number one (1) by the number forty-eight (48).
>
> The percentage of such ownership of the common areas and facilities and limited common areas shall be subject to change and adjustment in the event of annexation of additional properties and improvements to the condominium ….

¶18 Forty-eight, the number to be divided into the number one to determine the percentage ownership of each unit in SRE, was the original number of units in the project. The declaration provides that this number is to be increased "in the event of annexation of additional properties and improvements to the condominium."[6] Percentage ownership of the common elements, which includes the vacant land in question, is therefore determined by dividing the number one by the number of built units.[7]

¶19 Thus, under the condominium declarations, once one or more units are built, the unbuilt units do not possess any appurtenant interest in the common elements of the condominiums. Because Saddle Ridge, as owner of the rights to develop the unbuilt units, does not own any part of the condominiums' common elements, including the land reserved for development, Saddle Ridge is not

[6] By 2006, the number of built units in SRE had expanded to 132. Thus, under the terms of the SRE condominium declaration set forth above, the percentage of undivided interest in the common areas for each unit in 2006 would have been determined by dividing the number one by 132.

[7] Our interpretation of this part of the declaration is consistent with the circuit court's interpretation. We note that the Board did not challenge this interpretation on appeal, which was a necessary part of the circuit court's conclusion that Saddle Ridge was not the owner of the vacant land under the condominium declarations.

assessable for the land in question, except for its ownership share of the land as an owner of unsold built or partially built units.

¶20 This result is consistent with our analysis in ***Aluminum Industries Corp. v. Camelot Trails Condominium Corp.***, 194 Wis. 2d 574, 585, 535 N.W.2d 74 (Ct. App. 1995). There, we concluded that the definition of "unit" under the Act includes unbuilt units. ***Id.*** However, we further held that the terms of the condominium declaration ultimately determine whether an unbuilt unit is treated as a unit for purposes of assessment for common expenses. ***Id.*** at 586. Examining the condominium declaration, we concluded that the unbuilt units at issue in ***Aluminum Industries*** were not assessable for common expenses by the condominium association. ***Id.*** Likewise, our conclusion here that the common elements, including the vacant land at issue, are not subject to tax assessment flows from the condominium declarations, which limit ownership of the common elements to built units.

¶21 As the circuit court noted, the only arrangement by which Saddle Ridge would have been the *exclusive* owner of the vacant land is by the creation of a "land condominium," a variant of condominium ownership permitted by the Act though not explicitly authorized by it. *See* MICHAEL S. GREEN, ET. AL, WISCONSIN CONDOMINIUM LAW HANDBOOK, § 1.7 (3d ed. 2006). A land condominium is established when the condominium declaration designates the land on which the unit sits as a limited common element[8] reserved for the exclusive use of the unit

[8] A "limited common element" is a common element "identified in a declaration or on a condominium plat as reserved for the exclusive use of one or more but less than all of the unit owners." WIS. STAT. § 703.02(10).

owner. *See* 75 Wis. Op. Att'y Gen. 96 (1986).[9] But the condominium declarations in this case do not establish a land condominium. In fact, the declarations specifically include within the definition of common areas and facilities "the land on which the building or buildings are located."[10] [8:13]

CONCLUSION

¶22 In sum, we conclude that the beneficial ownership test is inappropriate for determining ownership of vacant land reserved for development within a condominium. We further conclude that vacant land reserved for development within a partially developed condominium project is a common element of the condominium, ownership of which is determined under the condominium declaration. Because Saddle Ridge was not an owner of the vacant

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[9] The attorney general opinion explains that the Condominium Ownership Act permits the creation of condominiums that "resemble subdivisions of land in all practical respects." 75 Wis. Op. Att'y Gen. 96 (1986).

> Creation of a so-called "land condominium" under chapter 703 can be accomplished through declaring an area of land a condominium under section 703.07, delineating sections of land resembling subdivision lots as "limited common elements" under section 703.02(10) and describing condominium units as "cubicles of air" above the limited common elements under section 703.02(15). In so doing, a condominium developer can create a "land condominium" resembling a subdivision without satisfying the requirements of chapter 236.

Id.

[10] The Board focuses exclusively on whether the vacant land, as a distinct feature separate from the unbuilt unit itself, is assessable. It does not argue that, even if Saddle Ridge is not the owner of the vacant land reserved for development, the assessment is valid on the alternative ground that the Town was permitted under the Condominium Ownership Act to assess Saddle Ridge for the development value of the air space designated for the declared but unbuilt units. Because the Board does not make an argument along these lines, we do not address the issue of whether a municipality may assess a condominium developer for the development value of the air space designated for a declared but unbuilt unit.

land in question under the condominium declarations, we conclude that the assessment was invalid. Accordingly, we affirm the circuit court's order reversing the Board's decision and remand to the circuit court with instructions to remand to the Town of Pacific Board of Review for further proceedings consistent with this opinion. *See* WIS. STAT. § 70.47(13).[11]

By the Court.—Order affirmed and cause remanded with directions.

Recommended for publication in the official reports.

[11] WISCONSIN STAT. § 70.47(13) states in pertinent part: "If the court on the appeal finds any error in the proceedings of the board which renders the assessment or the proceedings void, it shall remand the assessment to the board for further proceedings in accordance with the court's determination and retain jurisdiction of the matter until the board has determined an assessment in accordance with the court's order."

¶23 DYKMAN, J. (*dissenting*). If the majority is correct, Saddle Ridge has found the Holy Grail of real estate taxation. Not only can Saddle Ridge transfer its real estate taxes to others, it can avoid property taxes entirely, from the time it or any landowner forms a condominium until the time the first structure is built in the condominium.[1]

¶24 Perhaps the reason the majority ends up where it does is that the Town of Pacific has briefed an irrelevant issue—whether Saddle Ridge is the beneficial owner of the declared but unbuilt units.[2] Both the majority and I conclude that the beneficial ownership test doesn't apply to this case. But the problem is worse than that. Led astray by the Town of Pacific's briefs, the majority starts down the wrong road. The first sentence of the majority opinion

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[1] The majority denies this. But WIS. STAT. § 703.21(1) (2007-08) provides that common elements cannot be taxed separately from units. Under the majority's vision, the only way to tax the Saddle Ridge condominiums is through their built units, so there is nothing to tax until the first unit is built. As a Saddle Ridge representative noted at the Town of Pacific Board of Review hearing, for a future Saddle Ridge Condominium on land now owned by Saddle Ridge, that might not be for twelve to fifteen years.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Upon receiving the Town of Pacific's briefs, Saddle Ridge was faced with a dilemma. Addressing the real issue—whether Saddle Ridge had been properly assessed for "parcels," consisting of units and their appurtenant interest in the common elements—would have increased the chances that we would reverse the trial court. So, Saddle Ridge finessed the issue. It argued that the forty-one parcels were merely common elements, and thus owned by the existing unit owners; that assessment of the parcels resulted in double taxation; that an analysis of "beneficial ownership" was not required; that the owners of completed units were the beneficial owners; that Saddle Ridge was not required to provide evidence of the proper valuation of its parcels; and that the assessment of its parcels was too high.

asserts something as fact that didn't happen. The majority writes: "This case arises from Saddle Ridge Corporation's challenge of a property tax assessment against it for vacant land within three condominium projects reserved for development of forty-one recorded but unbuilt units." That is just incorrect. I append the Town of Pacific Board of Review's Exhibit 166 which shows that the property tax assessment was not for "vacant land" or, for that matter, any land at all. In the column titled "Acres," the forty-one units were each shown as containing 0.0000 acres of land. In reality, the assessment was for forty-one "units" that Saddle Ridge owned, identified by parcel number. The Town of Pacific's assessor never testified that he assessed vacant land. Instead, he testified that: "But as assessors we're required to put a value on that particular parcel, unit, call it whatever you wish. If it's described in that assessment roll, everything should have a value in there unless it's exempt."

¶25 This is not just a matter of word play or semantics. The words "unit" and "parcel" are words of art used to describe very specific things in the realm of condominium real estate taxation. A "parcel" in a condominium consists of a unit and its undivided interest in the common elements. WIS. STAT. § 703.21(1). "Parcels" in a condominium are what Town and Municipal assessors assess. ***Id.*** They are the basis for condominium taxation. ***Id***. "Land," in the context of condominium taxation, is just not relevant unless a condominium declaration makes land a part of the condominium's units. Saddle Ridge's declarations do not do that. All land in Saddle Ridge's three condominiums is a common element. Still, the majority uses the word "land" in its opinion thirty seven times, many of which are applied to the facts of this case. The Town of Pacific takes this "land" approach by using a "beneficial ownership" analysis, but the majority and I have both concluded that this approach does not work. Yet, the

majority focuses on the word "land" throughout its opinion. The majority ultimately concludes that because Saddle Ridge didn't own the "vacant land" the majority opinion extensively discusses, Saddle Ridge cannot be required to pay real estate taxes for that "land." I will explain later why the proper analysis leads to a very different conclusion.

¶26 ***Mineral Point Valley Limited Partnership v. Board of Review***, 2004 WI App 158, ¶5, 275 Wis. 2d 784, 686 N.W.2d 697, sets out the standard of review we must use in reviewing cases heard by a board of review. ***Mineral Point*** tells us that we are to review "the record made before the board of review." ***Id.*** (citation omitted). The majority seems to agree with this standard. Had the majority written a per curiam opinion or a summary disposition, both of which carry no precedential effect, I would have joined in an opinion affirming the circuit court because the appellant had raised no relevant issue. But the majority has written an opinion recommended for publication which will be read as legitimizing the notion that condominium declarations can be used to make some declared but unbuilt condominium units non-taxable and to shift unit taxation to others. This holding will have a dramatic effect on condominium purchasers, initial sales of condominium units, and sometimes on Towns and Municipalities which may find that they cannot tax certain condominiums.

¶27 The majority's "issue not briefed" focus runs against our standard of review requiring that we review the record made before the board of review. Why would we review the record if not to apply the law pertaining to what we found in the record? If an appellant asked us to review a record using the law applicable in Narnia, would we do so? I would have solved the "issue not briefed" problem by ordering oral argument or additional briefing.

¶28 I agree with the majority's belief that appellate courts "generally" or "ordinarily" do not address issues not briefed, but this case shows why we use modifiers like "generally," "ordinarily" and "usually." While we have no duty to consider any issues other than those presented to us, it is within our discretion to do so. ***Waushara County v. Graf***, 166 Wis. 2d 442, 453, 480 N.W.2d 16 (1992). Condominium development and ownership is a significant part of Wisconsin housing. When we write an opinion permitting tax shifting and tax exemption, we affect many people and untold amounts of money. While that may not be significant if we carefully explain that we have decided a case on an irrelevant issue, that is not what the majority has done. Indeed, the majority signals that it has reached a significant replicative issue by recommending its opinion for publication.[3]

¶29 The majority complains that this dissent addresses issues not raised by the Town of Pacific. Of course it does. I have explained why. The majority rejects the Town of Pacific's claim in two paragraphs. The balance of the majority's twenty-two paragraphs address issues never raised by the Town, and finessed or undeveloped by Saddle Ridge. In those twenty paragraphs, the majority never engages with the analysis of this dissent, nor explains why the majority disagrees, if it does, with that analysis, other than noting that the dissent raises issues not briefed. Nor does the majority give any reason why tax assessors should treat condominiums containing no built units differently than condominiums with one built unit. I conclude that had the Town of Pacific

[3] Both parties agreed that publication of our opinion was unnecessary.

addressed the proper issue, the majority would have reached the same conclusion I have reached.

¶30 Both briefs recognize the following standards applicable to our review of a board of review decision, but, as I have explained, both focus on an issue not relevant to our review of the record of the Town of Pacific Board of Review.[4] Our review is limited to:

> (1) whether the board acted within its jurisdiction; (2) whether the board acted according to law; (3) whether the board's action was arbitrary, oppressive or unreasonable, representing its will rather than its judgment; and (4) whether the evidence was such that the board might reasonably make the order or determination in question.

Nankin v. Village of Shorewood, 2001 WI 92, ¶20, 245 Wis. 2d 86, 630 N.W.2d 141 (citation omitted).

¶31 As required by ***Mineral Point***, I will review the record made at the board of review hearing. What did the board hear? The hearing was held on November 2, 2006. The board consisted of Supervisor Craig Cawley, Chairman William Devine, Clerk Ethel Smith and Tom Pinion. Saddle Ridge was apparently represented by Pat Kirk and Lee Gosda. Gosda did much of Saddle Ridge's presentation.

> Gosda: [A]ll of our objections are the same for each *parcel*, so we can treat this, all [the] rest of those numbers, and I'll redo the objection because it's all going to be ditto, ditto, ditto, ditto.
>
> ....

[4] Saddle Ridge discusses the issues the majority doesn't reach in a way that recognizes the applicable standards.

> Gosda: The assessed land value for each *unit* should also include an undivided share of all property owned by that particular condominium.

(Emphasis added.) Kirk also agreed that the Town assessor had assessed "parcels." This was part of the discussion of "units" and "parcels":

> Pinion: How did these get assigned parcel numbers for non-existing units, because you've declared them?
>
> Gosda: In one case, yes. We had to declare them by law.
>
> Chair: They're declared parcels?
>
> Man (unidentified): You've got ten years in which to declare them.
>
> Man: They're declared units.
>
> Man: Yes.
>
> ….
>
> Pinion: So because you've declared x number of units they have a matching x number of parcels?
>
> Gosda: Yes.
>
> Pinion: Some improved, some unimproved.
>
> Gosda: Yes.
>
> ….
>
> [Assessor]: Is the land under the individual units considered limited common?
>
> Kirk: It is not. It's part of the common area. The homeowner only owns a cubicle of air.
>
> [Assessor]: Is that a typical situation?
>
> Kirk: Absolutely.
>
> ….

> [Assessor]: Well, let's say there wasn't a single improved lot on this board. Do you understand where I'm going?
>
> Kirk: No.
>
> ….
>
> Chair: Can you sell the development rights?
>
> Gosda: I don't know. I don't know if we can or not because the declarant is named right from day one.
>
> ….

¶32 The board also heard from the Town of Pacific's assessor, Brian Frank. Frank explained how he had assessed each unit. He explained: "Each unit with its percentage interest in the common elements is subject to separate assessment and taxation. When performing the assessment the assessor must determine the market value of each individual unit in the condominium project, including its share in the common elements."

¶33 The board discussed the taxation of condominiums at length. Board members Pinion and Cawley voted to reject the assessor's value and assess each parcel at $5,000. Board members Devine and Smith disagreed. The board therefore split 2/2, which affirmed the assessor's valuation of Saddle Ridge's units.

¶34 This is part of the record we must review in light of Wisconsin's Condominium Ownership Act. First, it is important to understand that a condominium is established by recording a condominium declaration and plat. WIS. STAT. § 703.07(1). Once the declaration and plat are recorded, the condominium exists, whether or not construction has begun. WISCONSIN STAT. § 703.09(1)(c) requires that the declaration contain "[a] general description of each

unit, including its perimeters, location and any other data sufficient to identify it with reasonable certainty." (Emphasis added.) Section 703.09(1)(d) requires a general description of the common elements. A condominium, therefore, is composed of units and common elements, as described in the declaration and plat. By statute, there cannot be a condominium without units and common elements. *See also* WIS. STAT. § 703.02(2). This ensures that all condominium property is taxed under WIS. STAT. § 703.21(1), regardless whether any construction has begun. Thus, when Saddle Ridge recorded its condominium declarations and plats, by definition, it created both "common elements" and "units," and each unit established a taxable parcel.

¶35 There is no dispute that all of the land or dirt in Saddle Ridge's condominiums is described in the declarations as part of the condominiums' common elements.[5] So what and where are the units? According to WIS. STAT. § 703.02(15), a "unit" is "a part of a condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space or one or more rooms or enclosed spaces located on one or more floors, or parts thereof, in a building." Everyone agrees that a unit exists once Saddle Ridge builds a structure and sells the "cubicle of air" within it to an individual owner. The question in this case is, does "unit" also include the designated but unbuilt

[5] There is nothing in Chapter 703 which prevents units from being built on someone else's dirt or land. Indeed, that is exactly what has occurred for all of the owners of built units in Saddle Ridge. As Kirk noted at the board of review hearing:

> The landowner does not own the land under the condominium. The landowner does not own the exterior of that building. When I say the land, the condominium, the unit owner, does not own the land under the condominium. They do not own the exterior of the building. The only thing they own is the unit, which is a cube of air.

units described in Saddle Ridge's declarations and plats, thus establishing "parcels" subject to taxation under WIS. STAT. § 703.21?[6]

¶36 Had we ordered oral argument or supplemental briefing, I could have asked the parties to address the real issue—whether Saddle Ridge's condominium declarations and plats established "units" and "common elements." I believe that the answer would have been "Yes," in part because a portion of the "Forest" condominium declaration, board of review Exhibit 142, recorded in volume 479 at page 262 in the register of deeds office, reads: "3. Description of Units. Units are identified by Numbers. Each Unit and its area, location, Limited Common Elements and Common area to which it has access are shown on the Condominium Plat." Board of review Exhibits 294, 394 and 128 through 135 are maps. One was described by Gosda as a very accurate digitized county map made from aerial photos. I would have asked the parties whether these maps show the units described by numbers in the portion of the condominium declaration I have quoted above. This would have helped the parties address and argue the issue I conclude decides this case: whether the declarations have established "parcels" subject to taxation. As is, the majority resolves this case without the parties' help, and so must I.

¶37 The majority's first reason as to why Saddle Ridge was improperly assessed taxes for the undeveloped land in its condominiums is found in ¶16:

[6] There is no dispute that at the board of review hearing, everyone accepted that the assessor had assessed parcels, including parcels based on the forty-one declared but unbuilt units. And Saddle Ridge's representatives at the board meeting conceded that the parcels were based on designated units. This is further borne out by the board of review's Exhibit 166, appended to this opinion, which shows the forty-one disputed units, their unit number and parcel number, and by the board of review's Exhibit 294, also appended, which shows unit numbers for both built units and declared but unbuilt units.

"Rather, we conclude that, for purposes of taxation and assessment, ownership of the common elements of a condominium, including vacant land reserved for development, is determined by the terms of the condominium declaration." That statement is correct, but misleading and ultimately not relevant here. For taxation purposes, the threshold question is not who *owns* the common elements; rather, the question is what *are* the taxable parcels?[7] *See* WIS. STAT. § 703.21. This is because the legislature has decided that all of the "parcels" in a condominium—not the land—are subject to taxation. A parcel is a unit and its corresponding interest in the common elements. WIS. STAT. § 703.21(1). The question in this case is really whether a declared but unbuilt unit is a statutory "unit," thus creating a "parcel" subject to assessment and taxation. The statutes I have cited say it is. Just because the majority says that the question is whether Saddle Ridge can be taxed for the *land* in its condominiums doesn't make it so.

¶38 The majority has a second explanation: It claims that the PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS allows condominium developers to determine ownership of the common elements. Majority, ¶16. I agree that the ASSESSMENT MANUAL reads as the majority asserts. The first quoted paragraph is a restatement of WIS. STAT. § 703.21(1). The second paragraph explains that the condominium declaration can allocate ownership of the common elements in various ways to the condominium units. Again, I agree. But as with the majority's first reason, this does not answer the threshold question of whether the declared but unbuilt units are statutory "units."

[7] The only way a condominium declaration can influence taxation is by assigning unequal percentages of the common elements to various units. WIS. STAT. § 703.09(1)(e). Saddle Ridge has not done this.

¶39 The majority's third explanation is that ***Aluminum Industries Corp. v. Camelot Trails Condominium Corp.***, 194 Wis. 2d 574, 585, 535 N.W.2d 74 (Ct. App. 1995), supports its analysis. Majority, ¶20. The key to this explanation is the word "Likewise." Majority, ¶20. ***Aluminum Industries*** was a dispute between a condominium association and a unit owner over the unit owner's liability for condominium fees. We resolved this dispute by concluding that WIS. STAT. § 703.16(2) allowed a condominium declaration to allocate condominium fees by placing the liability for those fees only on constructed units. But this is not a § 703.16(2) condominium fees case. It is a § 703.21 condominium taxation case. Saying that a condominium declaration can allocate real estate taxes because a condominium declaration can allocate condominium fees fails to recognize that the legislature can and has provided different provisions for condominium taxes and condominium fees. "Likewise" explains nothing.

¶40 One reason that declared but unbuilt units must be "units" that establish parcels subject to taxation is that the majority's result leads to this: When a condominium is "born" by recording a declaration and plat (as Saddle Ridge did), there is nothing to tax because until something gets built, no units exist.[8] This is far from a speculative problem. Gosda explained that Saddle Ridge has "expandable areas" where there are no declared units. The record is unclear as to whether these areas are within or outside Saddle Ridge's three condominiums. Gosda testified that these areas could be used to expand one of Saddle Ridge's condominiums or to start a new condominium. Either way, if a declared but

[8] The Town of Pacific assessor recognized the problem with the majority's analysis by asking: "Well, let's say there wasn't a single improved lot on this board. Do you understand where I'm going?" The Saddle Ridge representative answered "No," and the majority hasn't contemplated the necessary answer to the assessor's question.

unbuilt unit does not establish a taxable parcel, the Town of Pacific will be unable to tax anything in these areas until something is built. If that time is, as Gosda explained, twelve to fifteen years away, Saddle Ridge will be able to avoid real estate taxes on those areas for that length of time.

¶41 Because I would affirm the board of review's decision, I must address the other issues Saddle Ridge raises.

¶42 Saddle Ridge asserts that the land reserved for the forty-one declared but unbuilt units is a common element owned by those who own completed units in its three condominiums. I agree that the dirt or land in the condominiums is a common element, and thus by the terms of the condominium declarations is "owned" by and indirectly assessed to the owners of completed units. However, this does not change the fact that the declared but unbuilt units are also "units," with corresponding interests in the common elements. Thus, Saddle Ridge's argument is a red herring. I agree with Saddle Ridge's facts, but Saddle Ridge has not addressed the real issue—whether its declared but unbuilt units establish parcels subject to taxation. I have concluded that they do.

¶43 Next, Saddle Ridge asserts that if we affirm the board of review, we will be allowing double taxation. Saddle Ridge argues: "If the Board now feels that it has underestimated the value of the [built] units by failing to consider all of the common elements, such concern does not involve Saddle Ridge." Exactly! Whether the assessor has under or overestimated the value of the common elements that belong pro rata to the owners of completed units may be of concern

to those owners.[9] Saddle Ridge does not have standing to complain about the assessments of units it doesn't own. *See* ***Krier v. Vilione***, 2009 WI 45, ¶20, ___ Wis. 2d ___, 766 N.W.2d 517. Saddle Ridge could complain that its pro-rata share of the common elements is excessive because the common elements were too highly assessed. But it doesn't make that assertion. Saddle Ridge can complain about the valuation of its parcels, an issue I address later, but I have concluded that its declared but unbuilt units establish parcels subject to assessment and taxation. If there was any double taxation, it did not affect Saddle Ridge.

¶44 Next, Saddle Ridge argues that an analysis of "beneficial ownership was not required." Saddle Ridge wins this one. Both the majority and I agree that "beneficial ownership" plays no part in analyzing the real issue in this case. But then Saddle Ridge asserts that the owners of completed units were the "beneficial owners" of the declared but unbuilt units. Saddle Ridge cannot have it both ways. Saddle Ridge was right the first time. Beneficial ownership plays no part in this case.

¶45 Saddle Ridge next asserts that, assuming it owns units, it was not required to provide evidence of the proper value of its units. Again, Saddle Ridge is correct, but the question is not relevant. In a certiorari action such as this, an assessment made in accordance with the statutory mandate must be upheld if it can be supported by any reasonable view of the evidence. *See* ***Mineral Point***, 275 Wis. 2d 784, ¶5. I have concluded that the Town of Pacific's assessor made his

[9] Indeed, when the owners of Saddle Ridge's built units discover that their assessments have increased substantially as a result of the majority's opinion, at least some of them will complain to the board of review that they are being taxed for Saddle Ridge's units. They will make the argument that the Town of Pacific failed to make here, with the result that the Town will be unable to tax Saddle Ridge's units to anybody.

assessment in accordance with the statutory mandate and that the board of review, by failing to overturn the assessor valuations, adopted the assessor's views. That ends my inquiry, except for Saddle Ridge's last assignment of error.

¶46 Saddle Ridge attacks the assessor's valuation of its units. It reasons that because the assessor used, as comparables, other condominiums where a unit owner owned land, and land in Saddle Ridge's condominiums was all common elements, the comparables the assessor used were worthless to indicate the value of Saddle Ridge's units. But the assessor explained that the comparable sales were adjusted for differences. And he explained that all condominiums were alike because assessors were required to assess units by adding to the assessment of each unit its percentage value of the common elements. A potential purchaser might assign more or less value to a condominium where he or she would own land. But the total value of any condominium unit is the value of the unit plus its interest in the value of whatever common elements exist, including land. As to land, the value of the unit could increase as the amount of land included in the unit increases. Likewise, as the amount of land in the common elements increases, the value of the common elements could increase. The total value of the unit and the percentage value of the common elements stays the same. The assessor knew that, and adjusted for differences which can be caused by amenities and the quality of the condominium.

¶47 There is a second reason why I must affirm the board's decision. One buys a condominium unit and determines its value by analyzing the use one can make of the unit and the condominium's common elements. Here, Saddle

Ridge's units are valuable as existing or potential dwellings.[10] All Saddle Ridge owns is the unit within a structure—either built or designated but unbuilt. The way Saddle Ridge will make a profit is by selling those units. Saddle Ridge's units are only useful as potential dwellings, and Saddle Ridge is only a home builder vis-à-vis those units.[11] A rational home builder would not care who owned the land on which he or she was to build a structure as long as building the structure was not prohibited and the builder was paid for labor and materials, hopefully at a price in excess of the builder's cost. So, the differences between condominiums where some land is owned as part of a unit and condominiums where a unit owner owns no land are minimal, other things being equal. A unit in a condominium which includes some land has a certain value because of how an owner can use it plus the value of the common elements. A unit in Saddle Ridge has a certain value for the same reasons. Saddle Ridge has not convinced me that the assessor used improper comparables and that the board erred by accepting those comparables to determine the value of Saddle Ridge's units. I would

[10] Kirk explained to the board that Saddle Ridge did not sell land or development rights, perhaps because it could not do so.

[11] The price a purchaser pays for a Saddle Ridge unit will also reflect Saddle Ridge's purchase price of the land and the cost of other common elements such as roads and the walls and roof surrounding a unit.

therefore reverse the trial court's order and direct the trial court to affirm the Town of Pacific Board of Review's decision.

¶48 I have explained how I would write this opinion if I were writing for a majority. But I am writing only for myself, and therefore can only respectfully dissent.

Attachment #1

The Saddle Ridge Corporation

Real Estate Sites

Item	Location	Unit	Prefix	Parcel No	Acres	2005 Tax Assessment Value	2006 Tax Assessment Value	(+/-)	Remarks
1	SRA	**845**	11032	758	0.0000	5,000.00	32,000.00	27,000.00	
2	SRA	**844**	11032	757	0.0000	5,000.00	32,000.00	27,000.00	
3	SRA	**843**	11032	756	0.0000	5,000.00	32,000.00	27,000.00	
4	SRA	**842**	11032	755	0.0000	5,000.00	32,000.00	27,000.00	
5	SRE	**607**	11032	863	0.0000	5,000.00	32,000.00	27,000.00	
6	SRE	**516**	11032	678	0.0000	5,000.00	32,000.00	27,000.00	
7	SRE	**515**	11032	677	0.0000	5,000.00	32,000.00	27,000.00	
8	SRE	**514**	11032	676	0.0000	5,000.00	32,000.00	27,000.00	
9	SRE	**513**	11032	675	0.0000	5,000.00	32,000.00	27,000.00	
10	SRE	**316**	11032	646	0.0000	5,000.00	32,000.00	27,000.00	
11	SRE	**315**	11032	645	0.0000	5,000.00	32,000.00	27,000.00	
12	SRE	**310**	11032	640	0.0000	5,000.00	32,000.00	27,000.00	
13	SRE	**309**	11032	639	0.0000	5,000.00	32,000.00	27,000.00	
14	SRE	**308**	11032	638	0.0000	5,000.00	32,000.00	27,000.00	
15	SRE	**307**	11032	637	0.0000	5,000.00	32,000.00	27,000.00	
16	SRE	**306**	11032	636	0.0000	5,000.00	32,000.00	27,000.00	
17	SRE	**305**	11032	635	0.0000	5,000.00	32,000.00	27,000.00	
18	SRE	**304**	11032	634	0.0000	5,000.00	32,000.00	27,000.00	
19	SRE	**303**	11032	633	0.0000	5,000.00	32,000.00	27,000.00	
20	SRE	**302**	11032	632	0.0000	5,000.00	32,000.00	27,000.00	
21	SRE	**301**	11032	631	0.0000	5,000.00	32,000.00	27,000.00	
22	Forest	**1068**	11032	1300.1068	0.0000	5,000.00	32,000.00	27,000.00	
23	Forest	**1067**	11032	1300.1067	0.0000	5,000.00	32,000.00	27,000.00	
24	Forest	**968**	11032	1300.0968	0.0000	5,000.00	32,000.00	27,000.00	
25	Forest	**967**	11032	1300.0967	0.0000	5,000.00	32,000.00	27,000.00	
26	Forest	**966**	11032	1300.0966	0.0000	5,000.00	32,000.00	27,000.00	
27	Forest	**965**	11032	1300.0965	0.0000	5,000.00	32,000.00	27,000.00	
28	Forest	**964**	11032	1300.0964	0.0000	5,000.00	32,000.00	27,000.00	
29	Forest	**963**	11032	1300.0963	0.0000	5,000.00	32,000.00	27,000.00	
30	Forest	**957**	11032	1300.0957	0.0000	5,000.00	32,000.00	27,000.00	
31	Forest	**919**	11032	1300.0919	0.0000	5,000.00	32,000.00	27,000.00	
32	Forest	**915**	11032	1300.0915	0.0000	5,000.00	32,000.00	27,000.00	
33	Forest	**913**	11032	1300.0913	0.0000	5,000.00	32,000.00	27,000.00	
34	Forest	**911**	11032	1300.0911	0.0000	5,000.00	32,000.00	27,000.00	
35	Forest	**847**	11032	1300.0847	0.0000	5,000.00	32,000.00	27,000.00	
36	Forest	**846**	11032	1300.0846	0.0000	5,000.00	32,000.00	27,000.00	
37	Forest	**808**	11032	1300.0808	0.0000	5,000.00	32,000.00	27,000.00	
38	Forest	**807**	11032	1300.0807	0.0000	5,000.00	32,000.00	27,000.00	
39	Forest	**806**	11032	1300.0806	0.0000	5,000.00	32,000.00	27,000.00	
40	Forest	**805**	11032	1300.0805	0.0000	5,000.00	32,000.00	27,000.00	
41	Forest	**804**	11032	1300.0804	0.0000	5,000.00	32,000.00	27,000.00	

FOR: GARDINER APPRAISALS

ESTIMATED ACREAGES FOR CONDO'S COMMON AREAS