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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

Plaintiffs,

Case No. 2024-CV-1584

v.

VILLAGE OF DOUSMAN
and
VILLAGE OF PEWAUKEE,

Defendants.

Plaintiffs' Response Brief Opposing
Defendants' Motion for Summary Judgment

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INTRODUCTION

The Villages' principal summary-judgment brief confirms what the Taxpayers suggested in their principal brief: this Court should declare that the Fire Charges are invalid special charges.[1] The Taxpayers and the Villages agree that the Fire Charges are special charges. The only real dispute is whether the Fire Charges comply with the special-charge statute, Wis. Stat. § 66.0627(2). Under *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 451 N.W.2d 436 (Ct. App. 1989), they do not.

The Villages' efforts to avoid *Town of Janesville* are baseless. The Villages falsely suggest that *Town of Janesville* did not address the special-charge statute. And then, contradicting their own false suggestion, the Villages assert that *Town of Janesville*'s discussion of this statute is dicta. It is not dicta, and this Court is not free to dismiss that language as dicta, anyway. Bound by *Town of Janesville*, this Court should declare the Fire Charges invalid.

If the Court decides to go further, it should conclude that the Fire Charges are unlawful property taxes. The Villages seek to avoid that conclusion by arguing the Fire Charges are fees because they are earmarked to pay for fire protection. But earmarking a tax does not turn it into a fee. A charge is a tax if it pays for a governmental function for the public's general benefit, even if it is deposited into an account separate from a municipality's "general fund." Municipalities cannot avoid the legal restrictions on property taxes by engaging in accounting shell games with their tax revenue.

For the sake of completeness, the Fire Charges are unlawful for several reasons even if they are fees. Specifically, they are preempted by several statutes and lack explicit statutory authority. This Court need not get this deep into the weeds, however, because the Fire Charges are invalid special charges.[2]

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[1] This brief uses the same terminology as the Plaintiffs' brief-in-chief. (*See* Dkt. 49.) In particular, this brief refers to the Plaintiffs as "the Taxpayers," the Defendants as "the Villages," the Villages' disputed charges as the "Fire Charges," Defendant Village of Dousman as "Dousman," Defendant Village of Pewaukee as "Pewaukee," and the ordinances that impose the Fire Charges as the "Dousman Ordinance" and the "Pewaukee Ordinance."

[2] This case is appropriate for summary judgment because, as the Villages concede, "there are no issues of material fact." (Dkt. 62:4.)

SUMMARY OF ARGUMENT

I. The Fire Charges are invalid special charges. The Villages rightly concede that the Fire Charges are special charges. As special charges, the Fire Charges 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 Dousman and Pewaukee Fire Charges are invalid special charges.

The parties agree that the Fire Charges are special charges. The dispute here is whether the Fire Charges comply with Wis. Stat. § 66.0627(2). This dispute boils down to the meaning of *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 451 N.W.2d 436 (Ct. App. 1989). Under *Town of Janesville*, this statute does not allow municipality-wide special charges to pay for fire protection. The Villages try and fail

to distinguish this controlling precedent. This Court should declare the Dousman Ordinance and the Pewaukee Ordinance invalid on this ground.

A. Under controlling precedent that the Villages cannot avoid, the Fire Charges are invalid special charges.

As an initial matter, the Fire Charges are undisputedly special charges. The Taxpayers explained in their brief-in-chief that the Fire Charges are special charges. (Dkt. 49:10–11.) The Villages concede this point in their brief-in-chief. Dousman asserts that its "Fire Protection Fee *is a special charge*, which it is authorized to enact and collect pursuant to Wis. Stat. § 66.0627(2)." (Dkt. 62:28 (emphasis added).) Likewise, Pewaukee claims its "Fire-EMS Protection Fee *is a special charge*, which it is authorized to enact and collect pursuant to Wis. Stat. § 66.0627(2)." (Dkt. 62:37 (emphasis added).) So the Taxpayers and the Villages agree that the Fire Charges are special charges.

But the Villages are wrong to argue that Wis. Stat. § 66.0627(2) authorizes the Fire Charges. As the Taxpayers already explained, the Fire Charges violate this statute because they are imposed on all property owners municipality-wide, not on a per-call basis. (Dkt. 49:11–13.) *Town of Janesville* compels this conclusion. (Dkt. 49:11–13.) The Villages' attempts to distinguish *Town of Janesville* are borderline frivolous.

1. Contrary to the Villages' assertion, *Town of Janesville* analyzed the special-charge statute.

The Villages falsely assert that the Taxpayers rely on language in *Town of Janesville* that involved "an outdated version of Wis. Stat. § 60.55," a statute that authorizes towns to impose taxes and fees for fire protection. (Dkt. 62:25.) Instead, the Taxpayers rely on language involving the predecessor version of the special-charge statute. (*See* Dkt. 49:11–13.) The current version of the special-charge statute is Wis. Stat. § 66.0627; its predecessor was Wis. Stat. § 66.60(16). *See, e.g.*, *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶17, 298 Wis. 2d 407, 727 N.W.2d 358; *State ex rel. Robinson v. Town of Bristo*l, 2003 WI App 97, ¶23 & n.14, 264 Wis. 2d 318, 667 N.W.2d 14.

In *Town of Janesville*, the key language involved the special-charge statute, Wis. Stat. § 66.60(16). The court there explained that "[s]ection 66.60(16)(a) contemplates charges for services rendered, that is services actually done or performed. This language limits the town 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. "Section 66.60(16)(a)," the court continued, "is not intended to provide 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. Those items are of equal benefit to the entire community and should be paid out of general property tax funds." *Id.* at 546–47.

The court thus clearly stated that these limits apply under Wis. Stat. § 66.60(16)(a), the special-charge statute. By suggesting this language in *Town of Janesville* referred to Wis. Stat. § 60.55, the Villages are clearly wrong. (*See* Dkt. 62:25.)

2. *Town of Janesville*'s analysis of the special-charge statute is binding precedent, not dicta.

Despite suggesting that *Town of Janesville*'s relevant langauge was limited to Wis. Stat. § 60.55, the Villages ultimately concede that *Town of Janesville* discussed the special-charge statute. Their attempts to avoid that discussion are baseless.

Without developing an argument on this point, the Villages note that the special-charge statute has "been renumbered and modified since" *Town of Janesville*. (Dkt. 62:26.) But they do not argue that the language was modified in such a way to render *Town of Janesville* no longer good law. If the Villages are trying to make that implication, this Court should reject it because courts "will not address undeveloped arguments." *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768.

The Taxpayers already explained why the special-charge statute still means what *Town of Janesville* said it means. (Dkt. 49:11–12 n.3.) If the Villages dispute this point in their response brief, the Taxpayers will address it in a reply brief.

The Villages perhaps recognize that the relevant language in the special-charge statute is still substantively the same. After all, they do *not* explicitly argue that *Town of Janesville* is not controlling due to the renumbering and minor changes to this statute.

The Villages instead assert that *Town of Janesville* is not controlling because its discussion of the special-charge statute, Wis. Stat. § 66.60(16)(a), was "*dicta*." (Dkt. 62:26.) But this Court may not dismiss language in a published court of appeals opinion as dicta. *See NCR Corp. v. Transp. Ins. Co.*, 2012 WI App 108, ¶27, 344 Wis. 2d 494, 823 N.W.2d 532 (citing *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997)). Only the Wisconsin Supreme Court has the power to "overrule, modify, or withdraw language from a prior supreme court or court of appeals opinion." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶54, 324 Wis. 2d 325, 782 N.W.2d 682 (citing *Cook*, 208 Wis. 2d at 189–90). By concluding that a statement in a published opinion "is dictum," a court "necessarily withdraws or modifies language from that opinion." *Id.* ¶57. This Court therefore may not dismiss any language in *Town of Janesville* as dicta.

Besides, the discussion of the special-charge statute in *Town of Janesville* was not dicta. A court's "discussion of a question 'germane to ... the controversy' is not dictum, even if that discussion is not 'decisive of [ ] the controversy.'" *Id.* ¶52 n.19 (alterations in original) (citation omitted). Dictum is "a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it." *Id.* (citation omitted).

In *Town of Janesville*, the court's discussion of the special-charge statute was germane to the controversy; it did not extend beyond the facts and was not broader than necessary. The town argued that its fire-protection special charge levied against county government property was authorized by "both sec. 66.60(16)(a), Stats. (1987–88) and sec. 60.55(2)(b), Stats. (1985–86)." *Town of Janesville*, 153 Wis. 2d at 540. The court of appeals first held that "sec. 60.55(2)(b) allows the town to charge the county for fire protection on a per call basis." *Id.* at 540. Back then, § 60.55(2)(b)

allowed a town to charge "property owners a fee for the cost of fire calls made to their property."[3] *Id.* at 541. Because that statute limited a town to imposing charges "on a per call basis," the town argued "that it may calculate its charges to the county based on valuation of county properties by virtue of sec. 66.60(16)(a), Stats.," the special-charge statute. *Id.* at 545.

The court rejected that argument, holding that § 66.60(16)(a) "allows a special charge only for services which are actually performed." *Id.* at 546. Because this statute "contemplates charges for services rendered," it "limits the town to charging only for services actually provided and not for services that may be available but not utilized." *Id.* at 546. The court thus concluded that, like § 60.55(2)(a), § 66.60(16)(a) "provides no more than an equivalent remedy, the costs of fire services rendered on a per call basis." *Id.* at 547.

Plainly, the court's discussion of the special-charge statute was not dicta. The town's argument relied on this statute and one other statute. After rejecting the town's reliance on § 60.55, it was necessary for the court to address the town's argument relying on § 66.60. Had the court agreed with the town's interpretation of § 66.60, the town would have prevailed on appeal. The court's discussion of the special-charge statute is therefore binding precedent, not dicta.

* * * * *

In short, the Fire Charges are invalid because they do not comply with the special-charge statute, Wis. Stat. § 66.0627(2). Under *Town of Janesville*, this statute allows a municipality to impose a special charge for fire protection on a per-call basis, not on all property owners municipality-wide like the Villages are doing. The Villages cannot get around *Town of Janesville*. That case is controlling and dispositive here.

[3] Shortly before *Town of Janesville* was decided, the legislature amended Wis. Stat. § 60.55(2)(b) to remove the per-call limitation. *Town of Janesville v. Rock Cnty.*, 153 Wis. 2d 538, 541 n.2, 451 N.W.2d 436 (Ct. App. 1989). The Villages do not rely on this statute to justify their Fire Charges. Indeed, the Villages seem to concede that this statute applies only to towns, not villages. (Dkt. 62:25.)

B. The Villages' other arguments about special charges are unavailing.

Besides trying in vain to avoid *Town of Janesville*, the Villages raise several other arguments to try to show their Fire Charges are lawful special charges. Those other arguments fail, too.

1. *Town of Hoard* does not authorize municipality-wide special charges.

The Villages assert that no judicial precedent prohibits a village from imposing "a special charge for the availability of fire and EMS services." (Dkt. 62:27.) But, as discussed, *Town of Janesville* does. Notably, the Villages do *not* argue that *Town of Janesville* is distinguishable because it involved a town rather than a village. Nor could they plausibly make such an argument because the special-charge statute applies to cities, villages, and towns alike. *See* Wis. Stat. § 66.0627(2).

The Villages argue that "the analysis of the fire protection services at issue in *Town of Janesville* was limited to the predecessor" version of Wis. Stat. § 60.55(2)(b). (Dkt. 62:26 (citing *Town of Hoard v. Clark Cnty.*, 2015 WI App 100, ¶27, 366 Wis. 2d 239, 873 N.W.2d 241).) If the Villages are once again suggesting that *Town of Janesville* did not discuss the special-charge statute, they are wrong for the reasons already stated. The court in *Town of Janesville* clearly analyzed Wis. Stat. § 66.60(16)(a), the predecessor to Wis. Stat. § 66.0627(2).

Relatedly, there is no merit to the Villages' suggestion that their Fire Charges are valid special charges under *Town of Hoard*. (*See* Dkt. 62:27.) The Taxpayers have already explained why. (Dkt. 49:19–20, 36.) The Taxpayers will briefly restate those reasons here.

First, the *Town of Hoard* court did not address the special-charge statute. In *Town of Hoard*, the court upheld a town's fire-protection charge under Wis. Stat. § 60.55(2)(b). The court thus declined to consider whether the charge was authorized under Wis. Stat. § 66.0627(2), the special-charge statute. *Town of Hoard*, 2015 WI App 100, ¶2 n.1. *Town of Hoard* thus has no bearing on whether the Fire Charges comply with § 66.0627(2). Under *Town of Janesville*, which analyzed the materially identical predecessor to § 66.0627(2), the Fire Charges are invalid. *Town of Hoard*

does not alter this conclusion. In fact, elsewhere in their brief, the Villages concede that *Town of Hoard* does not provide any guidance as to whether § 66.0627(2) authorizes the Fire Charges. (Dkt. 62:36.)

Second, the statute that the court analyzed in *Town of Hoard*—Wis. Stat. § 60.55—applies only to towns, not villages. The Villages seem to concede this point. (Dkt. 62:25.) For this reason as well, *Town of Hoard* sheds no light on whether the Fire Charges comply with § 66.0627(2).

2. The Villages' citation to Wis. Stat. § 61.34 is undeveloped and baseless.

The Villages suggest that Wis. Stat. § 61.34(1) allows them to impose special charges "for availability of services." (Dkt. 62:23.) But the Villages do not develop that argument or cite legal authority to support it. "Arguments unsupported by references to legal authority will not be considered." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). The same goes for "issues inadequately briefed." *Id.* This Court should therefore decline to address the Villages' undeveloped reliance on § 61.34.

In any event, the Villages cannot rely on § 61.34 to circumvent the limitations under the special-charge statute. The Taxpayers thoroughly discussed this point in their brief-in-chief. (Dkt. 49:33–35.) They will address this issue further in their reply brief if the Villages address it in their response brief.

For the sake of brevity, the Taxpayers will briefly reiterate why the Villages cannot rely on § 61.34 for imposing village-wide special charges. First of all, when "a specific statute relat[es] to a particular subject," "it controls over any general statutory language contained in" § 61.34. *See Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 462, 280 N.W.2d 166 (1979).[4] Wisconsin Stat. § 66.0627 is the specific statute

[4] In *Schroeder*, the supreme court held that "a specific statute relating to a particular subject" controlled "over any general statutory language contained in" Wis. Stat. § 62.11(5), the city home-rule statute. *Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 462, 280 N.W.2d 166 (1979). That holding logically also applies to Wis. Stat. § 63.14, the village home-rule statute. "Wisconsin Stat. § 61.34(1) gives village boards powers that are essentially the same as those given cities under Wis. Stat. § 62.11(5)." *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.

relating to the subject of special charges. And under this statute, a municipality may impose special charges for "the costs of fire services rendered on a per call basis." *Town of Janesville*, 153 Wis. 2d at 547. The Villages thus may not rely on § 61.34 to impose a special charge that contravenes § 66.0627. The controlling statute is § 66.0627, and it limits the Villages to imposing special charges for fire protection on a per-call basis.

Second, "a village may not adopt a tax under its home rule authority." *Wisconsin Manufacturers & Com., Inc. v. Vill. of Pewaukee*, 2024 WI App 23, ¶9, 411 Wis. 2d 622, 5 N.W.3d 949 (hereafter "*WMC*"), *review denied*, 2024 WI 36, 11 N.W.3d 923. Special charges are taxes. *See CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶40 n.17, 380 Wis. 2d 399, 909 N.W.2d 136 (characterizing "special charges" as "taxes"); *see also* Wis. Stat. § 75.001(1) (defining "Tax" to include special charges). A village thus may not rely on the home-rule statute, § 61.34, to enact special charges. For this reason as well, a village must comply with § 66.0627(2) when imposing a special charge.

3. The Villages' citation to *City of River Falls* is also without merit.

Citing *City of River Falls v. St. Bridget's Cath. Church of River Falls*, 182 Wis. 2d 436, 513 N.W.2d 673 (Ct. App. 1994), the Villages assert that "a charge need not be assessed for commodities actually consumed." (Dkt. 62:23.) That argument mischaracterizes *City of River Falls* and does not get around *Town of Janesville*.

The court in *City of River Falls* did not mention special charges or the special-charge statute. Rather, that case involved a charge for water under Wis. Stat. § 196.03(3)(b). *City of River Falls*, 182 Wis. 2d at 438. When the court mentioned charges for commodities not actually consumed, it did so in the context of holding that the charges under this statute were fees rather than taxes. *Id.* at 442. The court held that a charge is not necessarily a tax just because it is imposed on a person who might not use the service for which the charge is imposed. *Id.*

The distinction between taxes and fees has no bearing on the legality of a special charge. The nature of a charge and its legality are two separate questions. *See WMC*, 2024 WI App 23, ¶9. As mentioned above, the Taxpayers and the Villages agree

that the Fire Charges are special charges. The controlling case on the special-charge statute is *Town of Janesville*. Under *Town of Janesville*, municipality-wide special charges are not allowed. *City of River Falls* did nothing to change this rule.

4. The Villages' resort to broad construction does not help them.

The Villages argue that "Wis. Stat. § 66.0627 is to be broadly interpreted." (Dkt. 62:24.) As an initial matter, however, there is conflicting case law on whether this statute should be construed broadly or narrowly. *See Robinson*, 2003 WI App 97, ¶25 n.15 (noting this conflict).

More importantly, broad construction does not get the Villages around *Town of Janesville*. In *Town of Janesville*, the court noted that the special-charge statute has been interpreted "quite broadly." *Town of Janesville*, 153 Wis. 2d at 546. Applying a broad construction, the court held that fire protection is a service for which a special charge may be imposed even though the statute does not mention fire protection. *Id.* at 545–46. Nevertheless, the court held that the statute allows special charges "only for services actually provided and not for services that may be available but not utilized." *Id.* at 546. Given that limitation, a municipality may impose a special charge for "the costs of fire services rendered on a per call basis." *Id.* at 547.

Under *Town of Janesville*, the Fire Charges are invalid special charges. The Villages' resort to broad statutory construction does not save them.

* * * * *

Because the Fire Charges fail to comply with Wis. Stat. § 66.0627(2), this Court should declare the Dousman Ordinance and the Pewaukee Ordinance invalid. "A municipal ordinance which fails to comply with the empowering statute is invalid." *Laskaris v. City of Wisconsin Dells, Inc.*, 131 Wis. 2d 525, 531, 389 N.W.2d 67 (Ct. App. 1986) (special-charge case).

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.

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

The Villages argue their Fire Charges are not taxes mainly because they are earmarked to pay for their fire districts rather than going into a general fund. That argument has no merit. Earmarked charges can be—and often are—taxes, as recent Wisconsin precedent shows. The Villages' arguments for distinguishing this precedent are baseless.

1. The purpose of a charge is to raise revenue—and thus it is a tax—if it benefits the general public.

In arguing that the Fire Charges are not taxes, the Villages misunderstand the test for distinguishing fees from taxes. Fees bestow a "benefit on the [payor], not shared by other members of society," while taxes benefit "the wider public." *Fed. Commc'ns Comm'n v. Consumers' Rsch.*, 145 S. Ct. 2482, 2499 (2025) (alteration in original) (citation omitted). It is well established that user fees bestow a benefit on the payer that is not shared by other members of society.[5]

Yet the Villages argue that "[t]he focus must be upon the purpose of the charge, not on the identity of the service beneficiary." (Dkt. 62:29.) True, a charge's purpose dictates whether it is a tax. *Wisconsin Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, ¶10, 408 Wis. 2d 287, 992 N.W.2d 100. But the Villages are wrong to suggest that the beneficiaries of a charge are irrelevant in determining its purpose.

Identifying the beneficiaries helps a court determine a charge's purpose. A tax is imposed by a "municipality in its governmental capacity for the support of its government and its *public needs*." *City of River Falls*, 182 Wis. 2d at 441 (emphasis added). This is why, when distinguishing taxes from fees, Wisconsin courts distinguish "governmental" functions (which are funded by taxes) from "proprietary" functions (which are funded by fees). *See, e.g.*, *id.* at 442–43; *Bargo Foods North Inc. v. Dep't of Revenue*, 141 Wis. 2d 589, 596–98 & n.5, 415 N.W.2d 581 (Ct. App. 1987). Governmental functions have a "primary objective" of "health, safety and the public

[5] *See, e.g.*, *Heartland Apartment Ass'n, Inc. v. City of Mission*, 392 P.3d 98, 108 (Kan. 2017); *Denver St. LLC v. Town of Saugus*, 970 N.E.2d 273, 275 (Mass. 2012); *Bolt v. City of Lansing*, 587 N.W.2d 264, 271 (Mich. 1998); *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994); *see also City of De Pere v. Pub. Serv. Comm'n*, 266 Wis. 319, 328, 63 N.W.2d 764 (1954).

good," while proprietary functions have "primarily private concerns." *Save Elkhart Lake, Inc. v. Vill. of Elkhart Lake*, 181 Wis. 2d 778, 789, 512 N.W.2d 202 (Ct. App. 1993). Identifying who benefits from a charge is thus crucial to determining its purpose—and thus determining whether it is a tax or a fee.

Consider hypothetical charges to fund a municipal swimming pool. If a city imposes a $5 charge for the use of the pool, the charge would be a user fee because it provides an exclusive benefit to the payers: paying the charge allows the payers to use the pool. "[W]hen one pays for a service such as admission to the municipal swimming pool, one has received a special benefit—admission to the pool—and so the admission fee is not a tax." *Home Builders Ass'n of Greater Des Moines v. City of W. Des Moines*, 644 N.W.2d 339, 347–48 (Iowa 2002). By contrast, if a city charges every property owner $5 to fund a pool that is open to the public, the charge would be a tax because the pool benefits the wider public.

2. The Fire Charges are taxes even though they are earmarked for specific expenses.

The Villages argue that their Fire Charges are fees because they do not create a surplus of money or generate "general" revenue.[6] (Dkt. 62:28, 38.) Citing four cases, the Villages argue that a tax "raises general revenue." (Dkt. 62:29.) The Villages thus suggest that a charge necessarily is a fee (rather than a tax) if it does not raise "general" revenue. But those cases do not stand for that proposition—and some of them refute it.

In two of those cases, courts recently held that earmarked charges were taxes. *See Wisconsin Prop. Taxpayers*, 2023 WI 58; *WMC*, 2024 WI App 23.

In *Wisconsin Property Taxpayers*, the Town of Buchanan imposed a so-called "transportation utility fee" or TUF that was earmarked to pay for certain projects including "sidewalks" and "street lighting." *Wisconsin Prop. Taxpayers*, 2023 WI 58,

[6] That assertion is untrue with respect to Dousman. The Villages acknowledge that the Dousman Fire Charge produced "excess" revenue that was "put back in the general fund." (Dkt. 58:11; 62:9.) Ultimately, though, it does not matter whether the Dousman or Pewaukee Fire Charge produces excess revenue that goes into the general fund. As explained in the body of this brief, the distinction between the general fund and a separate fund is legally irrelevant in this case.

¶3 (citation omitted). The town "handled funds collected under the TUF *separately* and in addition to the general tax levy." *Id.* ¶5. Our supreme court unanimously held that "the TUF is a tax because the Town imposed it on a class of residents for the purpose of generating revenue." *Id.* ¶10. This holding clearly shows that a charge can be a tax even if it raises earmarked revenue.

Relying on *Wisconsin Property Taxpayers*, the court of appeals recently reached a similar conclusion in *WMC*, striking down Pewaukee's so-called "transportation user fee" or TUF. Under Pewaukee's TUF ordinance, TUF money had to be spent "*exclusively* on pavement preservation, street and sidewalk construction or reconstruction, street lighting, traffic control, pedestrian facilities, storage for the equipment used for these purposes, and its own administration." *WMC*, 2024 WI App 23, ¶4 (emphasis added). Revenue from the TUF went into a separate account, not Pewaukee's general fund.[7] The court of appeals held that Pewaukee's TUF was a tax. *Id.* ¶7. The court reached that conclusion because Pewaukee's TUF, like the Town of Buchanan's, was imposed on all developed property and used a generalized formula. *Id.* Like *Wisconsin Property Taxpayers*, *WMC* shows that a charge need not go into the general fund to be a tax.

Notably, in *WMC*, Pewaukee raised essentially the same arguments about earmarking that it raises here. Pewaukee argued that its TUF was a fee because it had "a designated, specific use while the funds remain in a segregated account to prevent the comingling [*sic*] with the general revenue fund."[8] Trying to distinguish *Wisconsin Property Taxpayers*, Pewaukee argued that the Town of Buchanan's TUF ordinance was "more readily characterized as a means of collecting general revenue and thus a tax."[9] Because that reasoning did not succeed in *WMC*, this Court should reject it here.

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[7] Pewaukee's Resp. Br. at 16, Wis. Ct. App., Appeal No. 2023AP690, https://acefiling.wicourts.gov/document/eFiled/2023AP000690/685177. When citing Pewaukee's brief from Appeal No. 2023AP690, the Taxpayers cite to the court-stamped number at the top of the page.

[8] Pewaukee's Resp. Br., *supra* note 7, at 17.

[9] Pewaukee's Resp. Br., *supra* note 7, at 35.

In another case that the Villages cite, the court stated that "[a] tax is one whose primary purpose is to *obtain revenue*, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation." *State v. Jackman*, 60 Wis. 2d 700, 707, 211 N.W.2d 480 (1973) (emphasis added). The court suggested that a specific charge "would constitute a tax" if it were used for "general revenue purposes." *See id.* at 709. But the court did *not* suggest that a charge is a tax only if it is desposited into a general fund. In other words, the court did not suggest that an earmarked charge necessarily is a fee. Such an implication would conflict with *Wisconsin Property Taxpayers*, where our supreme court recently held that an earmarked charge was a tax.

The final case in the Vilages' string cite is basically the same as *Jackman*. (*See* Dkt. 62:29.) In that other case, the court of appeals held that a supposed "fee" was actually "a tax." *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶7, 358 Wis. 2d 610, 856 N.W.2d 546. Among other things, the court observed that the revenue collected from this charge was used "purely for general government revenue." *Id.* But the court did not address an earmarked charge or suggest that one would be a fee. Again, such an implication would conflict with *Wisconsin Property Taxpayers*.

Consistent with *Wisconsin Property Taxpayers* and *WMC*, courts in other jurisdictions have held that earmarked charges can be (and often are) taxes. As the Fourth Circuit has explained, "the fact that revenue is placed in a special fund is not enough reason on its own to warrant characterizing a charge as a 'fee.'" *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 135 (4th Cir. 2000). "If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial." *Id.* As the Seventh Circuit has explained, a charge that raises revenue for "a separate fund rather than the general treasury" can be a tax because "a tax 'earmarked for a particular purpose is hardly unusual.'" *Kathrein v. City of Evanston*, 752 F.3d 680, 687 (7th Cir. 2014) (citation omitted).

There are good reasons for not attaching legal significance to a separate fund if it benefits the general public. If a charge were a fee simply because it goes into a separate fund, then "virtually 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).

The Villages thus miss the mark if they are suggesting that their Fire Charges are fees simply because the charges are earmarked to pay for fire protection. The correct analysis considers whether a charge pays for "general government activity that benefits the entire community." *Norfolk S. Ry. Co. v. City of Roanoke*, 916 F.3d 315, 320 (4th Cir. 2019). If so, the charge's purpose is consistent with a tax, "even if the revenue is placed into a special fund and segregated from general revenue." *Id.* General government activity includes "fire and flood protection and street maintenance." *Id.* (citing *City of Huntington*, 999 F.2d at 73); *see also, e.g.*, *Heartland Apartment Ass'n, Inc. v. City of Mission*, 392 P.3d 98, 108 (Kan. 2017) (holding a TUF that funded street maintenance was a tax despite being "earmarked" because it provided a benefit "of a general nature").

Wisconsin Property Taxpayers and *WMC* are in accord with those cases from other jurisdictions. The courts in *Wisconsin Property Taxpayers* and *WMC* held that charges were taxes when they were earmarked to pay for street maintenance and related work. *Wisconsin Property Taxpayers* and *WMC* refute the Villages' argument that their Fire Charges are fees because they do not raise "general" revenue.[10]

3. Under the reasoning of *Wisconsin Property Taxpayers* and *WMC*, the Fire Charges are taxes.

Wisconsin Property Taxpayers and *WMC* are on-point here and help show that the Fire Charges are property taxes. (*See* Dkt. 49:17–19.) Those two cases involved municipality-wide charges on all developed property to pay for street maintenance

[10] Our supreme court also held that an earmarked charge was a tax in *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 135 N.W.2d 799 (1965). There, a city adopted an ordinance that imposed a monthly charge on each residential and commercial utility customer. *Id.* at 103–04. All revenue collected pursuant to that charge went into "a separate account" and funded "the industrial expansion and growth of industry and new industries in the [city]." *Id.* (citation omitted). The city argued that the disputed charge was "a special assessment." *Id.* at 108. The court held that the charge was "not a special assessment," *id.* at 109, but instead was an excise tax or a general property tax, *id.* at 106–07. Like *Wisconsin Property Taxpayers* and *WMC*, *Elsner* shows that an earmarked charge can be a tax.

and related work. The present case involves village-wide charges on all developed property to pay for fire protection. Fire protection and street maintenance are governmental functions. *City of Huntington*, 999 F.2d at 73; *see also Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 542, 314 N.W.2d 321 (1982) (noting "fire protection" and "ensur[ing] health" are "governmental" functions); *Lickert v. Harp*, 213 Wis. 614, 616, 252 N.W. 296 (1934) (noting "repair and maintenance of highways constitute a governmental function"). The Villages thus have no basis for distinguishing *Wisconsin Property Taxpayers* and *WMC* from this case.

The Villages try to do so by arguing that the TUFs in *Wisconsin Property Taxpayers* and *WMC* raised "general, anticipatory revenue." (Dkt. 62:31.) As explained above, however, the TUFs in those cases did not raise revenue for the municipalities' general funds. Like the Fire Charges, the TUFs were earmarked for specific expenses. The Villages' passing reference to "general" revenue is not a plausible basis for disregarding these two recent precedents.

Nor do the Villages develop an argument that the TUF revenue was "anticipatory" or explain why that notion should matter. The courts in those two cases did not suggest that the anticipatory nature of the TUFs had any bearing on whether they were taxes. The Villages offer "scant evidence of any meaningful factual difference in either regard," and they cite "no support from [*Wisconsin Property Taxpayers*] or any other authority for the notion that any such differences have legal significance." *WMC*, 2024 WI App 23, ¶10. This Court "need not consider these arguments further." *Id.*

Besides, the Fire Charges appear to be anticipatory. As the Villages recognize, "the special charges collected by the Village of Pewaukee only pay the *estimated* budget provided by the City of Pewaukee…." (Dkt. 62:15; *see also* Dkt. 56:3; 58:15, 20–21.) They also seem to recognize that the Dousman Fire Charges imposed in a given year are based on the *previous* year's costs. (Dkt. 55:4–5; 62:9.) The Pewaukee and Dousman Fire Charges thus seem to be "anticipatory," and the Villages have not developed an argument to the contrary. The "anticipatory" nature of the TUFs is thus no basis for disregarding *Wisconsin Property Taxpayers* and *WMC*.

In a final grasp, the Villages observe that the town in *Wisconsin Property Taxpayers* conceded its TUF was a tax. (Dkt. 62:30–31.) But the Villages do not develop an argument on this point or explain why they think it matters. In *WMC*, Pewaukee argued that *Wisconsin Property Taxpayers* was not binding precedent because of the town's concession—but the court of appeals rejected that argument. *WMC*, 2024 WI App 23, ¶8. As the court of appeals explained, even though the parties in *Wisconsin Property Taxpayers* agreed that the TUF was a tax, the supreme court still decided that issue. *Id.* In deciding that the TUF was a tax, the supreme court adopted a precedential holding. *Id.* ¶¶8, 11. The Villages cannot get around *Wisconsin Property Taxpayers* by rehashing the same losing argument that Pewaukee raised in *WMC*.

In short, *Wisconsin Property Taxpayers* shows that a charge is a tax if it is imposed on all developed property based on a generalized formula. The Fire Charges fit that description.

4. *Town of Hoard* does not compel the conclusion that the Fire Charges are fees.

The Villages argue that "a nearly identical fire protection charge" was a fee in *Town of Hoard*. (Dkt. 62:23.) The Taxpayers explained in their brief-in-chief why this Court should not apply *Town of Hoard* here. If the Villages address those points in a response brief, the Taxpayers will address them further in reply. For now, the Taxpayers will briefly restate the three reasons why *Town of Hoard* is inapplicable here and respond to the Villages' contrary arguments.

First, the court in *Town of Hoard* did not consider whether the charge at issue there complied with the special-charge statute, Wis. Stat. § 66.0627(2). (Dkt. 49:19.) So if this Court concludes that the Fire Charges violate this statute, the Court need not address *Town of Hoard*. (Dkt. 49:19.) Indeed, the Villages concede that *Town of Hoard* does not provide any guidance as to whether this statute authorizes the Fire Charges. (Dkt. 62:36.)

Second, the charge in *Town of Hoard* was expressly authorized by Wis. Stat. § 60.55(2)(b), which applies only to towns. (Dkt. 49:19–20.) Notably, § 60.55(2)(c)

authorizes a "tax," while subsection (2)(b) authorizes a "fee." The present case does not involve a choice between those two subsections. In fact, the Villages appear to concede that § 60.55 applies only to towns, not villages. (Dkt. 62:25.)

The Villages nevertheless argue that *Town of Hoard* is still relevant to the tax–fee issue here even though that case involved "an ordinance passed by a town, not a village." (Dkt. 62:36.) The Taxpayers, however, do not argue that *Town of Hoard* is distinguishable here simply because a town enacted the ordinance in that case. They instead argue that *Town of Hoard* is distinguishable because its ordinance was enacted pursuant to a statute that applies only to towns. After all, the court recognized that the town had chosen to enact a fee under § 60.55(2)(b), and the court noted that other towns could choose to enact a tax under subsection (2)(c). *Town of Hoard*, 2015 WI App 100, ¶25.

A town's choice between § 60.55(2)(b) and subsection (2)(c) has significance. Apparently, the statutory designation that a town chooses dictates whether its charge is a tax or a fee. After all, the statutory designation of a charge can shed light on whether it is a fee or a tax. *See State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 104, 270 N.W.2d 187 (1978); *City of River Falls*, 182 Wis. 2d at 443.

Under the Villages' flawed logic, even a tax under subsection (2)(c) would be a fee if it went into a separate account and did not create a surplus of money. That view would not make much sense, though. For starters, nothing in the text of § 60.55 specifies whether a tax must go into a separate fund or a town's general fund. The statute thus leaves towns free to place their subsection (2)(c) tax revenue into a separate fund. In addition, the statute's text seemingly forbids a tax surplus because it allows a tax only "to pay for fire protection." Wis. Stat. § 60.55(2)(c). *Town of Hoard* thus does not support the proposition that a charge is necessarily a fee if it is earmarked and produces no surplus. If the law worked that way, then taxes under subsection (2)(c) could be fees.

The Villages are thus wrong to suggest that § 60.55 was completely irrelevant to the tax–fee analysis in *Town of Hoard*. "The holding in a particular case must be viewed in the context of the facts which give rise to the decision." *Vanlue v. State*, 96

Wis. 2d 81, 90–91, 291 N.W.2d 467 (1980). In *Town of Hoard*, the town "chose to charge a fee" under § 60.55(2)(b). *Town of Hoard*, 2015 WI App 100, ¶25. That fact gives crucial context to the court's holding that the town's disputed charge was a fee.

Relatedly, *Town of Hoard* does not support the Villages' view that a charge is a tax only if it produces "general" revenue. Neither a fee under § 60.55(2)(b) nor a tax under subsection (2)(c) produces "general" revenue under the Villages' reasoning because both types of charges pay only for fire protection. Yet, under the Villages' flawed logic, taxes under subsection (2)(c) would be fees because they do not produce "general" revenue.

For all these reasons, the most sensible reading of *Town of Hoard* is that the town's choice to proceed under § 60.55(2)(b) had a bearing on whether its charge was a fee. Because § 60.55 is not applicable here, *Town of Hoard* is distinguishable from this case.

Third, *Town of Hoard* conflicts with binding precedent in several ways. (Dkt. 49:20–24.) Understandably, the Villages do not address those points in much depth in their brief-in-chief. In arguing that *Town of Hoard* is still good law, the Villages respond to the Taxpayers' complaint, which alleged that *Town of Hoard* is not good law. (Dkt. 62:33.) This issue can be explored more fully in future briefs.

On a final note, even if the Fire Charges are fees, they are still unlawful for three reasons: they violate Wis. Stat. § 66.0628(2), are preempted by other statutes, and lack explicit statutory authority. (*See* Dkt. 49:28–37.) *Town of Hoard* sheds no light on these issues. The enabling statute in that case applies only to towns, and the court did not address § 66.0628 or any preemption arguments.

* * * * *

In sum, if the Fire Charges are not special charges, then they are property taxes. Either way, they are not fees.

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

If the Court determines that the Fire Charges are property taxes (rather than special charges), it should conclude they are unlawful for any of several reasons

stated in the Taxpayers' brief-in-chief. (Dkt. 49:24–27.) Notably, the Villages do not seem to argue that their Fire Charges are lawful *if they are property taxes*. (*See* Dkt. 62.) The Villages can address this issue in their response brief, and the Taxpayers can explore it further in reply.

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).

As the Taxpayers explained in their brief-in-chief, if the Fire Charges are fees, they violate Wis. Stat. § 66.0628(2). (Dkt. 49:28–30.) The Villages' arguments against this conclusion are not persuasive.

The Villages argue that the Fire Charges comply with this statute because they are transparent. (Dkt. 62:41–43.) That argument fails because it is not tied to the statutory language. Nothing in the text of § 66.0628 mentions transparency. This statute does *not* state that a municipal fee is valid if it is imposed through a transparent process.

Indeed, the Villages recognize that this statute "helps prevent a municipality from overcharging services." (Dkt. 62:42.) Exactly. The Fire Charges violate this statute because they allow the Villages to overcharge for their respective fire district's services. In Pewaukee, for example, the owners of two single-family homes will each pay $439 in annual Fire Charges. (*See* Dkt. 5:6, 50–51; 45:38; 58:18.) Both homeowners will pay that flat rate even if one homeowner receives 50 fire calls at his house in a given year while the other homeowner receives zero. The latter homeowner is being overcharged because he is paying $439 per year for no actual receipt of service.

Dousman's Fire Charge has the same defect. Two homeowners in Dousman will pay the same amount in Fire Charges if their residential lots and houses are the same size, even if one homeowner receives 50 fire calls while the other receives none. (*See* Dkt. 4:43; 58:9–10.) The homeowner who receives zero fire calls is being overcharged.

Worse yet, the Dousman Ordinance can require a homeowner to pay *more* in Fire Charges than another homeowner who receives far more fire calls. For example, a 2,000 square-foot house in Dousman will incur more Fire Charges than a 1,500 square-foot house—even if the larger house receives zero fire calls in a given year while the smaller house receives fifty. (*See* Dkt. 4:43; 58:9–10.) The owner of the larger house is being overcharged.

The Fire Charges in Dousman and Pewaukee effectively require non-users to subsidize the costs of users. Non-users are being overcharged, contrary to Wis. Stat. § 66.0628(2). (*See* Dkt. 49:28–30.)

The Villages assert that the Taxpayers "cannot cite any law prohibiting the recovery of the costs for firefighting or emergency services through the use of a special charge or a fee." (Dkt. 62:41.) The Taxpayers do *not* broadly argue that villages may not recover such costs by imposing a special charge or fee. Instead, the Taxpayers narrowly argue that villages may not saddle property owners municipality-wide with special charges or fees that are not based on actual use of fire services.

Yet the Villages suggest that the Fire Charges *are* for a service because they pay for "overhead" costs. (Dkt. 62:41.) Besides being undeveloped, that argument fails on the law. As already explained, municipalities may impose special charges for "the costs of fire services rendered on a per call basis." *Town of Janesville*, 153 Wis. 2d at 547. Municipalities may impose special charges "only for services actually provided and not for services that may be available but not utilized." *Id.* at 546. This same limitation applies to village fees by virtue of Wis. Stat. § 66.0628(2). (Dkt. 49:28–30.) Because the Fire Charges are not calculated based on a given property's actual use of services, they either violate Wis. Stat. § 66.0627(2) if they are special charges or violate § 66.0628(2) if they are fees.

Undeterred, the Villages suggest that municipalities may impose special charges and fees for services that are not consumed, citing *City of River Falls*. (Dkt. 62:41.) As explained above, however, *City of River Falls* did not broadly hold that municipalities may impose any special charges or fees they want, even for services that are not necessarily consumed. Instead, in *City of River Falls*, a church argued that a water-utility charge under Wis. Stat. § 196.03(3)(b) was a tax rather than a fee because the "charge is assessed regardless of whether the utility customer actually used water to fight a fire." *City of River Falls*, 182 Wis. 2d at 442. The court rejected that argument, holding that a charge can be a fee even if it the payer does not necessarily use the service for which the charge is imposed. *Id.*

That holding gets the Villages nowhere. In arguing that the Fire Charges violate § 66.0628(2), the Taxpayers assume *arguendo* that these charges are fees. (Dkt. 49:28.) The question is thus whether this statute allows fees for services that the payer does not receive. It does not. (*See* Dkt. 49:28–30.)

City of River Falls does not undermine this conclusion. That case did not involve § 66.0628. In fact, this statute was enacted almost ten years *after* that case was decided. *See* 2003 Wis. Act 134 (creating this statute). Also, the statute at issue in *City of River Falls* bears no resemblance to § 66.0628. The statute from *City of River Falls* explicitly allows a public utility to charge its customers for costs including the "production" and "storage" of "water for public fire protection purposes." Wis. Stat. § 196.03(3)(b). That language allows a charge for a commodity even if it is not used. By contrast, the language of § 66.0628(1)(b) is very similar to the special-charge statute, § 66.0627(2), which allows charges only for services rendered. (Dkt. 49:28–30.) As the Taxpayers have explained, unless a "more-specific statute … allows otherwise," § 66.0628 allows "a municipal service fee [to] be imposed only on a person who receives a service…." (Dkt. 49:30.) The Villages have not cited any statute like § 196.03(3)(b) that would allow them to impose their Fire Charges for services not rendered.

The Villages' discussion of home-rule authority does not help them circumvent the restrictions in § 66.0628(2), either. An ordinance is preempted if it conflicts with

state law. *Scenic Pit LLC v. Vill. of Richfield*, 2017 WI App 49, ¶8, 377 Wis. 2d 280, 900 N.W.2d 84. Such preemption complies with the Wisconsin Constitution's home-rule amendment "if the state statute touches upon a matter of statewide concern or if the state statute uniformly affects every city or village." *Black v. City of Milwaukee*, 2016 WI 47, ¶2, 369 Wis. 2d 272, 882 N.W.2d 333. "For purposes of the home rule amendment, an enactment is uniform when it is facially uniform." *Id.* ¶7. Here, § 66.0628 facially applies to every city or village. The home-rule amendment is thus irrelevant here. Section 66.0628 constitutionally can and does preempt the Dousman Ordinance and the Pewaukee Ordinance.

In sum, if the Fire Charges are 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.

As the Taxpayers explained in their brief-in-chief, if the Fire Charges are fees, they are unlawful because they violate the spirit and purpose of statutes that limit property taxes. (Dkt. 49:30–32.) The Villages address only one of these statutes, Wis. Stat. § 70.11, in their brief-in-chief. The Villages may address all these statutes in their response brief, and the Taxpayers will address the issue further in reply.

The Villages' argument about § 70.11 misses the mark. This statute exempts certain properties from taxation. The Villages argue this statute does not preempt the Fire Charges because this "statute is inapplicable to fees." (Dkt. 62:44.) Citing *City of River Falls*, the Villages argue that a municipality may impose fees and special charges on tax-exempt properties. (Dkt. 62:44.)

The Villages read too much into *City of River Falls*. True, § 70.11 does not exempt property owners from needing to pay special charges that are validly imposed under the special-charge statute. *See Grace Episcopal Church v. City of Madison*, 129 Wis. 2d 331, 335, 385 N.W.2d 200 (Ct. App. 1986). But *City of River Falls* did not involve a preemption claim. *City of River Falls* thus does not stand for the blanket proposition that statutes related to taxation cannot preempt a municipal fee.

City of River Falls does not help the Villages here for another reason: the city there imposed the disputed charge under explicit statutory, Wis. Stat § 196.03(3)(b).

City of River Falls, 182 Wis. 2d at 438–39. When a statute "explicitly authorizes" a municipality to act, its action likely is not preempted by some other statute. *See Associated Builders & Contractors of Wisconsin, Inc. v. City of Madison*, 2023 WI App 59, ¶36, 409 Wis. 2d 660, 998 N.W.2d 549. Here, however, no statute explicitly authorizes the Fire Charges. *See infra* at pages 28–35.

Relatedly, the Villages' argument about § 70.11 overlooks that an ordinance is preempted if it "violates the spirit of state legislation." *Scenic Pit*, 2017 WI App 49, ¶8. Even if a statute does not explicitly withdraw local power, an "ordinance nevertheless must fall" if legislative "intent" against such an ordinance "can be inferred from the fact that it defeats the purpose or goes against the spirit of the state legislation." *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). Even if the Fire Charges are fees, they violate the purpose and spirit of § 70.11 and other statutes that restrict property taxation. (Dkt. 49:30–32.) Two points are crucial here: (1) no statute explicitly authorizes the Fire Charges, and (2) the legislature has enacted a complex scheme of statutes that govern property taxes. From those points, legislative intent can be inferred against statutorily unauthorized, village-wide "property fees" that pay for the mere availability of services. If such "property fees" were permissible without explicit statutory authority, the purpose and spirit of the complex scheme of property-tax statutes would be defeated. (Dkt. 49:30–32.)

This point rings especially true of the levy limit statute, Wis. Stat. § 66.0602. This statute allows a municipality to exceed its property tax levy limit only with voters' consent through a referendum. *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶¶22–23. Crucially, a "fee for *access* to a governmental service is not the same as a fee for *use* of that service." *Bay Area Cellular Tel. Co. v. City of Union City*, 75 Cal. Rptr. 3d 839, 848 (Cal. Ct. App. 2008). If such fees were equivalent, levy limits "could easily become meaningless." *See id.* at 848 n.11. "Taxes paid by the public to fund police or fire services available to all could be renamed 'public safety access fees' and be exempt from the voter approval requirements." *Id.* "Taxes paid to maintain city streets could be renamed 'road access fees.'" *Id.* "The list of possibilities is endless." *Id.*

Because the Fire Charges would make several tax statutes meaningless, they are preempted. (Dkt. 49:30–32.) Street-maintenance charges violate several tax statutes. *See Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶¶18–19, 22–31. Even if the Fire Charges are fees rather than taxes, they violate the spirit and purpose of those statutes. (Dkt. 49:30–32.)

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

The Villages assert that "the Dousman and Pewaukee Ordinances are within the scope of Wis. Stats. §§ 61.34, 66.0301, 66.0627, and 74.01." (Dkt. 62:18.) None of those statutes authorize the Fire Charges.

The Villages also seem to argue that the Fire Charges are authorized under Article XI, § 3 of the Wisconsin Constitution, the home-rule amendment. (Dkt. 62:20–22.) This provision does not authorize the Fire Charges, either.

A. The village home-rule statute (Wis. Stat. § 61.34) and the home-rule amendment do not authorize the Fire Charges.

No Wisconsin appellate court has ever upheld anything like the Fire Charges under home-rule authority. When courts have relied on home-rule authority for upholding fees, the fees were modest regulatory measures imposed for obtaining a license. In other cases, courts have held that non-regulatory fees *exceeded* home-rule authority—and even those fees were far more modest than the Fire Charges. If this Court were to conclude that home-rule authority allows village-wide "fees" on all property owners to fund basic governmental functions, such a conclusion would radically transform the law and allow essentially limitless fees. Neither the home-rule statute nor the home-rule amendment allows such a drastic result.

1. For several reasons, Wis. Stat. § 61.34 does not authorize the Fire Charges.

In their brief-in-chief, the Taxpayers thoroughly explained why Wis. Stat. § 61.34 does not authorize the Fire Charges. (Dkt. 49:33–35.) The Villages can address those finer points in their response brief, and then the Taxpayers will address the issue once more in reply.

Relatedly, the Fire Charges are not within § 61.34's scope because they are not an exercise of the police power. Section 61.34(1) "describes the 'police powers' of the Village." *Scenic Pit*, 2017 WI App 49, ¶20 n.15 (quoting *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, ¶5 n.3, 338 Wis. 2d 488, 809 N.W.2d 362). Police power is the "power to restrain the individual to some extent." *Zwiefelhofer*, 2012 WI 7, ¶5 n.3 (citation omitted). In other words, police power is "the power of the government to regulate conduct and property of some for safety and property of all." *Id.* (citation omitted). Here, the Fire Charges do not regulate people or property or restrain individuals. Because the Fire Charges are not a regulatory measure, they need authority besides § 61.34.

2. Case law shows that the Fire Charges need statutory authority besides the home-rule statute and the home-rule amendment.

Case law compels the conclusion that the Fire Charges exceed home-rule authority. Wisconsin courts have explored whether home-rule authority allowed certain fees. In cases involving non-licensing or non-regulatory fees, our supreme court held that the fees exceeded home-rule authority. *Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965); *City of Madison v. Tolzmann*, 7 Wis. 2d 570, 572–76, 97 N.W.2d 513 (1959). In other cases, our supreme court relied on home-rule authority to uphold modest licensing fees. *Johnston v. City of Sheboygan*, 30 Wis. 2d 179, 186, 140 N.W.2d 247 (1966); *City of Milwaukee v. Hoffmann*, 29 Wis. 2d 193, 199, 138 N.W.2d 223 (1965). Those four cases are instructive here and help confirm that the Fire Charges exceed the Villages' home-rule authority.

In *Jordan*, the disputed fee exceeded home-rule authority. There, 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 (emphasis added). Nevertheless, the court held that Wis. Stat. § 61.34 and

the constitution's home-rule amendment did *not* authorize the equalization fee because it "possesse[d] sufficient attributes of a tax." *Id.* at 621. Although § 61.34 and the home-rule amendment give villages "wide powers to tax for the general welfare, they can only resort to the types of taxes that the legislature has authorized them to use." *Id.* The court thus held that explicit statutory was required to uphold the fee, and it found such authority in Wis. Stat. § 236.45. *Id.* at 621–22.

Here, like the fees in *Jordan*, the Fire Charges possess sufficient attributes of a tax. (*See* Dkt. 49:34–35.) The fees in *Jordan* were less far-reaching than the Fire Charges. They were imposed on real estate sub-dividers in exchange for approval of a plat, while the Fire Charges are imposed village-wide on all real property in Dousman and on all developed real property in Pewaukee. (Dkt. 4:4; 5:6.) The Fire Charges thus resemble property taxes even more so than the fees in *Jordan* did. Because the Fire Charges sufficiently resemble property taxes, they exceed home-rule authority and require explicit statutory authority, just like the fees in *Jordan*.

One more point about *Jordan* bears mentioning. As noted, the fees in *Jordan* were enacted under Wis. Stat. § 236.45. *Jordan*, 28 Wis. 2d at 621–22. This statute explicitly authorizes municipalities to "impose a fee or other charge to fund the acquisition or initial improvement of land for public parks if the fee or other charge is imposed under a subdivision ordinance" that meets certain requirements. Wis. Stat. § 236.45(6)(am). Other statutes also authorize villages to impose various kinds of fees. *See, e.g.*, Wis. Stat. § 66.0435(2)(b)2. (authorizing an annual license fee for operating a mobile home community); Wis. Stat. § 66.0617(2)(a) (authorizing impact fees on developers). If villages could rely on their home-rule authority to enact virtually any fee they want, statutes like these ones would be unnecessary.

The next instructive case is *Tolzmann*, where our supreme court held that a license fee exceeded a city's home-rule authority. In *Tolzmann*, a city ordinance required a license fee for operating a boat on waters within the city's jurisdiction. *Tolzmann*, 7 Wis. 2d at 571, 572. The supreme court concluded that this licensing provision of the ordinance was "invalid." *Id.* at 576. The court explained that the licensing fee exceeded the City of Madison's power under the city home-rule statute

(Wis. Stat. § 62.11(5)) and under the Wisconsin Constitution's home-rule amendment. *Id.* at 573–76. The home-rule amendment applies only to "local affairs" but not "matters of state-wide concern." *Id.* at 573. The fee, however, was imposed for the use of the water, "a matter of state-wide concern." *Id.* at 576. The court also rejected the city's argument that the fee was a permissible regulatory measure. *Id.* at 575–76. The court thus concluded that a city's statutory authority to impose such a fee "should be in clear and unmistakable language and cannot be implied from the language of a general statute delegating police power to cities," meaning § 62.11. *Id.* at 575.

Here, the Fire Charges exceed home-rule authority even more clearly than the fee in *Tolzmann* did. Like the fee in *Tolzmann*, the Fire Charges deal with an issue of statewide concern. Specifically, the Fire Charges pay for fire protection, and "fire protection is a matter of statewide concern." *Racine Fire & Police Comm'n v. Stanfield*, 70 Wis. 2d 395, 398, 234 N.W.2d 307 (1975). As a result, the Fire Charges exceed the home-rule amendment. Also, the Fire Charges are not a regulatory measure and are not even imposed in exchange for a license. Therefore, the Villages' authority to impose the Fire Charges "cannot be implied from the language of a general statute delegating police power to [villages]." *See Tolzmann*, 7 Wis. 2d at 575. Under *Tolzmann*, the Fire Charges exceed a village's statutory and constitutional home-rule authority.

When our supreme court upheld fees under home-rule authority, they were modest licensing fees that were part of regulatory schemes. In *Hoffmann*, a city ordinance restricted overnight street parking unless a person obtained a permit and paid a fee. *Hoffmann*, 29 Wis. 2d at 195, 198. The supreme court held that the city home-rule statute, Wis. Stat. § 62.11(5), gave Milwaukee "the authority to regulate parking on city streets." *Id.* at 199. The court further held that the fee was "a reasonable technique for the regulation of night parking on its streets." *Id.*

A modest licensing fee was also upheld in *Johnston*. There, a city ordinance required a person or business to obtain a license and pay a $5 licensing fee before selling food. *Johnston*, 30 Wis. 2d at 181–82. The supreme court held that this licensing requirement and its "modest fee of $5.00" were within the city's statutory

and constitutional home-rule authority. *Id.* at 185–86. After citing *Hoffmann* for support, the court explainded that the fee was "a reasonable technique for the regulation of the retail sale of food products within [the city's] boundaries." *Id.* at 185.

In stark contrast to the fees in *Johnston* and *Hoffmann*, the Fire Charges are not license fees. "Normally, a license is a right or permission granted by competent authority to do an act which without such license would be illegal." *Jackman*, 60 Wis. 2d at 711. The Fire Charges are not incurred in exchange for voluntarily receiving a license to engage in certain activity. They are imposed on all developed land within the Villages. For the Fire Charges to have a legal basis, the Villages need more explicit statutory authority than the general grant of police powers in Wis. Stat. § 61.34.

3. The Villages do not develop their argument on home-rule authority.

Regarding Wis. Stat. § 61.34, the Villages mostly make passing references to this statute in their brief-in-chief. (Dkt. 62:18, 19, 20, 23, 27, 38, 40.) The closest the Villages come to developing an argument on this statute is when they quote § 61.34(1) and (5), followed by a conclusory assertion that "[t]hese provisions are sufficient on their face to authorize the Villages to create their fire protection and emergency services special charges." (Dkt. 62:22.) This Court may reject that assertion as an undeveloped argument. *See Clean Wisconsin*, 2005 WI 93, ¶180 n.40.

The Villages argue that because of home-rule authority, "Wisconsin municipalities do not need explicit statutory authority to create a municipally owned utility." (Dkt. 62:21.) But the Taxpayers do not challenge a municipality's ability to create a utility. They challenge the Villages' ability to impose charges on all property owners (beyond the general property tax levy) to fund a basic governmental function.

The Villages suggest that their Fire Charges are analogous to charges for water, sewer, electric, and stormwater services. (Dkt. 62:20.) But the Villages do not explain why they think those charges are anaologous.

Besides, "this comparison fails" because charges for things like stormwater and sewer services "are for services actually rendered." *Heartland Apartment Ass'n*, 392

P.3d at 108 (dinstinguishing a TUF that funded street repair from stormwater and sewer charges). A fire-protection charge imposed on all property owners is not analogous to fees for water or sewer services rendered. *See City of Huntington*, 999 F.2d at 73 (making this distinction); *Discount Sleep of Ocala, LLC v. City of Ocala*, 300 So. 3d 316, 320 (Fla. Dist. Ct. App. 2020) (making this distinction because "the provision of fire service is not a utility"); *Barber v. Comm'r of Revenue*, 674 S.W.2d 18, 21 (Ky. Ct. App. 1984) ("Fire protection is a governmental service from which all residents receive an indirect benefit but only a few residents will receive a direct service. It is not comparable to a sewer service charge which may be based in part on water consumption…."). "A permissible utility service charge is one that 'reflects the actual costs of use, metered with relative precision in accordance with available technology....'" *Jackson Cnty. v. City of Jackson*, 836 N.W.2d 903, 914 (Mich. Ct. App. 2013) (quoting *Bolt v. City of Lansing*, 587 N.W.2d 264, 271 (Mich. 1998)). Unlike utility service charges, the Fire Charges are not based on actual, metered usage.

Even if the Fire Charges were analogous to things like stormwater charges, such charges do not necessarily fall within home-rule authority. Again, "a village may not adopt a tax under its home rule authority." *WMC*, 2024 WI App 23, ¶9. And some stormwater charges are taxes. *See, e.g.*, *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 732 F.3d 837, 842 (7th Cir. 2013) (holding the disputed "stormwater runoff assessment is a tax rather than a fee" because it "is not a fee for a service provided to a particular landowner"); *Bolt*, 587 N.W.2d at 272–73 (holding a city's "storm water service charge" was "a tax and not a valid user fee"). The Villages' argument wrongly assumes that they could enact things like stormwater charges under their home-rule authority without express statutory authorization.

Tellingly, the Villages have not cited any case law holding that villages may impose things like stormwater charges under their home-rule authority. Citing *City of River Falls* and *Town of Hoard*, the Villages suggest that home-rule authority "was relied upon by municipalities to create fire protection water fees." (Dkt. 62:21 & n.5.) But the court of appeals did not mention home-rule authority in either of those cases. In both of those cases, the municipalities enacted the disputed charges pursuant to

explicit statutory authority. In *Town of Hoard*, the town imposed a charge that was authorized by Wis. Stat. § 60.55(2)(b). *Town of Hoard*, 2015 WI App 100, ¶¶21–22, 25. And in *City of River Falls*, the city imposed a charge that was authorized by Wis. Stat. § 196.03(3)(b). *City of River Falls*, 182 Wis. 2d at 438–39. Those two cases do nothing to support the Villages' argument on home-rule authority. Indeed, elsewhere in the Villages' brief, they seem to concede that *Town of Hoard* provides no guidance on home-rule authority. (Dkt. 62:36.) This Court should decline to consider the Villages' suggestion that they could enact things like stormwater charges under their home-rule authority, because that suggestion is "unsupported by references to legal authority." *Pettit*, 171 Wis. 2d at 646.

And, again, even if a village could impose things like stormwater charges under its home-rule authority, such utility charges are distinguishable from the Fire Charges. The Villages' false analogy to utilities does nothing to advance its argument on home-rule authority.

In sum, Wis. Stat. § 61.34 and the home-rule amendment do not authorize village-wide charges on all property owners to fund fire protection. The Fire Charges thus require explicit statutory authority, which is lacking, as the Taxpayers explain next.

B. Wisconsin Stat. §§ 66.0627 and 74.01 do not authorize the Fire Charges.

The Villages assert that Wis. Stat. §§ 66.0627 and 74.01 authorize the Fire Charges. (Dkt. 62:18, 27.) They do not.

The Taxpayers explained above and in their brief-in-chief why the Fire Charges contravene § 66.0627(2). (Dkt. 49:9–13.)

As for § 74.01, the Villages just make a few conclusory assertions that this statute authorizes the Fire Charges. (Dkt. 62:18, 19, 23, 27.) Because courts "will not address undeveloped arguments," *Clean Wisconsin*, 2005 WI 93, ¶180 n.40, this Court should decline to address this statute.

In any event, § 74.01 does not help the Villages. This statute just provides definitions of several terms, including "special charge." No language in this statute allows municipality-wide special charges on all property owners.

Under *Town of Janesville*, the Fire Charges contravene § 66.0627(2). Nothing in § 74.01 saves the Villages from this conclusion.

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

In their brief-in-chief, the Villages make only fleeting references to Wis. Stat. § 66.0301. (Dkt. 62:18, 19, 20, 36.) The Villages never develop an argument under that statute. This Court should decline to address that statute because courts "will not address undeveloped arguments." *Clean Wisconsin*, 2005 WI 93, ¶180 n.40.

In addition, the Taxpayers already explained why that statute does not authorize the Fire Charges. (Dkt. 49:36–37.) If the Villages address that statute in their response brief, the Taxpayers will address it once again in reply.

* * * * *

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

CONCLUSION

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

Dated this 3rd day of October 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 3rd day of October 2025.

Electronically signed by
Scott E. Rosenow

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