

FILED
09-23-2024
Clerk of Circuit Court
Waukesha County
2024CV001584

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

HAWTHORNE PLACE LLC
1105 Hawthorne Place
Pewaukee, Wisconsin 53072

KKNN QUAIL LLC
1088 Quail Court #100
Pewaukee, Wisconsin 53072

LEE BLEECKER
169 Highway 67
Dousman, Wisconsin 53118

and

WISCONSIN MANUFACTURERS
AND COMMERCE INC.
501 East Washington Avenue
Madison, Wisconsin 53703

Case Type: Declaratory Judgment
Case Code: 30701

Case No. 24-CV-

Plaintiffs,

v.

VILLAGE OF DOUSMAN
118 South Main Street
Dousman, Wisconsin 53118

and

VILLAGE OF PEWAUKEE
235 Hickory Street
Pewaukee, Wisconsin 53072

Defendants.

Summons

THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is **Waukesha County Courthouse, Civil Division, Room C-167, 515 West Moreland Boulevard, Waukesha, Wisconsin 53188**, and to the WMC Litigation Center, Plaintiffs' attorney, whose address is **501 East Washington Avenue, Madison, Wisconsin 53703**. You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 23rd day of September 2024.

Respectfully submitted,

Electronically signed by
Nathan J. Kane

Nathan J. Kane (SBN 1119329)
Scott E. Rosenow (SBN 1083736)
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 893-2082
nkane@wmc.org
srosenow@wmc.org

Attorneys for Plaintiffs

FILED
09-23-2024
Clerk of Circuit Court
Waukesha County
2024CV001584

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

HAWTHORNE PLACE LLC
1105 Hawthorne Place
Pewaukee, Wisconsin 53072

KKNN QUAIL LLC
1088 Quail Court #100
Pewaukee, Wisconsin 53072

LEE BLEECKER
169 Highway 67
Dousman, Wisconsin 53118

and

WISCONSIN MANUFACTURERS
AND COMMERCE INC.
501 East Washington Avenue
Madison, Wisconsin 53703

Case Type: Declaratory Judgment
Case Code: 30701

Case No. 24-CV-

Plaintiffs,

v.

VILLAGE OF DOUSMAN
118 South Main Street
Dousman, Wisconsin 53118

and

VILLAGE OF PEWAUKEE
235 Hickory Street
Pewaukee, Wisconsin 53072

Defendants.

Complaint

Plaintiffs allege their complaint against Defendants as follows:

Introduction

1. The Village of Dousman and the Village of Pewaukee (together, the Villages; on their own, Dousman and Pewaukee, respectively) have each imposed on real property an annual special charge for fire protection (the Charges).

2. A municipality can impose a special charge for “the costs of fire services rendered on a per call basis.” *Town of Janesville v. Rock Cnty.*, 153 Wis. 2d 538, 547, 451 N.W.2d 436 (Ct. App. 1989).

3. Special charges are not “a municipality-wide funding mechanism for . . . municipality-wide services that are not necessarily utilized by every property owner. Those items are of equal benefit to the entire community and should be paid out of general property tax funds.” *Id.* at 546–47.

4. The Charges are not calculated on a per-call basis. They are thus invalid special charges.

5. But regardless of their label—whether treated as special charges, taxes, or fees—the Charges are statutorily unauthorized and thus illegal.

6. Villages have no inherent authority to impose taxes. Nor do they have inherent authority to impose fees that resemble taxes. *See Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965).

7. Plaintiffs request that this Court declare the Charges unlawful. Plaintiffs further request that this Court permanently enjoin the Villages from imposing the Charges.

Parties

8. Plaintiff Hawthorne Place LLC owns the Hawthorne Place apartments in the Village of Pewaukee, Wisconsin.

9. The Hawthorne Place apartments are an independent community for tenants aged 55 and older in Pewaukee.

10. In or about December 2023, Pewaukee imposed an annual fire-protection charge on Hawthorne Place LLC as the owner of the Hawthorne Place apartments.

11. Hawthorne Place LLC maintains its office at 1105 Hawthorne Place, Village of Pewaukee, Wisconsin 53072.

12. Plaintiff KKNN Quail LLC owns the Quail Pointe apartments, which are located at 1088 Quail Court, Village of Pewaukee, Wisconsin 53072.

13. The Quail Pointe apartments are a community of apartment homes that consist of 135 residential units with approximately 160 tenants.

14. In or about December 2023, Pewaukee imposed an annual fire-protection charge on KKNN Quail LLC as the owner of the real property located at 1088 Quail Court, Village of Pewaukee, Wisconsin 53072.

15. KKNN Quail LLC has a business office at 1088 Quail Court #100, Village of Pewaukee, Wisconsin 53072.

16. Plaintiff Lee Bleecker owns real property in Dousman, including at 169 Highway 67, Village of Dousman, Wisconsin 53118.

17. At the property at 169 Highway 67, Lee Bleecker does business as Sanford Enterprises and offers trucking, excavating, and repair services.

18. In or about December 2023, Dousman imposed an annual fire-protection charge on Lee Bleecker, as the owner of the real property located at 169 Highway 67, Village of Dousman, Wisconsin 53118.

19. Plaintiff Wisconsin Manufacturers and Commerce Inc. (WMC) is Wisconsin's largest business trade association, representing roughly 3,700 employers of every size and from every sector of the state's economy.

20. WMC maintains its office at 501 East Washington Avenue, Madison, Wisconsin 53703.

21. WMC is a non-profit business organized as a membership association under Section 501(c)(6) of the Internal Revenue Code.

22. The purpose of WMC is to represent the interests of its members, including by working to make Wisconsin the best state in the nation to do business. This goal includes advocating for the enactment of laws and policies that allow businesses and economic investment to flourish. One of WMC's goals is to ensure that its members are not subjected to unlawful or excessive taxes and fees.

23. In each of the Villages, a WMC member occupies property.

24. In each of the Villages, a WMC member has begun paying an annual fire-protection charge.

25. WMC is asserting claims on behalf of its members to protect their pecuniary interests.

26. Neither the claims asserted nor the relief requested requires the participation of any WMC member in this lawsuit.

27. Each of the Villages is responsible for the adoption and collection of an annual fire-protection charge challenged in this lawsuit.

Jurisdiction and Venue

28. Plaintiffs Hawthorne Place LLC, KKNN Quail LLC, Lee Bleecker, and WMC seek a declaration that the Villages' ordinances that impose an annual charge for fire protection are void and unenforceable, giving this Court jurisdiction to hear this case under Wis. Stat. § 806.04.

29. Hawthorne Place LLC has standing to bring this lawsuit and assert the claims in this complaint because it is subject to Pewaukee's annual charge, which is being challenged in this lawsuit.

30. KKNN Quail LLC has standing to bring this lawsuit and assert the claims in this complaint because it is subject to Pewaukee's annual charge, which is being challenged in this lawsuit.

31. Lee Bleecker has standing to bring this lawsuit and assert the claims in this complaint because he is subject to Dousman's annual charge, which is being challenged in this lawsuit.

32. WMC has standing to bring this lawsuit and assert the claims in this complaint on behalf of its members who reside in the Villages and are paying the Charges.

33. On February 27, 2024, WMC sent a notice of claim to the clerk of each of the Villages.

34. Each of those notices satisfied Wis. Stat. § 893.80(1d).

35. Each of the Villages' clerks sent WMC a signed admission of service dated February 28, 2024, regarding the notice of claim.

36. On June 26, 2024, 120 days had passed since those notices of claim were served. At no time during those 120 days did either Village repeal its ordinance creating its annual fire-protection charge.

37. Venue in this County is proper under Wis. Stat. § 801.50(2).

Background

I. Dousman's Annual Fire-Protection Charge

Dousman's Adoption of an Annual Fire-Protection Charge

38. Dousman is a member of the Western Lakes Fire District (WLFD), which operates according to the Inter-Municipal Agreement for the Creation of the Western Lakes Fire District (WLFD Agreement). (*See Ex. B.*)¹

39. The WLFD is a joint fire department that was created by four neighboring municipalities, including Dousman. (Ex. B:1.)

¹ A copy of the Western Lakes Fire District inter-municipal agreement dated February 16, 2017, is filed along with this complaint as Exhibit B.

40. Six additional municipalities contract for services from the WLFD. (Ex. C:3;² Ex. D:1.)³

41. The WLFD has various duties. Providing “fire protection” and “emergency medical services” are among those duties. (Ex. B:3.)

42. The WLFD is overseen by a Fire Board. (Ex. B:2.)

43. The Fire Board must each year propose to the municipalities a WLFD budget. (Ex. B:8.)

44. Once the Fire Board proposes a budget, that budget is subject to approval by each member municipality. (Ex. B:8–9.)

45. The Fire Board’s proposed 2023 budget contained a \$4 million increase in funding. (Ex. C:1.)

46. “Each municipality may determine the source of funding for its contribution to the [WLFD] capital budget.” (Ex. B:11.)

47. In August 2022, each member municipality held a referendum, asking the public to vote on whether the property-tax levy should be raised to enable a larger WLFD budget. (Ex. E:1.)⁴

48. Five of the ten municipalities that receive services from the WLFD voted “no” on that referendum. (Ex. E:1.)

² Exhibit C is a copy of a *Milwaukee Journal Sentinel* article dated September 30, 2022.

³ Exhibit D is a copy of the WLFD’s Station Listing, which names all the municipalities the WLFD serves.

⁴ Exhibit E is a copy of a *Milwaukee Journal Sentinel* article dated August 9, 2022.

49. That referendum failed in Dousman by a 22% margin, or by a vote of 211 to 335. (Ex. E:3.)

50. Despite the failed referendum, the Dousman Village Board approved the Fire Board's proposed budget—increase and all. (Exs. C:3; F:1.)⁵

51. To pay initially for those increased costs, Dousman used a portion of its ARPA⁶ funds. (Ex. G:1.)⁷ It also took out a loan from a local bank. (Ex. G:1.)

52. To recoup those costs, and to continue to pay for its portion of the WLFD budget in future years, the Dousman Village Board adopted Ordinance § 3.15.⁸ (Ex. H.)⁹

⁵ Exhibit F, which is filed along with this complaint, is a copy of the minutes for Dousman's Fire Department Annual Meeting held on September 28, 2022. These meeting minutes are also available at <https://villageofdousman.gov/wp-content/uploads/2022/09/FIRE-DEPT-MTG-9.28.22.doc>.

⁶ "ARPA" refers to the American Rescue Plan Act. ARPA was passed in 2021 in response to the COVID-19 pandemic. US Department of Treasury, *American Rescue Plan: Treasury's Progress and Impact after Six Months* at 2 (September 2021), <https://home.treasury.gov/system/files/136/American-Rescue-Plan-Six-Month-Report.pdf>. ARPA allocated over \$1 trillion in aid to municipalities across the nation. *Id.*

⁷ Exhibit G, which is filed along with this complaint, is a copy of the minutes for Dousman's Budget Workshop Meeting held on October 3, 2022. These meeting minutes are also available at <https://villageofdousman.gov/wp-content/uploads/2022/10/BUDGET-MINUTES-10.03.22.doc>.

⁸ This ordinance is filed along with this complaint as Exhibit A. This ordinance is also available at <https://cdn.townweb.com/villageofdousman.gov/wp-content/uploads/2023/11/CHAPTER-3-FINANCE-TAXATION.pdf>, accessible via <https://villageofdousman.gov/ordinances-resolutions/>.

⁹ Exhibit H, which is filed along with this complaint, is a copy of the minutes for Dousman's Budget Hearing held on November 13, 2023. These minutes are also available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fvillageofdousman.gov%2Fwp-content%2Fuploads%2F2023%2F11%2FBUDGET-HEARING-SPECIAL-MTG-11.13.23-and-board-mtg.doc&wdOrigin=BROWSELINK>.

53. This ordinance imposes an annual fire-protection charge on all real property in Dousman.

The Dousman Ordinance

54. Dousman's fire-protection charge is imposed annually on all real property throughout the Village. (Ex. A:1 (sections 3.15.3.–4.a).)

55. The amount of the charge is based on property size—on either the acreage of a parcel or the square footage of any building on it. (Ex. I:1.)¹⁰

56. The charge “is included on annual tax bills as a special charge.” (Ex. A:2 (section 3.15.4.a.iii).)

57. Property owners must pay the charge “in full by January 31.” (Ex. A:2 (section 3.15.4.a.iii).)

58. After that date, “any unpaid fee shall be considered delinquent and subject to interest and penalties. A delinquent special charge becomes a lien on the property against which it is imposed as of the date of delinquency. The delinquent special charge shall be included in the current or next tax roll for collection and settlement.” (Ex. A:2 (section 3.15.4.a.iii).)

59. To collect a delinquent fee, Dousman may under the ordinance use any “manner provided for by law or equity, including a suit in the Waukesha County Circuit Court.” (Ex. A:2 (section 3.15.4.a.iv).)

¹⁰ Exhibit I, which is filed along with this complaint, is Dousman's Fire Fee Fact Sheet, dated December 11, 2023. This fact sheet is also available at <https://villageofdousman.gov/2023/12/11/fire-fee-fact-sheet-2/>.

60. Throughout Dousman Ordinance § 3.15, Dousman calls this fire-protection charge a “special charge.”

61. As a result, Dousman relies on Wis. Stat. § 66.0627—the special-charge statute—to authorize its annual fire-protection charge. (Ex. A:1 (section 3.15.2).)

62. Dousman also cites Wis. Stat. § 61.34 (the village home-rule statute) and Wis. Stat. § 66.0301 (a statute about multi-municipal agreements) as authority to impose this fire-protection charge. (Ex. A:1 (section 3.15.2).)

II. Pewaukee’s Annual Fire-Protection Charge

Pewaukee’s Adoption of an Annual Fire-Protection Charge

63. Pewaukee, a village, “has contracted with the City [of Pewaukee] for Fire/EMS and fire inspection services since 2004.” (Ex. M:23.)¹¹

64. The City of Pewaukee operates the Pewaukee Fire Department (PFD).

65. The Village of Pewaukee must pay a yearly fee to the City of Pewaukee for that service.

66. The cost of that yearly fee is based on the Village’s share of the PFD’s call volume. (Ex. N:3–4.)¹²

¹¹ Exhibit M, which is filed along with this complaint, is the City of Pewaukee Fire Department’s Strategic Plan for 2019–2023. This plan is also available at <https://www.cityofpewaukee.us/DocumentCenter/View/3314/StrategicPlan2019>.

¹² Exhibit N, which is filed along with this complaint, is a copy of the Pewaukee Village Board meeting minutes from November 7, 2023. These meeting minutes are also available at <https://www.villageofpewaukee.com/Data/Sites/38/Meetings/village/5c5a6c92-bb1e-405f-b83e-2296e24a8eb4.pdf>.

67. But the cost of its yearly fee does not exceed “90% of the full cost of [the Village of Pewaukee’s] share of the [PFD’s] expenses.” (Ex. N:4)

68. Needing to increase its yearly contribution to the PFD, the Pewaukee Village Board met on January 17, 2023, to hear “the options the Village ha[d] to fund the increase in Fire/EMS expenses.” (Ex. O:3.)¹³

69. At this meeting, a Village Trustee “explained that one option [was] a referendum.” (Ex. O:3.)

70. This Village Trustee recognized, however, that “the referendum may fail.” (Ex. O:3.)

71. According to another Trustee, a referendum “would set the Village up for failure” because of the “short time to get out information to the residents.” (Ex. O:3.)

72. A Village Trustee also stated that a referendum would constitute “the highest cost to the taxpayers because it doesn’t take into account the tax-exempt properties.” (Ex. O:3.)

73. The Village Board then considered a “Fire/EMS fee,” an option that “multiple surrounding municipalities in the same boat” had been “looking into.” (Ex. O:3.)

74. This option, recognized one Village Trustee, “would charge all properties in the Village, even tax-exempt properties.” (Ex. O:3.)

¹³ Exhibit O, which is filed along with this complaint, is a copy of the Pewaukee Village Board meeting minutes from January 17, 2023. These meeting minutes are also available at <https://www.villageofpewaukee.com/village-board-meetings-and-agendas?Type=M&ID=280#ERS>.

75. The Board then agreed “to start working on a Fire/EMS fee schedule to start in 2024.” (Ex. O:3.)

76. To develop the basis of the fire-protection charge, the Village Board contracted with an accounting firm, which developed a formula for calculating the amount of the charge. (Ex. P:3–5.)¹⁴

77. Under this formula, each charge would be based on what is called an Emergency Service Equivalent (ESE). (Ex. P:4–5.)

78. The ESE is in essence a multiplier.

79. To determine the cost of a property’s annual fire-protection charge, the property is first assigned an ESE value. (Ex. L:3¹⁵ (section 93.104.a.ii.1.–7.); *see also* Ex. P:4.)

80. This number varies and is calculated differently depending on the type of property at hand. (Ex. P:4–5.)

81. For residential properties, the ESE value generally is based on the number of families a property can house. (*See* Ex. P:4–5.)

82. So a single-family home, for instance, receives an ESE value of one—while a four-unit apartment building receives a value of four. (*See* Ex. P:4–5.)

¹⁴ Exhibit P, which is filed along with this complaint, is Pewaukee’s fact sheet for its annual fire-protection charge. This fact sheet is also available at <https://www.villageofpewaukee.com/Data/Sites/38/media/for-residents/fire-ems-services/fireems.pdf>.

¹⁵ The ordinance codifying Pewaukee’s annual fire-protection charge is included with this complaint as Exhibit L. That ordinance (ch. 93) is also available at https://library.municode.com/wi/pewaukee/codes/code_of_ordinances?nodeId=PTIIMUCO_CH93FISPRFE.

83. Senior-living homes, however, are assigned an inflated ESE value—equaling the number of units in the facility multiplied by 4.75. (Ex. L:3 (section 93.104.a.ii.3.); *see also* Ex. P:5.)

84. ESE values are determined differently for nonresidential properties. (Ex. L:3 (section 93.104.a.ii.); *see also* Ex. P:5.)

85. Those values are based on square footage—and the larger the building, the larger the ESE value. (Ex. L:3 (section 93.104.a.ii.); *see also* Ex. P:5.)

86. For all properties, once an ESE value is calculated, that value is multiplied by \$241. (Ex. P:5; *see also* Ex. Q.)¹⁶ That dollar value represents “[t]he total amount of the required contract for services for any year . . . divided by the total number of ESEs located within the village.” (Ex. L:3 (section 93.104.a.i).)

87. The result of this multiplication is the cost of a property’s annual fire-protection charge. (Ex. P:5.)

88. On November 7, 2023, the Pewaukee Village Board adopted a fire-protection charge that uses the formula described above. (Ex. N:1–2.) And on November 21, 2023, the Board adopted the corresponding fee schedule for calculating each property’s charge. (Ex. R:1–2.)¹⁷

¹⁶ Exhibit Q, which is filed along with this complaint, is a copy of Pewaukee Resolution No. 2023-17, which established an ESE amount of \$241. This resolution is also available at <https://www.villageofpewaukee.com/Data/Sites/38/media/for-residents/resolutions/2023-17-fire-ems-protection-fee-ese.pdf>.

¹⁷ Exhibit R, which is filed along with this complaint, is a copy of the Pewaukee Village Board meeting minutes from November 21, 2023. These meeting minutes are also available at <https://www.villageofpewaukee.com/village-board-meetings-and-agendas?Type=M&ID=330>.

The Pewaukee Ordinance

89. The fire-protection charge is codified at Chapter 93 of the Pewaukee Village Code.

90. The “purpose and intent” of the charge is to create a “fee apportioned to all properties” to provide “a sustainable source of funds for the provision of fire-EMS services to all properties within the Village of Pewaukee.” (Ex. L:2 (section 93.100(a).))

91. Under the ordinance, a charge is “imposed upon every developed property” considered as one of the following:

- Single-Family/Duplex
- Multi-Family
- Senior Living
- Care Home
- Commercial
- Industrial
- Institutional

(Ex. L:3 (section 93.104.a.ii.1.–7.).)

92. The ESE value assigned to each property depends on either a building’s housing capacity or its square footage. (Ex. P:4–5.; Ex. L:3 (section 93.104.a.ii.1.–7.).)

93. For each property, this annual charge is “included on the annual property tax bill[]” of that property “as a special charge.” (Ex. L:3 (section 93.104.a.iii.).)

94. This annual fire-protection charge “shall be paid in full by January 31.” (Ex. L:3 (section 93.104.a.iii.).)

95. After that date, “any unpaid fee shall be considered delinquent and subject to interest and penalties.” (Ex. L:3 (section 93.104.a.iii.).)

96. “A delinquent special charge becomes a lien on the property against which it is imposed as of the date of delinquency,” and “[t]he Village may collect delinquent special charges in any other manner provided for by law.” (Ex. L:3 (sections 93.104a.iii.–iv.).)

97. The ordinance cites multiple statutes as authorization. Those are: Wis. Stat. § 66.0627 (the special-charge statute), Wis. Stat. § 61.34 (the village home-rule statute), Wis. Stat. § 61.65 (the village fire-protection-provision statute), Wis. Stat. § 62.11(5) (the city home-rule statute), and Wis. Stat. § 66.0301 (a statute about multi-municipal agreements). (Ex. L:1 (citing statutes in the recitals); Ex. L:3 (citing more statutes in section 93.102.a.).)

98. In addition, the ordinance purports to draw authorization from case law: *Town of Hoard v. Clark County*, 2015 WI App 100, 366 Wis. 2d 239, 873 N.W.2d 241 and *Hack v. City of Min. Point*, 203 Wis. 215, 233 N.W. 82 (1930). (Ex. L:1 (citing cases in the recitals).)

Claim 1:

Dousman’s Annual Fire-Protection Charge Is Unlawful

Claim 1.A:

***Dousman’s Annual Fire-Protection Charge Is an Invalid
Special Charge under Wis. Stat. § 66.0627(2)***

99. Plaintiffs re-allege and incorporate the preceding allegations of the complaint.

100. Wisconsin Stat. § 66.0627 empowers municipalities to impose special charges—but not in unlimited or unbridled fashion.

101. Special charges may be imposed only “for current services rendered by allocating all or part of the cost of the service to the property served.” Wis. Stat. § 66.0627(2).

102. This statute authorizes “charges for services rendered, that is services actually done or performed. This [statutory] language limits [a municipality] to charging only for services actually provided and not for services that may be available but not utilized.” *Town of Janesville*, 153 Wis. 2d at 546 (addressing predecessor statute). This statute “allows a special charge only for services which are actually performed.” *Id.*

103. Special charges are not “municipality-wide funding mechanism[s]” for services “not necessarily utilized by every property owner.” *Id.* at 546–47.

104. Instead, a municipality may impose a special charge to recover “the costs of fire services rendered on a per call basis.” *Id.* at 547.

105. Dousman’s annual fire-protection charge, described as a special charge in Dousman Ordinance § 3.15, is illegal because it is a municipality-wide funding mechanism for services not necessarily utilized by every property owner.

106. This charge is imposed annually on all properties throughout Dousman. (Ex. A:1 (section 3.154.a.).)

107. And this charge is based on property size—on the acreage of land or the square footage of building space, depending on the property at issue. (Ex. I:1.)

108. For these reasons, Dousman’s fire-protection charge is not authorized by Wis. Stat. § 66.0627 and is thus an invalid special charge.

***Claim 1.B:
Dousman’s Annual Fire-Protection Charge Is an Unconstitutional and
Otherwise Unlawful Property Tax***

109. Plaintiffs re-allege and incorporate the preceding allegations of the complaint.

Dousman’s Charge Is a Property Tax

110. “The purpose, and not the name it is given, determines whether a government charge constitutes a tax.” *Wisconsin Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, ¶ 10, 408 Wis. 2d 287, 992 N.W.2d 100 (quoting *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶ 6, 358 Wis. 2d 610, 856 N.W.2d 546 (citing *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d 299, 305–06, 94 N.W.2d 584 (1959))).

111. “A ‘fee’ imposed for the purpose of generating revenue for the municipality is a tax, and without legislative permission it is unlawful.” *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶ 10.

112. A tax is “[a]ny payment *exacted* by the state or its municipal subdivisions as a contribution toward the cost of maintaining *governmental functions*, where the special benefits derived from their performance is merged in the *general benefit*.” *Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d at 304 (emphases added) (citation omitted); *see also, e.g., City of River Falls v. St. Bridget’s Cath. Church of River Falls*, 182 Wis. 2d 436, 441, 513 N.W.2d 673 (Ct. App. 1994) (noting a municipality imposes a tax in “its governmental capacity for the support of its government and its public needs”).

113. By contrast, a fee for municipal services is imposed “in the city’s proprietary capacity” such that it delivers to the payer a “benefit” that is “not shared by other members of society.” *City of De Pere v. Pub. Serv. Comm’n*, 266 Wis. 319, 325, 328, 63 N.W.2d 764 (1954).

114. Dousman’s fire-protection charge is a tax.

115. It is involuntarily imposed (i.e., exacted) on all real property throughout Dousman. (Ex. A:1 (section 3.15.4.a).)

116. Fire protection is a governmental function. *Strohmaier v. Wisconsin Gas & Elec. Co.*, 214 Wis. 564, 570–71, 253 N.W. 798 (1934); *Christian v. City of New London*, 234 Wis. 123, 290 N.W. 621, 623 (1940) (discussing *Strohmaier* and “the pursuance of the governmental function of furnishing fire protection”).

117. And fire protection is a service of general, municipality-wide benefit. *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 542, 314 N.W.2d 321 (1982) (describing fire protection as a “monopoly for the public good”).

118. Like fire protection, EMS is a governmental function providing a general benefit to the public. *See Save Elkhart Lake, Inc. v. Vill. of Elkhart Lake*, 181 Wis. 2d 778, 789, 512 N.W.2d 202 (Ct. App. 1993) (“A municipality acts in its governmental capacity when its primary objective is health, safety and the public good.”).

119. A village-wide charge on all properties to fund those services is thus a tax. *See City of River Falls*, 182 Wis. 2d at 443 (holding that a water-utility charge

was a fee rather than a tax because it did *not* pay for “equipment needed to fight fires”).

120. Indeed, according to Dousman itself, the purpose of this charge is to “provide the funding for” the “fire protection service” that the WLFD provides to Dousman. (Ex. A:1 (sections 3.15.1., 3.15.2).)

121. Accordingly, this charge, by Dousman’s own admission, funds a governmental function that provides a general benefit to the public—to Dousman residents, Dousman property owners, and any other person who may need fire protection or EMS while in Dousman.

122. This charge is therefore a tax.¹⁸

123. And because this tax is imposed on all *real property* in Dousman, it is a property tax.

124. This tax, as such, is subject to the Wisconsin Constitution’s Uniformity Clause.

As a Tax, Dousman’s Charge Violates the Uniformity Clause

125. “Article VIII, section 1 of the Wisconsin Constitution requires that the method or mode of taxing real property must be applied uniformly to all classes of

¹⁸ A court of appeals opinion that conflicts with supreme court or earlier court of appeals precedent is not binding. *Cuene v. Hilliard*, 2008 WI App 85, ¶ 15, 312 Wis. 2d 506, 754 N.W.2d 509; *State v. Swiams*, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400, 690 N.W.2d 452. So to the extent the court of appeals in *Town of Hoard v. Clark County*, 2015 WI App 100, 366 Wis. 2d 239, 873 N.W.2d 241, held that the fire-protection charges at issue there were not taxes but fees for services, *Town of Hoard* conflicts with the precedents discussed in this complaint and is therefore not binding. Even if good law, *Town of Hoard* is distinguishable here because it involved Wis. Stat. § 60.55, which applies only to towns, and because it did not involve special charges.

property within the tax district.” *U.S. Oil Co. v. City of Milwaukee*, 2011 WI App 4, ¶ 23, 331 Wis. 2d 407, 794 N.W.2d 904 (footnote omitted).

126. “The purpose of the Uniformity Clause is to ensure the tax burden is allocated proportionally to the value of each person’s property.” *Milewski v. Town of Dover*, 2017 WI 79, ¶ 47, 377 Wis. 2d 38, 899 N.W.2d 303. The Uniformity Clause requires “a uniform tax rate.” *Id.* ¶ 48. Property tax is calculated “by multiplying the mill rate by the assessed value of [the] property.” *Id.* ¶ 47.

127. As Dousman admits, its annual fire-protection charge “bears no relation to the taxable value of a property.” (Ex. J:3.)¹⁹

128. So because this charge is actually a tax on real property, it violates the Uniformity Clause in Article VIII, section 1 of the Wisconsin Constitution.

129. This Court should declare that Dousman’s fire-protection charge is an unconstitutional property tax.

As a Tax, Dousman’s Charge Also Violates a Battery of Statutes

130. Whatever its constitutional infirmities, this fire-protection charge violates several state statutes.

131. First, a property tax’s “assessment methodology is unlawful” if the tax is not calculated based on property value. *See Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶ 18.

132. Dousman’s annual fire-protection charge is not based on property value.

¹⁹ Exhibit J, which is filed along with this complaint, is Dousman’s Fire Fee Fact Sheet, dated August 15, 2023. This fact sheet is also available at <https://villageofdousman.gov/2023/08/15/fire-fee-fact-sheet/>.

133. This charge is thus illegal. *See id.*

134. Second, Wis. Stat. Ch. 70 “exempts certain properties from property taxation altogether.” *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶ 19. Wisconsin law does not allow a municipality to impose a property tax on tax-exempt property. *See id.*

135. The annual fire-protection charge in Dousman, however, applies to tax-exempt property. (Ex. J:2.)

136. This charge is unlawful for this reason as well.

137. Third and more generally, the fire-protection charge in Dousman lacks requisite statutory authority.

138. “Wisconsin recognizes the general rule of construction that a tax cannot be imposed without clear and express [statutory] language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax.” *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶ 11 (citation omitted). Municipalities “may only enact the types of taxes authorized by the legislature.” *Id.* (citation omitted).

139. No statute provides clear and express authority for a village to impose a fire-protection tax on real property.

140. The Village of Dousman’s annual fire-protection charge is illegal for this reason as well.

141. This Court should also declare that Dousman's annual fire-protection charge is *ultra vires* and unlawful because it violates state statutes and lacks explicit statutory authority.

***Claim 1.C:
Dousman's Annual Fire-Protection Charge Violates and Is Preempted by
Wis. Stat. § 66.0628***

142. Plaintiffs re-allege and incorporate the preceding allegations of the complaint.

143. If the Charge is a fee as Dousman sometimes describes it to be, Wis. Stat. § 66.0628(2) preempts it.

144. Wisconsin Stat. § 66.0628(2) limits the types of fees municipalities may impose, requiring that "[a]ny fee" imposed by a Village "bear a reasonable relationship to the service for which the fee is imposed." Wis. Stat. § 66.0628(2).

145. "Reasonable relationship" "means that the cost charged by a political subdivision for a service provided to a person may not exceed the political subdivision's reasonable direct costs that are associated with any activity undertaken by the political subdivision that is related to the fee." Wis. Stat. § 66.0628(1)(b).

146. This statute therefore bars municipalities from imposing a fee on a property rather than on a person.

147. It also bars a municipality from imposing a fee for a service provided to the public rather than to one person.

148. Here Dousman is doing both those things.

149. First, its fire-protection charge is imposed yearly on real property—not on people, as the statute requires.

150. Second, the charge is not imposed based upon an individual person's receipt of any particular service. Rather, it is imposed on all real property because fire protection is available to all persons and property within Dousman—i.e., the public.

Claim 1.D:

Dousman's Fire-Protection Charge Is Preempted by Wis. Stat. § 70.11

151. Plaintiffs re-allege and incorporate the preceding allegations of the complaint.

152. An ordinance is preempted when it “defeats the purpose of state legislation” or “violates the spirit of state legislation.” *Scenic Pit LLC v. Vill. Of Richfield*, 2017 WI App 49, ¶ 8, 377 Wis. 2d 280, 900 N.W.2d 84 (citing *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984)).

153. Dousman's annual fire-protection charge violates both the purpose and the spirit of Wis. Stat. § 70.11.

154. Wisconsin Stat. § 70.11 is our state's tax-exemption statute for real property.

155. This law exempts from taxation certain types of property to spur on endeavors the legislature thinks particularly beneficent to the public. *Int'l Found. Of Emp. Ben. Plans, Inc. v. City of Brookfield*, 95 Wis. 2d 444, 455, 290 N.W.2d 720 (Ct. App. 1980) (explaining tax-exempt properties are “devoted to the general well-being

of mankind and thus provide a benefit to the taxpaying community”), *summarily aff’d*, 100 Wis. 2d 66, 301 N.W.2d 175 (1981).

156. Yet Dousman imposes its annual fire-protection charge on exempt properties. (Ex. J:2; *see also* Ex. K.)²⁰

157. Imposition of the fire-protection charge obstructs an obvious legislative effort to encourage the choice activities that tax-exempt properties promote.

158. As a result, imposition of the fire-protection charge defeats the purpose and kills the spirit of the tax-exemption statute, meaning the charge is preempted.

**Claim 2:
Pewaukee’s Annual Fire-Protection Charge Is Unlawful**

***Claim 2.A:
Pewaukee’s Annual Fire-Protection Charge Is an Invalid Special Charge
under Wis. Stat. § 66.0627(2)***

159. Plaintiffs re-allege and incorporate the preceding allegations of the complaint.

160. As explained in paragraphs 100–104, a special charge for fire protection must be, under Wis. Stat. § 66.0627(2), calculated on a per-call basis.

161. Pewaukee’s fire-protection charge, described as a special charge in Pewaukee Ordinance ch. 93, is not calculated on a per-call basis.

162. Instead, it is based on a figure the Village labels an “emergency service equivalent,” or “ESE.” (Ex. L:3 (section 93.104.a.i.))

²⁰ Exhibit K, which is filed along with this complaint, is a copy of the minutes from the Dousman Village Board’s special meeting held on September 25, 2023. These meeting minutes are also available at <https://villageofdousman.gov/wp-content/uploads/2023/09/SPECIAL-BOARD-MTG-9.25.23.pdf>.

163. The ESE represents the yearly average value of fire-protection services provided to single-family properties.

164. Based on ESEs, Pewaukee's annual fire-protection charge is illegal.

165. An average cost of fire protection provided to a class of properties is not equivalent to the value of services actually provided or performed for a specific piece of property.

166. The ESE is based only on the total value of all calls made to all single-family homes in Pewaukee.

167. Nonetheless, the ESE is used to calculate the cost of a special charge imposed on properties of all types.

168. The number of ESEs assigned to a piece of property is based on the property's housing capacity or square footage.

169. Any given real property in Pewaukee must pay the annual fire-protection charge even if the fire district does not actually perform any services at that property during a given year.

170. Pewaukee's annual fire-protection charge, as imposed under Chapter 93 of the Pewaukee Village Code, is not imposed on a per-call basis.

171. Pewaukee's annual fire-protection charge is an illegally calculated and thus invalid special charge.

***Claim 2.B:
Pewaukee's Fire-Protection Charge Is an Unconstitutional and Otherwise
Unlawful Property Tax***

172. Plaintiffs re-allege and incorporate the preceding allegations of the complaint.

Pewaukee's Charge Is a Property Tax

173. Pewaukee imposes “an annual fee” on “every developed property” within the Village. (Ex. L:3 (section 93.104.a.).)

174. Pewaukee's fire-protection charge is a tax for the same reasons as Dousman's is. Those reasons are explained in paragraphs 110–119.

175. Like Dousman, Pewaukee too has admitted its fire-protection charge is in fact a tax.

176. The purpose of this charge, as described via ordinance, is to provide “a sustainable source of funds for the provision of fire-EMS services to all properties within the Village of Pewaukee.” (Ex. L:2 (section 93.100(a)).)

177. Also according to ordinance, Pewaukee imposes this charge “to allow the Village to pay in its entirety the amount of the Village's contract for the receipt of fire and EMS Services.” (Ex. L:3 (section 93.104.a.).)

178. This charge is therefore a tax, and because it is imposed on all real property, it is a property tax subject to the Wisconsin Constitution's Uniformity Clause.

As a Tax, Pewaukee's Charge Violates the Uniformity Clause

179. As explained in paragraphs 125–126, the Uniformity Clause requires that the property-tax burden be apportioned based on property value alone.

180. Pewaukee's fire-protection charge is not based on property value.

181. Pewaukee's fire-protection charge thus violates the Uniformity Clause and is unconstitutional.

182. This Court should declare that Pewaukee's fire-protection charge is an unconstitutional property tax.

As a Tax, Dousman's Charge Also Violates a Battery of Statutes

183. All its constitutional infirmities aside, Pewaukee's fire-protection charge violates state statutes because it is not based on property value.

184. In addition, Pewaukee applies this charge to tax-exempt property.

185. This charge is therefore illegal because, as explained in paragraph 134, a property tax cannot be imposed on tax-exempt property.

186. In addition, no statute clearly and explicitly authorizes Pewaukee to impose this annual fire-protection charge. This charge is an unlawful tax for this reason as well—for the reasons explained in paragraphs 138–139.

187. This Court should declare that Pewaukee's annual fire-protection charge is *ultra vires* and unlawful because it violates state statutes and lacks explicit statutory authority.

***Claim 2.C:
Pewaukee's Annual Fire-Protection Charge Violates and Is Preempted by
Wis. Stat. § 66.0628***

188. Plaintiffs re-allege and incorporate the preceding allegations of the complaint.

189. If Pewaukee's fire-protection charge is a fee as the Village sometimes describes it to be, Wis. Stat. § 66.0628(2) preempts it.

190. As explained in paragraphs 144–147, Wis. Stat. §§ 66.0628(1) and (2) bar municipalities from imposing fees on properties rather than on people.

191. As also described in paragraphs 144–147, those statutory provisions also bar municipalities from imposing fees for services provided to the public rather than to individual persons.

192. Here, Pewaukee is doing both those things.

193. First, its fire-protection charge is imposed yearly on real property—not on people, as the statute requires.

194. Second, the charge is not imposed based upon an individual person's receipt of any particular service. Rather, it is imposed on all properties because fire protection is provided to all persons and property within Pewaukee—i.e., to the public as a whole.

195. Therefore, Wis. Stat. § 66.0628 preempts Pewaukee's fire-protection charge, making the charge illegal.

***Claim 2.D:
Pewaukee's Annual Fire-Protection Charge
Is Preempted by Wis. Stat. § 70.11***

196. Plaintiffs re-allege and incorporate the preceding allegations of the complaint.

197. For the same reasons explained in paragraphs 152–158, Pewaukee's annual fire-protection charge violates both the purpose and the spirit of Wis. Stat. § 70.11.

Request for Relief

Plaintiffs request the following relief:

- (i) A declaration that the Charges are unlawful and invalid;
- (ii) An injunction prohibiting the Villages from levying, enforcing, or collecting the Charges;
- (iii) Costs or attorney fees—or both—awarded to Plaintiffs as authorized by law; and
- (iv) Such other relief as the Court deems appropriate.

Dated this 23rd day of September 2024.

Respectfully submitted,

Electronically signed by
Nathan J. Kane

Nathan J. Kane (SBN 1119329)
Scott E. Rosenow (SBN 1083736)
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 893-2082
nkane@wmc.org
srosenow@wmc.org

Attorneys for Plaintiffs