STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

HAWTHORNE PLACE LLC,
KKNN QUAIL LLC,
LEE BLEECKER, and
WISCONSIN MANUFACTURERS
AND COMMERCE INC.,

Plaintiffs,

Case No. 24-CV-1584

v.

VILLAGE OF DOUSMAN
and
VILLAGE OF PEWAUKEE,

Defendants.

Brief Supporting Plaintiffs' Motion for Summary Judgment

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INTRODUCTION

When striking down an unlawful tax masquerading as a "license fee," our supreme court noted back in 1959 that "municipalities generally have been seeking new sources of revenue." *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d 299, 308, 94 N.W.2d 584 (1959). They still are. In recent years, municipalities have been searching for creative ways to circumvent legal limits on property taxes. In doing so, municipalities have enacted so-called "fees" and "special charges" that have no legal basis.

As one recent example, the Village of Pewaukee and other municipalities adopted so-called "transportation utility fees" to pay for road repair and related projects. In unanimous decisions, however, appellate courts struck down those "fees" as unlawful taxes. *Wisconsin Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100; *Wisconsin Manufacturers & Commerce, Inc. v. Vill. of Pewaukee*, 2024 WI App 23, 411 Wis. 2d 622, 5 N.W.3d 949.

Around that same time, the Village of Pewaukee and the Village of Dousman adopted so-called fire-protection fees. Pewaukee and Dousman impose these village-wide "fees" as special charges on annual property tax bills. Dousman adopted these charges after its citizens overwhelmingly voted against raising their property taxes. Pewaukee adopted these charges without asking its citizens for permission to raise their property taxes. Indeed, Pewaukee Village Board members suggested that voters might reject such a request.

These charges are unlawful for several reasons. First, state law does not allow municipality-wide special charges to pay for fire protection. *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 546–47, 451 N.W.2d 436 (Ct. App. 1989). Second, these charges are unlawful property taxes, just like "transportation utility fees." Third, these charges violate multiple statutes even if they are fees. Fourth and finally, these charges otherwise lack any statutory basis.

Although these charges are unlawful, Dousman and Pewaukee have some flexibility in spreading the costs of fire protection. Dousman and Pewaukee may pay for their fire districts with "general property tax funds" and by imposing special

charges for "the costs of fire services rendered on a per call basis." *See id.* at 547. When imposing a special charge, a village may "allocate[e] *all or part* of the cost of the service to the property served." Wis. Stat. § 66.0627(2) (emphasis added).

But Dousman and Pewaukee may not impose fire-protection charges in the way that they are: as village-wide special charges on all developed property for village-wide services that not every property owner necessarily uses. *See Town of Janesville*, 153 Wis. 2d at 546–47.

STATEMENT OF THE CASE

A. Dousman and Pewaukee each adopt an ordinance creating a village-wide charge to fund their fire districts.

Before addressing the facts of this case, a brief overview of levy limits will put this case into context. "The law limits the amount by which municipalities may increase property taxes." *Wisconsin Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, ¶22, 408 Wis. 2d 287, 992 N.W.2d 100. Specifically, the "levy limit statute, Wis. Stat. § 66.0602, limits how much, and under what circumstances, a political subdivision may increase its property tax levy." *Id.* ¶1. The statute limits increases in municipal property tax levies to an amount based on new construction, "effectively freezing property taxes on existing property within the municipality." *Id.* ¶23. A municipality may increase its levy limit only with voters' consent through a referendum. *Id.* ¶¶22–23.

In the summer of 2022, citizens in several municipalities in Waukesha County—including the Village of Dousman ("Dousman")—voted against referendums to raise their levy limits and their property taxes to fund their fire district. (Dkt. 4:37–39.) In Dousman, the referendum failed by a vote of 211 to 335. (Dkt. 4:37–39.) Due to the failed referendums, some of those municipalities considered adopting a "fire fee." (Dkt. 4:33.)

Several months later, the Village of Pewaukee ("Pewaukee") also considered how to pay for increasing costs for fire protectiom and emergency medical services ("EMS"). (Dkt. 5:45.) At a village board meeting in January 2023, a Pewaukee village trustee explained that "one option" to fund these increasing costs was "a referendum."

(Dkt. 5:45.) This trustee noted that, as another option, "[t]here are multiple surrounding municipalities in the same boat that are looking into the Fire/EMS fee." (Dkt. 5:45.)

At that meeting, Pewaukee trustees raised concerns with holding a referendum to raise property taxes. Two trustees stated that a referendum might fail to pass. (Dkt. 5:45.) A trustee further explained that the referendum option would not "take into account the tax-exempt properties," while a fire/EMS fee "would charge all properties in the Village, even tax-exempt properties." (Dkt. 5:45.)

In the fall of 2023, some municipalities in Waukesha County adopted ordinances to impose fire/EMS charges. In October or November of 2023, the Dousman Village Board created § 3.15 of the Village of Dousman Municipal Code, titled "Village Fire Protection Fees" (hereafter "Dousman Ordinance"). (Dkt. 4:4–5; 45:15, 21.) Around that same time, the Pewaukee Village Board created Chapter 93 of the Village Code, titled "Fire-EMS Protection Fee" (hereafter "Pewaukee Ordinance"). (*See* Dkt. 5:4–7; 45:28–29.)

B. The Dousman Ordinance

Dousman is a member of the Western Lakes Fire District ("WLFD"), which operates according to an inter-municipal agreement. (Dkt. 4:6–30, 35.) The WLFD is a joint fire department that was created by four neighboring municipalities, including Dousman. (Dkt. 4:6.) Several additional municipalities contract for services from the WLFD. (Dkt. 4:32, 35.) The WLFD has various duties. Providing "fire protection" and "emergency medical services" are among those duties. (Dkt. 4:8.)

The declared purpose of the Dousman Ordinance is to provide "the funding for" the fire-protection service that the WLFD provides to Dousman. (Dkt. 4:4.) To achieve that purpose, the Dousman Ordinance imposes an annual charge ("Fire Charge") on all real property throughout the village. (Dkt. 4:4.) The amount charged to a given property depends "on acreage and building square footage." (Dkt. 4:47.) Each parcel of land pays a flat fee of $15, with an additional $2 charge for land greater than one acre. (Dkt. 4:43.) For outbuildings, a $10 charge is imposed per 200 square feet. (Dkt.

4:43.) For residential, commercial, or manufacturing buildings, a $151.99 charge is imposed per 500 square feet. (Dkt. 45:23–24.)

The Fire Charge "is included on annual tax bills as a special charge." (Dkt. 4:5.) Property owners must pay the Fire Charge "in full by January 31." (Dkt. 4:5.)

C. The Pewaukee Ordinance

Pewaukee, a village, "has contracted with the City [of Pewaukee] for Fire/EMS and fire inspection services since 2004." (Dkt. 5:30.)

The Pewaukee Ordinance's stated "purpose and intent" is to provide "a sustainable source of funds for the provision of fire-EMS services to all properties within the Village of Pewaukee." (Dkt. 5:5.) To raise those funds, the Pewaukee Ordinance imposes an annual charge ("Fire Charge") on all developed property throughout the village. (Dkt. 5:6.)

The Fire Charge is "included on the annual property tax bills as a special charge." (Dkt. 5:6.) The Fire Charge "shall be paid in full by January 31." (Dkt. 5:6.)

The amount charged to a given property depends on what the Pewaukee Ordinance calls an "Emergency Service Equivalent" or "ESE." (Dkt. 5:5–6, 50–51.) The ESE is essentially a multiplier. To determine the cost of a property's Fire Charge, each property is assigned an ESE value based on its general property type. (Dkt. 5:6, 50.) A property's ESE value is then multiplied by an ESE amount that the village board sets by resolution, currently $439.[1] The result of this multiplication is the annual cost of a property's Fire Charge. (*See* Dkt. 5:50–51.)

ESE values vary depending on the type of property at hand. (Dkt. 5:6, 50–51.) Residential properties are assigned one ESE value "per unit," while commercial, industrial, and institutional properties are charged based on square footage. (Dkt. 5:6.)[2] So a single-family home, for instance, receives an ESE value of one—while a

[1] In November 2023, Pewaukee adopted an ESE amount of $241. (Dkt. 5:52.) One year later, Pewaukee increased the ESE amount to $439. (Dkt. 45:38.)

[2] Pewaukee initially assigned an ESE value of 4.75 per unit at properties that it classified as "Senior Living" and "Care Home." (Dkt. 5:6.) Pewaukee has since eliminated this multiplier, now assigning an ESE value of one per unit at such properties. (Dkt. 45:32–33, 35.)

four-unit apartment building receives a value of four. (*See* Dkt. 5:50–51.) For other types of property, the Pewaukee Ordinance assigns one ESE value per 3,350 square feet of commercial property, 31,000 square feet of industrial property, and 6,500 square feet of institutional property. (Dkt. 45:33, 35.)

D. Several taxpayers sue Dousman and Pewaukee to challenge the Fire Charge ordinances.

In September 2024, several plaintiffs ("the Taxpayers") filed this lawsuit against Dousman and Pewaukee to challenge the validity of the Fire Charge ordinances. (Dkt. 3.) In their complaint, the Taxpayers raised four nearly identical claims against each ordinance. (Dkt. 3:15–32.)

The Taxpayers develop those claims below in this brief. This brief supports the Taxpayers' motion for summary judgment. (Dkt. 46.)

SUMMARY JUDGMENT STANDARDS

"Summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law." *Dieter v. Chrysler Corp.*, 2000 WI 45, ¶14, 234 Wis. 2d 670, 610 N.W.2d 832. "The existence of a new or difficult issue of law does not, in and of itself, render the summary judgment mechanism inappropriate." *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 569, 297 N.W.2d 500 (1980).

Because "the validity of an ordinance is a question of law," *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 353, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994), a court may decide the validity of an ordinance on summary judgment, *see, e.g.*, *Wisconsin Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, ¶¶1–2, 408 Wis. 2d 287, 992 N.W.2d 100.

SUMMARY OF ARGUMENT

I. The Fire Charges are invalid special charges. The Fire Charges are special charges, and the ordinances treat them as such. They are unlawfully calculated because they are imposed village-wide on all developed property. Binding case law holds that municipalities may not impose special charges this way.

II. Alternatively, the Fire Charges are unlawful property taxes. They are taxes because they fund governmental functions that benefit the general public. And they are *property* taxes because they are taxes imposed on property. As property taxes, the Fire Charges are unlawful for three reasons: (1) they are non-uniform, in violation of the Wisconsin Constitution; (2) they violate state statutes; and (3) they lack explicit statutory authority.

III. Even if the Fire Charges are fees (rather than special charges or general property taxes), they are still unlawful for two separate reasons. They violate Wis. Stat. § 66.0628 because the amount charged to a given property owner is not directly related to the costs of a service provided to that person. The Fire Charges also violate the spirit and purpose of—and thus are preempted by—statutory limitations on property taxes.

IV. Finally, the Fire Charges are unlawful because they lack statutory authority. No statute authorizes a village to fund a fire department by imposing a separate charge on every property owner throughout the village.

ARGUMENT

I. The Fire Charges are invalid special charges.

"When an ordinance fails to comply with the empowering statute, it is invalid." *Nw. Properties v. Outagamie Cnty.*, 223 Wis. 2d 483, 488, 589 N.W.2d 683 (Ct. App. 1998) (citing *Laskaris v. City of Wisconsin Dells, Inc.*, 131 Wis. 2d 525, 531, 389 N.W.2d 67 (Ct. App. 1986)).

Dousman and Pewaukee impose their Fire Charges on annual property tax bills "as a special charge." (Dkt. 4:5; 5:6.) Wisconsin Stat. § 66.0627 enables special charges; it also prescribes a method for calculating special charges. Neither Dousman nor Pewaukee has followed that prescribed method, rendering each village's Fire Charge invalid.

The Taxpayers will first explain why the Fire Charges are special charges. Next, the Taxpayers will explain how Wisconsin law allows municipalities to impose special charges. Finally, the Taxpayers will explain why the Fire Charges are imposed unlawfully.

A. The Fire Charges are special charges, as the ordinances treat them.

The Dousman Ordinance and the Pewaukee Ordinance impose the Fire Charges "as a special charge." (Dkt. 4:5; 5:6.) The term "special charge" is no mere label in these ordinances. The Fire Charges bear the hallmarks of a special charge. For one thing, all special charges "that are placed in the tax roll shall be paid in full on or before January 31." Wis. Stat. § 74.11(3). Consistent with that trait, both ordinances place the Fire Charges on annual tax bills, and the Fire Charges "shall be paid in full by January 31." (Dkt. 4:5; 5:6.) In addition, "[i]f a special charge is not paid within the time determined by the governing body, the special charge is delinquent." Wis. Stat. § 66.0627(4). Echoing that sentiment, each ordinance states that "any unpaid fee shall be considered delinquent." (Dkt. 4:5; 5:6.) Finally, "[a] delinquent special charge becomes a lien on the property against which it is imposed as of the date of delinquency." Wis. Stat. § 66.0627(4). The Fire Charges share this trait as well—each ordinance includes that lien disclaimer verbatim. (Dkt. 4:5; 5:6.)

Because the Fire Charges walk and talk like a special charge, this Court should treat them as such, even if Dousman and Pewaukee try to argue they are something else. If Dousman and Pewaukee try to recharacterize the Fire Charges as something else, this Court should not allow it.

A municipality may not recharacterize a charge during litigation in an attempt "to legitimize" it. *See Hildebrand v. Town of Menasha*, 2011 WI App 83, ¶43, 334 Wis. 2d 259, 800 N.W.2d 502. In *Hildebrand*, the Town of Menasha assessed the Hildebrands more than $33,000 for a trail that the town had installed along the Hildebrands' property boundary. *Id.* ¶¶15, 17. In a lawsuit challenging the special assessment, the town argued (among other things) that the "trail is the same as a sidewalk for special assessment purposes." *Id.* ¶39. The court of appeals rejected that argument, reasoning that "[t]he Town cannot have it both ways. The facts unequivocally show that the Town treated the trail as a trail. The Town cannot now call it a sidewalk simply to legitimize the special assessment levied against the Hildebrands' property." *Id.* ¶43.

That principle applies here. The Dousman Ordinance and the Pewaukee Ordinance treat the Fire Charges as special charges. (Dkt. 4:5; 5:6.) This Court should do the same.

B. A municipality may impose a special charge for fire protection but only for services actually rendered to a property.

Municipalities may impose special charges, but they may not calculate those charges however they please. A special charge is defined as "a charge against real property to compensate for all or part of the costs to a public body of *providing services to the property*." Wis. Stat. § 74.01(4) (emphasis added). A municipality may "impose a special charge against real property *for current services rendered* by allocating all or part of the cost of the service to the *property served*." Wis. Stat. § 66.0627(2) (emphases added).

This language in Wis. Stat. § 66.0627(2) means a special charge cannot be levied just for making a service available. *See Town of Janesville v. Rock Cnty.*, 153 Wis. 2d 538, 546, 451 N.W.2d 436 (Ct. App. 1989). That role is reserved instead for general property taxes. *See id.* at 546–47. Special charges have comparatively slim utility. A special charge must be equivalent to (or less than) the cost of a service "actually performed." *Id.* at 547.

The statutory language shows why the controlling case here, *Town of Janesville*, came out how it did. There, the Town of Janesville tried to charge Rock County for fire protection "based on the valuation of county properties within the town." *Id.* at 545. The town argued that the special-charge statute allowed it to calculate the charge this way. *Id.*

Rejecting that argument, the court of appeals explained that a special charge for fire protection is valid only if calculated "on a per call basis." *Id.* at 547. Addressing the predecessor to Wis. Stat. § 66.0627(2),[3] the court held that the statute

[3] Although the special-charge statute was amended and renumbered since *Town of Janesville*, that case is still good law. *See State ex rel. Robinson v. Town of Bristol*, 2003 WI App 97, ¶¶23 n.14, 25 n.15, 264 Wis. 2d 318, 667 N.W.2d 14. When *Town of Janesville* was decided, the statute provided that "special charges for *current services rendered* may be imposed by the governing body by allocating all or part of the cost to the *property served*." *Town of Janesville v. Rock Cnty.*, 153 Wis. 2d 538, 545, 451 N.W.2d 436 (Ct. App. 1989)

"contemplates charges for services rendered," meaning "services actually done or performed." *Id.* at 546. This statutory language, the court explained, "limits the town to charging only for services actually provided and not for services that may be available but not utilized." *Id.*

Special charges thus are *not* "a municipality-wide funding mechanism for items such as public schools, libraries and other municipality-wide services that are not necessarily utilized by every property owner." *Id.* at 546–47. Such "items are of equal benefit to the entire community and should be paid out of general property tax funds." *Id.* at 547.

C. The Fire Charges are unlawfully calculated under Wis. Stat. § 66.0627, the special-charge statute.

The question here is whether the Dousman and Pewaukee Fire Charges are calculated consistently with Wis. Stat. § 66.0627(2). Neither is. So each is invalid.

Contrary to *Town of Janesville*, Dousman and Pewaukee are *not* imposing their Fire Charges only on properties that are actually served, *i.e.*, properties where the fire department responds to a call for assistance. They instead are imposing the Fire Charges on properties village-wide, regardless of whether a given property received services from the fire department during the annual billing cycle.

The Dousman Ordinance imposes an annual Fire Charge on "all Real Property" in the village. (Dkt. 4:4.) The amount charged to a given property depends "on acreage and building square footage." (Dkt. 4:47; *see also* Dkt. 4:43; 45:23–24.)

The Pewaukee Ordinance similarly imposes a Fire Charge on "every developed property" in the village. (Dkt. 5:6.) The amount charged to a given property varies based on "property class." (Dkt. 5:5.) Residential properties are charged "per unit," while commercial, industrial, and institutional properties are charged based on square footage. (Dkt. 5:6; *see also* Dkt. 45:32–33, 35.)

(emphases added) (quoting Wis. Stat. § 66.60(16)(a) (1987–88)). As renumbered, the statute similarly provides that a village "may impose a special charge against real property for *current services rendered* by allocating all or part of the cost of the service to the *property served*." Wis. Stat. § 66.0627(2) (emphases added). The statute thus still limits the scope of special charges to current services rendered to the property served.

The Dousman Ordinance and the Pewaukee Ordinance thus impose the Fire Charges as "a municipality-wide funding mechanism for … municipality-wide services that are not necessarily utilized by every property owner." *See Town of Janesville*, 153 Wis. 2d at 546–47. Municipalities cannot impose special charges this way. *Id.* Instead, a special charge may be imposed for "the costs of fire services rendered on a per call basis." *Id.* at 547.

Both ordinances are therefore invalid under *Town of Janesville*. "A municipal ordinance which fails to comply with the empowering statute is invalid." *Laskaris*, 131 Wis. 2d at 531 (special-charge case). Because the Fire Charges fail to comply with Wis. Stat. § 66.0627(2), the Dousman Ordinance and the Pewaukee Ordinance are invalid. This Court should so declare.

II. Alternatively, the Dousman and Pewaukee Fire Charges are unlawful property taxes.

Because the Dousman and Pewaukee Fire Charges are invalid special charges, the Court can end its analysis there. In the alternative, the Court may conclude they are unlawful property taxes.

As property taxes, the Fire Charges are unlawful for three separate reasons: (1) they are not uniformly imposed based on property value, in violation of the Uniformity Clause in Article VIII, § 1 of the Wisconsin Constitution; (2) they violate state statutes; and (3) they lack explicit statutory authority.

The Taxpayers will first explain why the Fire Charges are property taxes and then will explain why, as taxes, they are unlawful.

A. The Dousman and Pewaukee Fire Charges are property taxes.

The Fire Charges are taxes because they are involuntary and they fund governmental functions that benefit the general public. And they are *property* taxes because they are imposed on real property.

1. A tax is a forced charge to pay for governmental functions of general benefit.

"The law distinguishes between taxes and fees." *Edgerton Contractors, Inc. v. City of Wauwatosa*, 2010 WI App 45, ¶16, 324 Wis. 2d 256, 781 N.W.2d 228. "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). "'[T]he primary purpose of a tax is to obtain revenue for the government' as opposed to covering the expense of providing certain services or regulation." *Bentivenga*, 2014 WI App 118, ¶6 (alteration in original) (quoting *City of River Falls v. St. Bridget's Cath. Church of River Falls*, 182 Wis. 2d 436, 441–42, 513 N.W.2d 673 (Ct. App. 1994)). "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.

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*." *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d 299, 304, 94 N.W.2d 584 (1959) (emphases added) (citation omitted). In other words, "[a] tax is an enforcement of proportional contributions from persons and property, imposed by a state or municipality in its *governmental capacity* for the support of its government and its *public needs*." *City of River Falls*, 182 Wis. 2d at 441 (emphases added). General public benefit is inherent in a governmental function: "[a] municipality acts in its governmental capacity when its primary objective is health, safety and the public good." *Save Elkhart Lake, Inc. v. Vill. of Elkhart Lake*, 181 Wis. 2d 778, 789, 512 N.W.2d 202 (Ct. App. 1993).

By contrast, "[a] charge is a 'fee' … when it is for a 'benefit' granted to the payor that is 'not shared by other members of society.'" *Fed. Commc'ns Comm'n v. Consumers' Rsch.*, 145 S. Ct. 2482, 2491 (2025) (quoting *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336, 341 (1974)); *see also City of De Pere v. Pub. Serv. Comm'n*, 266 Wis. 319, 328, 63 N.W.2d 764 (1954). In other words, a municipal fee is imposed "in the city's proprietary capacity," not "in the exercise of its sovereign power delegated to it by the state." *See City of De Pere*, 266 Wis. at 325. Private benefits are inherent in proprietary services: "[a] municipality acts in its proprietary

capacity when engaging in business with primarily private concerns, even if some elements are governmental." *Save Elkhart Lake*, 181 Wis. 2d at 789.

The distinction between proprietary services and governmental functions is thus crucial to the difference between fees for services and taxes. *See, e.g.*, *Bargo Foods North Inc. v. Dep't of Revenue*, 141 Wis. 2d 589, 597–98 & n.5, 415 N.W.2d 581 (Ct. App. 1987). Several cases highlight that distinction. In *Bargo*, 141 Wis. 2d at 597–98, the court held that because "the operation of the Milwaukee county airport is a proprietary function," the "fees the county charged for Bargo's use of the airport are not taxes." The court noted that its "decision rests on the conclusion that operation of the airport is a proprietary rather than a governmental function." *Id.* at 597 n.5. The court distinguished *Milwaukee & Suburban*, which had held that a city's charge on trolleys was a tax, because "control of streets is a governmental function." *Id.* In *City of De Pere*, 266 Wis. 2d at 325, our supreme court held that a city's charge for connecting to a water main was a fee rather than a tax, reasoning that the charge was imposed "in the city's proprietary capacity." And in *City of River Falls*, the court reasoned that a water-utility charge was a fee rather than a tax because its purpose was "a proprietary function, not a governmental function." *City of River Falls*, 182 Wis. 2d at 443.

Voluntariness is also relevant in determining whether a charge is a tax or a fee for services. Taxes are "forced" payments to the government. *Milwaukee & Suburban*, 6 Wis. 2d at 304 (citations omitted). "A fee, however, is incident to a voluntary act…." *National Cable Television Assn.*, 415 U.S. at 340. User fees "are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994); *see also, e.g.*, *Heartland Apartment Ass'n, Inc. v. City of Mission*, 392 P.3d 98, 106 (Kan. 2017) ("Payment of a fee is voluntary—an individual can avoid the charge by choosing not to take advantage of the service, benefit, or privilege offered.").

In *City of De Pere*, for example, our supreme court emphasized the voluntary nature of a water-connection fee. The court explained that "the necessity for payment

does not arise unless and until the individual requests the public authority to make the connection to the [water] main. So long as the service is not asked, the money will never be demanded." *City of De Pere*, 266 Wis. at 326. The court thus reasoned that the charge was "a voluntary fee 'in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society.'" *Id.* at 328 (citation omitted). In other words, when a charge is optional, it presumably confers a private benefit on the payers.

A compelled charge, by contrast, presumably benefits the public. *See, e.g.*, *Emerson College v. City of Boston*, 462 N.E.2d 1098, 1106 (Mass. 1984) (holding a compelled fire-protection charge was a tax, not a fee). There is a simple reason why: when the payers of a charge receive a private benefit, there is "no reason to depart from the optional character of a traditional fee." *Id.* The private benefit provides an incentive to pay the charge.

Summed up, fees bestow a "benefit on the [payor], not shared by other members of society," while taxes benefit "the wider public." *Consumers' Rsch.*, 145 S. Ct. at 2499 (alteration in original) (quoting *National Cable Television Assn.*, 415 U.S. at 341).

2. The Dousman and Pewaukee Fire Charges are general property taxes because they are forced charges on real property to pay for governmental functions of general benefit.

Here, the Dousman and Pewaukee Fire Charges are taxes because they pay for governmental functions for the public's benefit. As the Dousman Ordinance and the Pewaukee Ordinance recognize, the Fire Charges' purpose is to raise "sufficient" revenue for Dousman and Pewaukee to pay the "entirety" of the amount they owe for services from their respective fire department. (Dkt. 4:4; 5:6.) Our supreme court has held that "fire protection" is "a governmental rather than a proprietary service" because it is done "for the public good." *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 542, 314 N.W.2d 321 (1982).

For this reason, the Fire Charges fund services that benefit the general public, not just the persons paying the charges. The Western Lakes Fire District provides

fire protection and related services for all persons and property in Dousman. (Dkt. 4:6; 8.) The City of Pewaukee Fire Department provides similar services for the Village of Pewaukee. (Dkt. 5:24, 30, 47.) These fire departments thus would be required, for example, to respond to car fires that occur in Dousman and Pewaukee, even if the owners and passengers of the cars were not residents of Dousman or Pewaukee. Similarly, these fire departments would be required to respond to a fire or EMS emergency at an apartment building in their respective village even if the renters who live there do not pay the Fire Charges. As another example, these fire departments would be required to respond to a workplace fire or EMS emergency even if the workers there do not pay the Fire Charges. These examples show that the Fire Charges support "the public good." *See Town of Hallie*, 105 Wis. 2d at 542. These charges do *not* bestow on the payers a benefit that is "not shared by other members of society." *See City of De Pere*, 266 Wis. at 328 (citation omitted).

In addition, the Fire Charges are involuntary. They are imposed on all real property in Dousman and all developed real property in Pewaukee. (Dkt. 4:4; 5:6.) The Fire Charges thus are *not* limited to persons who have "asked a public officer to perform certain services for [them]." *See City of De Pere*, 266 Wis. at 328 (citation omitted). The Fire Charges' involuntary nature further shows that they are taxes.

In short, because the Fire Charges "exact[]" money to pay for "governmental functions" of "general benefit," they are "a tax." *See Milwaukee & Suburban*, 6 Wis. 2d at 304 (citation omitted). Stated differently, the Fire Charges are *not* a "voluntary" charge for a "proprietary" service that "bestow[s] upon [the payers] a benefit not shared by other members of society." *See City of De Pere*, 266 Wis. at 325, 328 (citation omitted). The Fire Charges are taxes, not fees for proprietary municipal services.

3. Recent, controlling precedents show that the Fire Charges are property taxes.

Wisconsin Property Taxpayers is controlling here, helping confirm that Dousman's and Pewaukee's Fire Charges are property taxes. In *Wisconsin Property Taxpayers*, our supreme court unanimously held that the Town of Buchanan's "transportation utility fee" or TUF was actually a tax, even though it was labeled a

"fee" in the town's ordinance. *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶10. The Town of Buchanan imposed that charge on every developed property within the town. *Id.* ¶3. The Town of Buchanan "handled funds collected under the TUF separately." *Id.* ¶4. The TUF was earmarked to pay for road construction and related expenses, including sidewalks and street lighting. *Id.* ¶¶3, 5. The town imposed a flat charge on all residential property and imposed a charge on commercial property that varied "based on the size and type of business and the number of estimated 'trips' on municipal roads the business is expected to generate." *Id.* ¶4. The supreme court held that the TUF was "a property tax." *Id.* ¶18.

The court of appeals recently applied *Wisconsin Property Taxpayers* and struck down Pewaukee's TUF. The court reached this result based on the similarity between the two TUFs. The court explained that, like Pewaukee, "the Town of Buchanan sought to fund its [transportation] utility with a fee imposed on '[e]very developed property within the Town.'" *Wisconsin Manufacturers & Commerce, Inc. v. Vill. of Pewaukee*, 2024 WI App 23, ¶7, 411 Wis. 2d 622, 5 N.W.3d 949 (hereafter "*WMC*") (second alteration in original) (quoting *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶3). The court also noted that properties paid generalized rates based on a given property's classification. *Id.* Finally, the court noted that Pewaukee's and Buchanan's TUFs were earmarked to pay for transportation facilities. *Id.* For these reasons, the court concluded that *Wisconsin Property Taxpayers* was "controlling precedent" under which Pewaukee's TUF was "a tax rather than a fee." *Id.* ¶11.

Dousman's and Pewaukee's Fire Charges are materially indistinguishable from the TUFs in *Wisconsin Property Taxpayers* and *WMC*. All four charges are imposed on developed property throughout a municipality. (Dkt. 4:4; 5:6.) All four charges are involuntary. Like the TUFs, the Fire Charges have generalized rates based on a given property's classification. (Dkt. 4:43, 47; 5:6.) And all four charges are earmarked to pay for specific expenses.

Although the TUFs in *Wisconsin Property Taxpayers* and *WMC* funded road work rather than fire departments, that distinction is irrelevant. Like fire protection, "repair and maintenance of highways constitute a governmental function." *Lickert v.*

Harp, 213 Wis. 614, 616, 252 N.W. 296 (1934). Dousman's and Pewaukee's fire "fees" are property taxes as much as Buchanan's and Pewaukee's transportation utility "fees" were property taxes.

4. *Town of Hoard* is not controlling precedent on the tax–fee issue here.

The Pewaukee Ordinance cites *Town of Hoard v. Clark County*, 2015 WI App 100, 366 Wis. 2d 239, 873 N.W.2d 241. (Dkt. 5:4.) As an initial matter, if this Court concludes the Fire Charges are invalid special charges, the Court need not address *Town of Hoard*.

If the Court addresses *Town of Hoard*, it should decline to apply that case for two separate reasons: (1) *Town of Hoard* relied on a statute that applies only to towns, not villages; and (2) *Town of Hoard* conflicts with binding precedent.

a. *Town of Hoard* did not address the special-charge statute.

As just noted, if this Court concludes the Fire Charges are invalid special charges, the Court need not address *Town of Hoard*.

In *Town of Hoard*, the town adopted a fee under Wis. Stat. § 60.55(2)(b), which explicitly authorizes town boards to impose fees on property owners for fire protection. *Town of Hoard*, 2015 WI App 100, ¶2. Because the court relied on § 60.55(2)(b) to uphold the fees, the court declined to consider whether the charges were valid special charges under Wis. Stat. § 66.0627(2). *Id.* ¶2 n.1.

Unlike the Town of Hoard, Dousman and Pewaukee are imposing their Fire Charges "as a special charge." (Dkt. 4:5; 5:6.) As explained above in Argument § I, the Fire Charges are invalid special charges because they do not comply with Wis. Stat. § 66.0627(2). Because the court in *Town of Hoard* did not address this statute, that case sheds no light on whether the Fire Charges are invalid special charges. As mentioned above, if the Court determines that the Fire Charges are invalid special charges, the Court can end its analysis there.

b. *Town of Hoard* relied on a statute specific to towns.

Even regarding the tax–fee distinction, *Town of Hoard* is inapposite here. In *Town of Hoard*, the court of appeals held that the fire-protection charge was a fee

rather than a tax. *Town of Hoard*, 2015 WI App 100, ¶¶11–15. The court explained that Wis. Stat. § 60.55(2) "identifies alternatives for funding fire protection. Subsection (2)(b) authorizes a fee and subsection (2)(c) authorizes a tax." *Id.* ¶25. The court noted that the town had "chose[n] to charge a fee in this case, as authorized under subsection (2)(b)." *Id.* The court noted that other towns could choose to impose a tax under subsection (2)(c). *Id.*

Here, by contrast, Dousman and Pewaukee did not adopt their Fire Charges under Wis. Stat. § 60.55(2)(b). Neither ordinance purports to rely on this statute, which applies only to towns, not villages. For these reasons, *Town of Hoard* is not controlling on whether the Fire Charges are fees or property taxes (if they are not special charges).

c. *Town of Hoard* conflicts with binding precedent.

Town of Hoard does not apply here for another reason: it is not good law to the extent it held that the fire-protection charges there were fees rather than taxes. "To the extent that a supreme court holding conflicts with a court of appeals holding, we follow the supreme court's pronouncement." *Cuene v. Hilliard*, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509. Similarly, a court of appeals opinion is not binding precedent if it conflicts with an earlier published court of appeals opinion. *State v. Swiams*, 2004 WI App 217, ¶23, 277 Wis. 2d 400, 690 N.W.2d 452.[4] Here, *Town of Hoard* conflicts with supreme court precedent and earlier court of appeals precedent in five ways.

First, the court in *Town of Hoard* seemed to imply—incorrectly—that fire protection is a proprietary service. The court referred to "fire protection" as a "service." *Town of Hoard*, 2015 WI App 100, ¶¶13, 15. The court purported to rely on *City of River Falls*, which recognizes that fees pay for proprietary services. *See id.* ¶14; *City of River Falls*, 182 Wis. 2d at 442–43. Our supreme court, however, has repeatedly characterized "furnishing fire protection" as a "governmental function."

[4] Our supreme court has discussed this first-in-time rule without expressing an opinion on its merits. *Marks v. Houston Cas. Co.*, 2016 WI 53, ¶¶78–79, 369 Wis. 2d 547, 881 N.W.2d 309.

See, e.g., *Town of Hallie*, 105 Wis. 2d at 542; *Christian v. City of New London*, 234 Wis. 123, 290 N.W. 621, 623 (1940); *Strohmaier v. Wisconsin Gas & Elec. Co.*, 214 Wis. 564, 253 N.W. 798, 801 (1934).[5] *Town of Hoard* conflicts with this longstanding principle.

Second, if the *Town of Hoard* court was implying that fees pay for governmental services, that implication conflicts with supreme court and earlier court of appeals precedent. As explained, taxes support governmental services, while fees pay for proprietary services. *See supra* at pages 14–15.

Third, *Town of Hoard* conflicts with the court of appeals' earlier decision in *City of River Falls*. In *City of River Falls*, the court concluded that the water-utility charge there was "a fee, not a tax," reasoning that "the purpose" of the charge was "a proprietary function, not a governmental function." *City of River Falls*, 182 Wis. 2d at 442–43. Crucially, in making this distinction, the court noted that the charge was *not* imposed in the city's "role as a municipality providing equipment needed to fight fires." *Id.* at 443.[6]

Unlike in *City of River Falls*, the charge in *Town of Hoard* paid for "the cost of operating the fire district and the funding of its capital needs." *Town of Hoard*, 2015 WI App 100, ¶4. In fact, the Town of Hoard itself explained that the charge allowed

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[5] More than 100 years ago, our supreme court explained that "[i]n conducting a fire department, [a] city . . . 'is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community.'" *Manske v. City of Milwaukee*, 123 Wis. 172, 101 N.W. 377, 378 (1904) (quoting *Hayes v. City of Oshkosh*, 33 Wis. 314, 318 (1873)).

[6] The charge in *City of River Falls* was a so-called "public fire protection" or PFP charge under Wis. Stat. § 196.03(3)(b). To avoid confusion with Dousman's and Pewaukee's Fire Charges, this brief refers to the charge in *City of River Falls* as a water-utility charge. Despite its name, a PFP charge does not pay for fire protection by a fire department. Instead, a PFP charge "covers the costs to augment the utility's water system in order to provide the high flows and pressures needed to fight fires." Public Service Commission of Wisconsin, "Investigation into the methods used by Wisconsin's water utilities in allocating public fire protection (PFP) costs," at 2 (Dec. 15, 2016), https://psc.wi.gov/Documents/water/PFPfinalreport2016.pdf. Those costs include a water utility's "supply, storage and distribution infrastructure," such as water-storage facilities, water mains, and fire hydrants. *Id.* at 3.

the fire district "to acquire equipment and facilities for the suppression of fires, and to employ experienced and trained personnel to provide fire protection services." (Resp. Br. at 42, *Town of Hoard v. Clark Cnty.*, Wis. Ct. App. Case No. 2015AP678 (citation omitted).)[7] The court in *Town of Hoard* ostensibly relied on *City of River Falls*. *See Town of Hoard*, 2015 WI App 100, ¶¶14, 28. But *City of River Falls* did not involve a charge for funding the operation of a fire district; it involved a charge for funding a water utility's storage and delivery of water. The court there indicated that a municipal charge to pay for "equipment needed to fight fires" *would* be a tax. *See City of River Falls*, 182 Wis. 2d at 443. By reaching the opposite conclusion, *Town of Hoard* conflicts with *City of River Falls*. Because *City of River Falls* is the earlier opinion, it controls over *Town of Hoard*. *See Swiams*, 2004 WI App 217, ¶23 (noting if two published court of appeals opinions conflict, the first controls).

Fourth, the court in *Town of Hoard* incorrectly dismissed the relevance of a lien for nonpayment. The court there stated that "whether non-payment results in a tax lien" is not relevant when determining whether a charge is a tax or a fee. *Town of Hoard*, 2015 WI App 100, ¶14. The court dismissed the lien factor in *City of River Falls* as mere "factual background." *Id.* The court in *City of River Falls*, however, clearly relied on the lien factor when deciding whether the charge was a tax. The court there explained that the fact that the water-utility "charge lacks some of the common characteristics of a tax supports our conclusion that the [water-utility] charge is a fee and not a tax." *City of River Falls*, 182 Wis. 2d at 443. Addressing one of those common traits, the court explained that "unlike property taxes and assessments, nonpayment of the [water-utility] charge does not result in a lien on the utility customer's land." *Id.* (citing *City of De Pere*, 266 Wis. at 326–27). By suggesting that the prospect of a lien is irrelevant, *Town of Hoard* conflicts with *City of River Falls*. For the same reason, *Town of Hoard* conflicts with *City of De Pere*, where our

[7] Available at https://acefiling.wicourts.gov/document/eFiled/2015AP000678/144696.

supreme court determined that a charge was a fee because (among other reasons) it was not a "lien against the real estate." *City of De Pere*, 266 Wis. at 327.[8]

Fifth and finally, *Town of Hoard* conflicts with *Wisconsin Property Taxpayers*, where the supreme court held that a "transportation utility fee" or TUF was a property tax. As explained above, the tax in *Wisconsin Property Taxpayers* is indistinguishable from a charge that is imposed on all developed property in a municipality to fund a fire department. *See supra* at pages 17–19.

The court's reasoning in *Town of Hoard* conflicts with *Wisconsin Property Taxpayers*. In *Town of Hoard*, the court reasoned that the charge there was a fee because it was determined by a formula and was earmarked to pay for fire protection. *Town of Hoard*, 2015 WI App 100, ¶13. The charge in *Wisconsin Property Taxpayers*, however, was a property tax even though it was determined by a formula and was earmarked to cover specific expenses. *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶¶3–5, 10, 18. Likewise, in *WMC*, the court applied *Wisconsin Property Taxpayers* and concluded that Pewaukee's TUF was a tax even though the TUF was determined by a formula and was earmarked for specific functions. *WMC*, 2024 WI App 23, ¶¶4, 7.[9]

Indeed, a generalized formula is one reason why the charges in *WMC* and *Wisconsin Property Taxpayers* were taxes. *See id.* ¶7. In *Wisconsin Property Taxpayers*, residential properties were charged differently than commercial properties, and the amount charged to commercial properties was "based on their size, type of business, and the number of trips they were estimated to take on municipal roads." *Id.* (citing *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶4). The court

[8] As mentioned above, nonpayment of the Dousman and Pewaukee Fire Charges results in "a lien on the property." (Dkt. 4:5; 5:6.) This fact further confirms the Fire Charges are not fees.

[9] *Town of Hoard*'s reasoning also conflicts with *Elsner*, a case where our supreme court held that an earmarked charge was a tax rather than a special assessment. *See City of Plymouth v. Elsner*, 28 Wis. 2d 102, 103–09, 135 N.W.2d 799 (1965); *see also, e.g.*, *Kathrein v. City of Evanston*, 752 F.3d 680, 687 (7th Cir. 2014) (noting earmarked taxes are common); *Norfolk S. Ry. Co. v. City of Roanoke*, 916 F.3d 315, 320 (4th Cir. 2019) (noting an earmarked charge is likely a tax if it goes into a special fund that is used to benefit the entire community).

in *WMC* cited this generalized formula as a reason for applying *Wisconsin Property Taxpayers* and concluding Pewaukee's TUF was a tax. *See id.*

The formula in *Town of Hoard* is similar to—and even more generalized than—the one in *Wisconsin Property Taxpayers*. In *Town of Hoard*, the amount charged was "based upon two factors: the property's square footage and its nature of use (e.g., residential, commercial, hospital)." *Town of Hoard*, 2015 WI App 100, ¶6. The formula in *Wisconsin Property Taxpayers* was also based on size and nature of use. And because that formula considered a property's estimated usage of roads, it was less generalized than the formula in *Town of Hoard*. The charge in *Town of Hoard* is thus even more clearly a tax than the charge in *Wisconsin Property Taxpayers*.

Ultimately, the *Town of Hoard* court misapplied the test for distinguishing taxes from fees. The court noted that "[t]he primary purpose of a tax is to obtain revenue for the *government*, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities." *Town of Hoard*, 2015 WI App 100, ¶12 (emphasis added) (quoting *City of River Falls*, 182 Wis. 2d at 441–42). But the court went off track when it characterized a municipality-wide charge on properties to pay for fire protection as a "fee" for a "service." *See id.* ¶¶13, 15. Because fire protection is a *governmental* function, a municipal charge for fire protection provides *revenue for the government* and is therefore a tax.

* * * * *

In sum, *Town of Hoard* does not apply here because it did not address the special-charge statute, it involved a statute specific to towns, and it conflicts with binding precedent.

B. As property taxes, the Fire Charges are unlawful for several reasons.

As just explained, the Fire Charges are property taxes. As such, they are unlawful for three separate reasons: (1) they violate our state constitution's Uniformity Clause; (2) they violate statutes governing property taxes; and (3) they lack explicit statutory authority. This Court may declare the Fire Charges invalid for any or all of these reasons.

1. The Fire Charges are unconstitutional because they are non-uniform property taxes.

"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 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). "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. A tax is non-uniform if "taxpayers owning equally valuable property will ultimately be paying disproportionate amounts of real estate taxes." *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 412, 288 N.W.2d 85 (1980) (citation omitted). So, for example, a flat-dollar-amount property tax is non-uniform and therefore unconstitutional. *See City of Plymouth v. Elsner*, 28 Wis. 2d 102, 107, 135 N.W.2d 799 (1965).

Here, the Dousman and Pewaukee Fire Charges are unconstitutional. Dousman's Fire Charge includes both flat rates and rates that vary based on square footage rather than property value. Pewaukee's Fire Charge rates are based on a similar formula that is not based on property value, either.

As Dousman recognizes, its Fire Charge "bears no relation to the taxable value of a property." (Dkt. 4:47.) This charge has multiple components. Dousman imposes a $15 "flat fee" on all land and a $2 "additional fee" on land above one acre. (Dkt. 4:43.) For outbuildings, Dousman imposes a $10 charge per 200 square feet. (Dkt. 4:43.) For residential, commercial, and manufacturing property, Dousman imposes a $151.99 charge per 500 square feet. (Dkt. 45:23–24.) Because this Fire Charge is a property tax that is not based on property value, it violates the Wisconsin Constitution's Uniformity Clause.

So does Pewaukee's Fire Charge. Pewaukee determines the amount of Fire Charge that any given property owes based on a figure that Pewaukee labels an "emergency service equivalent" or "ESE." (Dkt. 5:5–6.) To determine the cost of a

property's Fire Charge, the property is first assigned an ESE value. (Dkt. 5:6, 50–51.) This number varies and is calculated differently depending on the type of property at hand. (Dkt. 5:6, 50–51.) For residential properties, the ESE value is essentially based on the number of families a property can house. (Dkt. 5:6, 50–51.) So a single-family home, for instance, receives one ESE—while a four-unit apartment building receives four ESEs. (Dkt. 5:51.) ESE values are determined differently for nonresidential properties. (Dkt. 5:6, 51.) Those values are based on square footage—the larger the building, the larger the value. (Dkt. 5:6, 51.) For all properties, once an ESE value is calculated, that value is multiplied by $439. (Dkt. 45:38.) The result of this multiplication is the price of a property's annual Fire Charge. (Dkt. 5:6, 50–52.) Quite plainly, Pewaukee's ESE formula is not based on property value. Pewaukee's Fire Charge thus violates the Uniformity Clause of the Wisconsin Constitution.

Non-uniform property taxation is problematic because "[t]he uniformity clause is intended to protect the citizen against unequal and unjust taxation." *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 108, 270 N.W.2d 187 (1978). Instead of following the Uniformity Clause's concept of equality and justice, Dousman and Pewaukee claim that their Fire Charges are "equitable." (Dkt. 4:46; 5:49.) Dousman and Pewaukee may not substitute their adjudgments of equity for those the constitution commands.

2. As property taxes, the Fire Charges violate state statutes.

In addition to being unconstitutional, the Dousman and Pewaukee Fire Charges violate state statutes on property taxes.

First, the Fire Charges are not based on property value, as just explained. Wisconsin Stat. Ch. 70 "outlines a procedure for calculating an ad valorem property tax, meaning one based on the market value of the property." *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶18. A property tax's "assessment methodology is unlawful" if, as here, the tax is not calculated based on property value. *See id.* The Fire Charges are unlawful for this reason.

Second, Wis. Stat. Ch. 70 "exempts certain properties from property taxation altogether." *Id.* ¶19. Wisconsin law does not allow a municipality to impose a property

tax on tax-exempt property. *See id.* As relevant here, one lengthy statute exempts dozens of types of real property from having to pay property taxes, including property owned by the government, churches, schools, and other nonprofit entities. *See generally* Wis. Stat. § 70.11. The Fire Charges in Dousman and Pewaukee, however, apply to tax-exempt property. (Dkt. 4:46; 5:49.) The Fire Charges are thus unlawful property taxes for this additional reason.

3. The Fire Charges are unlawful taxes because they lack explicit statutory authority.

Finally, the Fire Charges lack explicit statutory authority, which is required for taxes. The Wisconsin Legislature, not the municipal level of government, "has plenary power over the whole subject of taxation." *State ex rel. Thomson v. Giessel*, 265 Wis. 207, 213, 60 N.W.2d 763 (1953). Municipalities have "no inherent power to tax." *Blue Top Motel, Inc. v. City of Stevens Point*, 107 Wis. 2d 392, 395, 320 N.W.2d 172 (1982). "[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).

No statute provides clear and express authority for a village to impose a tax on all developed property to pay for fire protection. *See infra* at pages 32–37. The Fire Charges are unlawful taxes for this reason, too.

* * * * *

In sum, the Dousman and Pewaukee Fire Charges are unlawful property taxes. They are taxes because their purpose is to raise revenue for governmental functions of general benefit. They are *property* taxes because they are taxes imposed on real property throughout each village. And they are unlawful because they violate the Uniformity Clause in the Wisconsin Constitution, they violate statutory requirements for property taxes, and they lack explicit statutory authority.

III. The Dousman and Pewaukee Fire Charges conflict with state law even if they are fees.

As explained above, the Dousman and Pewaukee Fire Charges are either invalid special charges or unlawful property taxes. If the Court concludes the Fire Charges are fees, it should still declare them unlawful. Specifically, if these charges are fees, they violate the text of Wis. Stat. § 66.0628 and violate the spirit and purpose of statutes that impose limitations on property taxes.

A. The Dousman and Pewaukee Fire Charges violate Wis. Stat. § 66.0628(2).

If the Dousman and Pewaukee Fire Charges are fees (rather than special charges or general property taxes), then they violate Wis. Stat. § 66.0628(2). This statute imposes limitations on municipal fees: "Any fee that is imposed by a political subdivision shall bear a reasonable relationship to the service for which the fee is imposed." Wis. Stat. § 66.0628(2). "Reasonable relationship" is defined to mean "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).

This statute applies to municipal charges if: (1) the charges are imposed "through legislative enactments," and (2) the charges are fees because they are "imposed in exchange for a service." *See Mary Lane Area Sanitary Dist. v. City of Oconomowoc*, 2023 WI App 48, ¶¶31, 33, 409 Wis. 2d 159, 996 N.W.2d 101. Here, the Fire Charges are imposed through legislative enactments, namely, ordinances. And in making this alternative argument under Wis. Stat. § 66.0628, the Taxpayers assume *arguendo* that the Fire Charges are fees imposed in exchange for a service.

If the Fire Charges are fees, they violate this statute. The statutory language is key. A municipal fee "may not exceed" the "*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) (emphases added). The "activity undertaken" refers to the "service provided to a person." *See id.* If a service is provided to only *some* of the persons who are charged a fee, a municipality does not undertake activity regarding the persons

who are not provided the service. The municipality thus incurs no direct costs associated with the non-recipients. For these reasons, a municipal fee violates § 66.0628(2) if it is imposed village-wide on all developed property to pay for general public services that not every property owner necessarily uses.

A closely-related statute bolsters this point. Statutory interpretation considers "the language of surrounding or closely-related statutes." *State v. Reyes Fuerte*, 2017 WI 104, ¶26, 378 Wis. 2d 504, 904 N.W.2d 773 (citation omitted). "Statutes are closely related when they are in the same chapter, reference one another, or use similar terms." *Id.* ¶27. Here, one closely-related statute is the special-charge statute, Wis. Stat. § 66.0627. This statute is closely related to Wis. Stat. § 66.0628 because they are in the same chapter and use similar terms. Indeed, these two statutes are right next to each other.

Interpreting the materially identical predecessor to Wis. Stat. § 66.0627(2),[10] the court of appeals held that the statute "contemplates charges for services rendered," meaning "services actually done or performed." *Town of Janesville*, 153 Wis. 2d at 546. This statute limits a municipality "to charging only for services actually provided and not for services that may be available but not utilized." *Id.* Addressing a fire-protection charge specifically, the court held that a special charge could be based on "the costs of fire services rendered on a per call basis." *Id.* at 547. The service rendered is "making fire calls to … properties," not the mere "availability" of fire protection. *Id.* 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. Simply stated, a special charge goes too far if it applies to all propery owners within a municipality, regardless of a given property owner's usage of the service in question.

The same logic applies to municipal fees under Wis. Stat. § 66.0628. Both statutes prohibit a municipality from imposing a charge that exceeds the cost of the

[10] *See supra* note 3.

service provided. In prohibiting such charges, both statutes use similar language. The fee statute uses the key phrase "service provided to a person." Wis. Stat. § 66.0628(1)(b). This language is similar to "services rendered" in the special-charge statute, Wis. Stat. § 66.0627(2). There is no meaningful difference between "service provided" and "services rendered." In fact, another statute defines "special charge" to mean "a charge against real property to compensate for all or part of the costs to a public body of *providing services* to the property." Wis. Stat. § 74.01(4) (emphasis added). These statutes thus use "providing," "provided," and "rendered" interchangeably. Absent a more-specific statute that allows otherwise, a municipal service fee may be imposed only on a person who receives a service, *see* Wis. Stat. § 66.0628(1) and (2)—just like how a special charge may be imposed only on a property that receives a service, *see Town of Janesville*, 153 Wis. 2d at 546–47.

So for the same reasons why the Dousman and Pewaukee Fire Charges are invalid special charges, they violate Wis. Stat. § 66.0628(2) if they are service fees. The Fire Charges are imposed annually on all developed property village-wide, even if a given property does not use any fire department services during the year. (Dkt. 4:4; 5:6.) Because "municipality-wide services" that benefit "the entire community … should be paid out of general property tax funds," *Town of Janesville*, 153 Wis. 2d at 547, such services may not be funded with village-wide fees on real property.

In short, if the Fire Charges are service fees, they violate Wis. Stat. § 66.0628(2).

B. The Dousman and Pewaukee Fire Charges also violate the spirit and purpose of statutes that limit property taxes.

If the Fire Charges are service fees, they are unlawful for a second reason, independent of Wis. Stat. § 66.0628(2): they violate the spirit and purpose of statutes that limit property taxes. The Fire Charges are therefore preempted.

"An ordinance is preempted when any of the following four tests are satisfied: (1) the legislature has expressly withdrawn the power of the municipality to act, (2) the ordinance logically conflicts with state legislation, (3) the ordinance defeats the purpose of state legislation, or (4) the ordinance 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. An ordinance violates the spirit of state law if it "runs counter" to "a complex and comprehensive statutory structure." *Lake Beulah Mgmt. Dist. v. Vill. of E. Troy*, 2011 WI 55, ¶19, 335 Wis. 2d 92, 799 N.W.2d 787 (citation omitted).

"The legislature has enacted a comprehensive scheme for the levy, assessment and collection of taxes." *Tavern League of Wisconsin v. City of Madison*, 131 Wis. 2d 477, 484, 389 N.W.2d 54 (Ct. App. 1986). Three statutory schemes are relevant here. First, Wis. Stat. ch. 70 generally requires property taxes to be based on property value, known as ad valorem property taxes. *See Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶18. Second, Wis. Stat. ch. 70 "exempts certain properties from property taxation altogether." *Id.* ¶19; *see also* Wis. Stat. § 70.11. Third and finally, another complex statute, Wis. Stat. § 66.0602, "limits the amount by which municipalities may increase property taxes." *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶22. This statute allows municipalities "to raise their levy limits only with the voters' consent through referendum." *Id.* ¶23.

If a village could enact a fire-protection "fee" like Dousman's and Pewaukee's Fire Charges, without explicit statutory authority, then the restrictions on property taxation discussed in the preceding paragraph would be meaningless. If villages could impose involuntary "fees" on all real property in their jurisdiction to support basic governmental functions like fire protection, then there would be no limit to the types of "fees" that villages could enact. "[V]irtually all of what now are considered 'taxes' could be transmuted into 'user fees' by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a 'police fee.'" *United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993). Villages and cities would no longer need property taxes for much of anything (if anything at all) because they could fund their entire governments with a host of "fees" on property owners—such as police fees, library fees, municipal swimming-pool fees, snow-removal fees, public-works fees, parks-and-recreation fees, and more. All those hypothetical fees would look an awful lot like property taxes because they would be imposed municipality-wide on real property to support governmental functions of general benefit, functions

that are not necessarily used by every property owner. Yet those "fees" would not be subject to levy limits or property-tax exemptions, and they would not need to be based on property value. The legislature's complex and comprehensive statutory scheme regulating property taxes would be meaningless if villages and cities could replace or substantially supplement their property taxes with property "fees."

Even if this litany of hypothetical charges could be characterized as fees, they sufficiently resemble property taxes such that they violate the spirit and purpose of state statutes governing property taxes. Those hypothetical charges, as well as Dousman's and Pewaukee's Fire Charges, are preempted because they defeat the purpose and violate the spirit of state law on property taxes.

Levy limits highlight this point. Pewaukee indicated that it adopted its Fire Charge because levy limits restricted its ability to raise property taxes to pay for "the increased cost of Fire and EMS services." (Dkt. 5:48.) Multiple Pewaukee Village Board members suggested that the Fire Charges were necessary because a referendum to raise levy limits likely would have failed. (Dkt. 5:45.) As for Dousman, it adopted its Fire Charge after its citizens *rejected* a referendum that would have increased their property taxes to provide more money for their fire district. (Dkt. 4:37–39.)

The Fire Charges defeat the purpose and violate the spirit of the levy-limit statute as well as the statutes that exempt various properties from taxation and require ad valorem property taxes. State law thus preempts the Fire Charges.

IV. In addition, the Fire Charges are unlawful because they lack a statutory basis.

For the sake of completeness, the Fire Charges lack statutory authority. They are unlawful for this reason, too—regardless of whether they are special charges, taxes, or fees.

"In Wisconsin, municipalities have no inherent powers." *Nw. Properties*, 223 Wis. 2d at 487. Perhaps recognizing this limitation on villages' powers, Dousman and Pewaukee purport to rely on several statutes for enacting their Fire Charges.

Wisconsin Stat. § 66.0627 aside,[11] the Pewaukee Ordinance purports to draw authority from four other statutes: Wis. Stat. §§ 61.34(1), 61.65, 62.11(5), and 66.0301. (Dkt. 5:4–6.) The Dousman Ordinance purports to draw authority from three of those statutes: §§ 61.34, 66.0301, and 66.0627. (Dkt. 4:4.)

None of those statutes authorize the Fire Charges. If the Fire Charges were statutorily authorized, Dousman and Pewaukee could point to a single statute for support. The fact that Dousman and Pewaukee try to cobble together a slew of statutes all but proves that the Fire Charges lack a statutory basis. Tellingly, the Pewaukee Ordinance goes far beyond citing specific statutes, broadly asserting it is enacted under "Chapters 61 and 66 of the Wisconsin Statutes, including but not limited to" certain statutes. (Dkt. 5:5.) The Pewaukee Ordinance further asserts that it is "enacted pursuant to … other applicable laws," without specifying which ones. (Dkt. 5:6.) By failing to pin point which statute supposedly authorizes the Fire Charges, the Dousman Ordinance and the Pewaukee Ordinance practically concede the Fire Charges are not statutorily authorized. The Taxpayers will now explain why the identified statutes do not authorize the Fire Charges.

A. Wisconsin Stat. § 61.34 does not authorize the Fire Charges.

Wisconsin Stat. § 61.34 is "the home rule statute" for villages. *Town of Grand Chute v. U.S. Paper Converters, Inc.*, 229 Wis. 2d 674, 686, 600 N.W.2d 33 (Ct. App. 1999). This statute implements our state constitution's home-rule amendment. *Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965).

This statute, however, does not authorize the Dousman and Pewaukee Fire Charges—for three reasons. First, the Fire Charges are taxes, and villages may not adopt taxes under Wis. Stat. § 61.34. Second, the Fire Charges are governed by more-specific statutes that control over § 61.34. Third, even if the Fire Charges are fees, § 61.34 still does not authorize them because they sufficiently resemble taxes.

Turning to the first point, as the court of appeals recently reminded Pewaukee, "a village may not adopt a tax under its home rule authority." *WMC*, 2024 WI App

[11] In Argument § I, the Taxpayers explained why Wis. Stat. § 66.0627 does not authorize the Fire Charges.

23, ¶9. Although taxation is listed as a statutory home-rule power, municipalities "may only enact the types of taxes authorized by the legislature." *N. Cent. Conservancy Tr., Inc. v. Town of Harrison*, 2023 WI App 64, ¶37, 410 Wis. 2d 284, 1 N.W.3d 707 (quoting *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶11). The Dousman and Pewaukee Fire Charges are special charges, *see supra* at pages 10–11, and a special charge is a type of tax, *see CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶40 n.17, 380 Wis. 2d 399, 909 N.W.2d 136 (referring to "special charges" and "special assessments" as "taxes"); Wis. Stat. § 75.001(1) (defining "Tax" to include special charges). In addition, the Fire Charges are property taxes. *See supra* at pages 13–24. For either or both of these reasons, the Fire Charges are taxes and therefore are not authorized by Wis. Stat. § 61.34.

Moving on to the second point, when "a specific statute relat[es] to a particular subject," "it controls over any general statutory language contained in" the home-rule statute. *Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 462, 280 N.W.2d 166 (1979). Because Wis. Stat. § 66.0627 is a specific statute that relates to the particular subject of special charges, it controls over any general language in Wis. Stat. § 61.34, the home-rule statute. The same goes for Wis. Stat. § 66.0628: because this statute specifically governs municipal fees for services, it controls over the general language in § 61.34. Section 61.34 does not authorize special charges that fail to comply with § 66.0627 or fees that fail to comply with § 66.0628. Regardless of whether the Fire Charges are special charges or fees, either way they are governed by "a specific statute" that "controls over any general statutory language contained in" § 61.34. *See Schroeder*, 90 Wis. 2d at 462.

Third and finally, even if the Dousman and Pewaukee Fire Charges are fees, there is another reason why Wis. Stat. § 61.34 does not authorize them. This statute does not authorize a fee that "possesses sufficient attributes of a tax," regardless of whether it is a tax. *See Jordan*, 28 Wis. 2d at 621. Such a fee requires explicit statutory authority, just like taxes. *See id.*

Jordan is instructive here. In *Jordan*, a village ordinance required real estate sub-dividers to pay "an equalization fee in lieu of dedicating land." *Id.* at 610. Revenue

from that fee went into two non-lapsing funds that provided money for schools and development of park and recreation area. *Id.* at 611. Our supreme court held that the equalization fee was "not a property tax" because it was "imposed on the transaction of obtaining approval of the plat." *Id.* at 621–22. Nevertheless, the court held that Wis. Stat. § 61.34 and the constitutional home-rule amendment did *not* authorize the equalization fee because it "possesse[d] sufficient attributes of a tax." *Id.* at 621.[12]

Here, similarly, even if the Dousman and Pewaukee Fire Charges are fees, they "cannot be grounded upon" Wis. Stat. § 61.34 because they possess "sufficient attributes of a tax." *See id.* As explained above, the Fire Charges *are* property taxes. *See supra* at pages 13–24. Even if the Court disagrees with that conclusion, the Fire Charges at least sufficiently resemble taxes such that they fall outside the scope of § 61.34. Indeed, the Fire Charges more closely resemble a property tax than the fee in *Jordan* did. The Fire Charges are imposed village-wide on all real property in Dousman and on all developed real property in Pewaukee, not on a specific transaction like the fee in *Jordan*. (Dkt. 4:4; 5:6.) Because the fee in *Jordan* sufficiently resembled a tax to fall outside home-rule authority, the same is true of Dousman's and Pewaukee's Fire Charges, even if they are technically "fees."

For all these reasons, Wis. Stat. § 61.34 does not authorize the Dousman and Pewaukee Fire Charges.

B. Wisconsin Stat. § 62.11(5) does not authorize the Fire Charges.

Wisconsin. Stat. § 62.11(5) also does nothing to rescue the Fire Charges. Whatever the substance of this statute, it applies only to cities, and both Dousman and Pewaukee are villages.

Even if this statute were somehow relevant here, its substance simply mirrors Wis. Stat. § 61.34's. *See Town of Brockway v. City of Black River Falls*, 2005 WI App 174, ¶35 n.11, 285 Wis. 2d 708, 702 N.W.2d 418 (noting these statutes "are essentially

[12] The court ultimately held that a different statute, Wis. Stat. § 236.45, authorized the equalization fee. *Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621–22, 137 N.W.2d 442 (1965). The court also held that the equalization fee did not violate the Wisconsin Constitution's Uniformity Clause because, "if a tax," the fee would be "an excise tax" rather than a property tax. *Id.* at 622.

the same"). Wisconsin Stat. § 62.11 thus leads right back where this section of the brief began, in search of specific permission to impose the Fire Charges.

C. Wisconsin Stat. § 61.65 does not authorize the Fire Charges.

Wisconsin Stat. § 61.65 is also useless here. While this statute does speak to fire protection and villages, it does not speak to fees, taxes, or charges. This statute merely mandates that villages of a certain size "provide fire protection services." Wis. Stat. § 61.65(2)(a). A requirement to provide fire protection services is not authorization to impose any particular type of charge to pay for the service.

As discussed above, the Pewaukee Ordinance cites *Town of Hoard* (Dkt. 5:4), a case involving Wis. Stat. § 60.55. But this statute does not authorize the Fire Charges. Indeed, despite citing *Town of Hoard*, the Pewaukee Ordinance does not purport to rely on § 60.55. (Dkt. 5:4–7.) Neither does the Dousman Ordinance. (Dkt. 4:4–5.) For good reason. This statute explicitly authorizes a "town board" to pay for fire protection in various ways, including by imposing "a fee" or "taxes." Wis. Stat. § 60.55(2)(intro.), (2)(b), (2)(c), (2)(d). This statute does not authorize *villages* to do the same. As villages, Dousman and Pewaukee may not (and do not) rely on § 60.55 as authority for their Fire Charges.

If anything, § 60.55 helps show that the Dousman and Pewaukee Fire Charges lack statutory authority. Again, this statute provides that a "town board may" fund fire protection in several different ways, including by imposing a "fee" or "taxes." Wis. Stat. § 60.55(2)(b)–(d). Yet the analog for villages, Wis. Stat. § 61.65, does not mention fees or taxes. This omission is significant. "'[I]f a statute contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing' a different meaning." *State v. Lickes*, 2021 WI 60, ¶23, 397 Wis. 2d 586, 960 N.W.2d 855 (alteration in original) (citation omitted). Unlike § 60.55 (which applies to towns), § 61.65 (which applies to villages) does not authorize the imposition of taxes or fees specifically for fire protection.

D. Wisconsin Stat. § 66.0301 does not authorize the Fire Charges.

Wisconsin Stat. § 66.0301 is much the same story. This statute deals with multi-municipal agreements. It does not mention, much less authorize, any taxes,

fees, or other charges. At most, it might help authorize Dousman and Pewaukee to enter into agreements with other municipalities to form joint fire districts—like Wis. Stat. § 61.65(2)(a)3. more explicitly allows. But § 66.0301, like § 61.65, does not explicitly authorize a village to impose a special charge, other tax, or fee to fund a fire department.

* * * * *

In sum, the Dousman and Pewaukee Fire Charges lack statutory authorization. They are invalid for this reason, too.

CONCLUSION

This Court should grant the Plaintiffs' motion for summary judgment.

Dated this 10th day of September 2025.

Electronically signed by
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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of September 2025.

Electronically signed by
Scott E. Rosenow

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