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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. 24-CV-1584

v.

VILLAGE OF DOUSMAN
and
VILLAGE OF PEWAUKEE,

Defendants.

Reply Brief Supporting Plaintiffs' Motion for Summary Judgment

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INTRODUCTION¹

Under the Villages' logic, every city and village in Wisconsin may impose "fees" on all property owners to fund its fire department and any other governmental function. Such fees would be limited only by a government's imagination and desire to take and spend its citizens' money. A municipal fire department, for example, could buy a \$30 million Super Scooper firefighting airplane and pass the cost onto property owners in the form of exorbitant fees.

Fortunately, the law does not work that way. For the reasons stated in the Taxpayers' prior briefs, this Court should declare that the Fire Charges are invalid.

ARGUMENT

I. The Fire Charges are invalid special charges.

The Taxpayers will first address the Villages' argument that the Fire Charges are valid special charges. The Fire Charges are special charges, but they are invalid.

A. The Fire Charges are special charges.

The Taxpayers explained why the Fire Charges are special charges. (Dkt. 49:10–11.) In response, the Villages do not seem to dispute this conclusion. (See Dkt. 69:11–12.) "Unrefuted arguments are deemed conceded." *State v. Verhagen*, 2013 WI App 16, ¶38, 346 Wis. 2d 196, 827 N.W.2d 891. And in their brief-in-chief, the Villages concede their Fire Charges are "a special charge." (Dkt. 62:28, 37.) The Court should adopt this undisputed point.

B. Under *Town of Janesville*, the Fire Charges are invalid because they violate the special-charge statute, Wis. Stat. § 66.0627(2).

As the Taxpayers have explained, the Fire Charges violate the special-charge statute as interpreted in *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 451 N.W.2d 436 (Ct. App. 1989). (Dkt. 49:11–13; 64:5–13.) The Villages' efforts to circumvent *Town of Janesville* fall flat. In the Villages' response brief, they repeat the baseless arguments about *Town of Janesville* that they raised in their brief-in-

¹ This brief uses the same terminology as the Plaintiffs' prior briefs. (See Dkt. 64:4 n.1.)

chief. The Taxpayers already refuted those arguments in their own response brief and will do so again here.

The Villages first suggest that *Town of Janesville* was about “the powers of towns,” while the special-charge statute is about “the powers of villages.” (Dkt. 69:12.) As the Taxpayers have explained, however, “the special-charge statute applies to cities, villages, and towns alike.” (Dkt. 64:10.) The statute provides that “the governing body of a *city, village or town* 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) (emphasis added). In *Town of Janesville*, the court addressed the predecessor version of this statute, Wis. Stat. § 66.60(16)(a). That version of the statute was not limited to towns, either. *See Town of Janesville*, 153 Wis. 2d at 545–46.

The Villages next assert that the court in *Town of Janesville* “held that Wis. Stat. § 60.55(2)(b) – not § 66.60(16)(a) – permitted the town to bill emergency services on a per call basis.” (Dkt. 69:12 (footnote omitted).) If the Villages are suggesting that *Town of Janesville* did not hold that § 66.60(16)(a) allows special charges for fire protection only on a per-call basis, the Villages are wrong. The court held that both statutes provided “an equivalent remedy, the costs of fire services rendered on a per call basis.” *Town of Janesville*, 153 Wis. 2d at 547. The court then held that because Rock County had a strong argument that it was immune from even having to pay special charges for fire protection under § 66.60(16)(a), “the town should proceed” under § 60.55 on remand. *Id.*

So the court made two points about the special-charge statute in *Town of Janesville*. First, it held that this statute allows special charges for fire protection only on a per-call basis, not on a municipality-wide basis. Second, the court suggested that tax-exempt county property was possibly immune from even having to pay such charges under this statute.

The Villages seemingly suggest that *Town of Janesville* had nothing to say about the prior version of the special-charge statute, § 66.60(16)(a). (Dkt. 69:12–13.) The Taxpayers already explained why that suggestion is false. (Dkt. 64:6–7.)

Relatedly, the Villages assert that *Town of Janesville* “did not rely on Wis. Stat. § 66.0627(2), instead interpreting towns’ powers to create special charges.” (Dkt. 69:28.) But, again, the court in *Town of Janesville* clearly analyzed § 66.60(16)(a) (*see* Dkt. 64:6–7), and the Villages concede that § 66.60(16)(a) was “the predecessor statute to Wis. Stat. § 66.0627(2)” (Dkt. 69:12). Because this statute was not substantively changed when it was renumbered, *Town of Janesville*’s analysis of § 66.60(16)(a) applies equally to § 66.0627(2). (Dkt. 49:11 n.3.) The Villages do not argue that the renumbering of this statute affected its substance in any way relevant here. Also, as just explained, the Villages are wrong to suggest that the special-charge statute addresses only towns’ powers. The special-charge statute applies to cities, villages, and towns—as its prior version did when *Town of Janesville* was decided.

Despite falsely claiming that the special-charge statute was “not under consideration” in *Town of Janesville*, the Villages seem to recognize that the court did in fact discuss this statute. (Dkt. 69:13.) Specifically, the Villages argue that “[a]ny references to Wis. Stat. § 66.60(16)(a) in the [*sic*] *Town of Janesville* was *dicta*, as the court stated multiple times in its decision.” (Dkt. 69:13.) But, again, the court did more than make “references” to this statute. It analyzed this statute. (Dkt. 64:6–9.)

And the Villages are wrong for several reasons to dismiss language in *Town of Janesville* as *dicta*. Contrary to the Villages’ assertion, the court did not say that its discussion of the special-charge statute was *dicta*. The Taxpayers already explained why that discussion is not *dicta*. (Dkt. 64:8–9.) True, the court held that the town could not rely on the special-charge statute to bill the county for fire protection. *Town of Janesville*, 153 Wis. 2d at 545–47. But that holding does not mean, as the Villages contend, that this statute “was not under review.” (Dkt. 69:13.) It means the opposite: the court considered and rejected the town’s argument that it could rely on this statute for charging county property for fire protection. By deciding that issue, the court’s discussion of the special-charge statute is binding precedent. (Dkt. 64:7–9.)

In any event, the Taxpayers also explained why this Court is not free to dismiss any language in a published Wisconsin Court of Appeals opinion—including *Town of Janesville*—as *dicta*. (Dkt. 64:8.) The Villages’ argument fails for this reason, too.

The Villages note that the “language of Wis. Stat. § 60.55(2)(b) was modified to remove the ‘per call’ limitation.” (Dkt. 69:13.) So what? The Villages do not rely on that statute as authority for their Fire Charges. Nor could they do so because, as they seem to concede, that statute applies only to towns. (Dkt. 62:25.)

The statute that applies here—the special-charge statute—still has a per-call limitation for fire protection. The court in *Town of Janesville* interpreted the special-charge statute as allowing a municipality to charge for fire protection on a per-call basis. *Town of Janesville*, 153 Wis. 2d at 546–47. As noted, the statutory language that the court found crucial in *Town of Janesville* is still substantively intact (Dkt. 49:11 n.3), and the Villages do not seem to argue otherwise. They just incorrectly argue that the court did not interpret the special-charge statute as allowing charges for fire protection only on a per-call basis. It clearly did.

The Villages try to distinguish *Town of Janesville* because the town there tried to impose a special charge based on property value. (Dkt. 69:17.) But the court did not hold that the town violated the special-charge statute just because it used property value. Instead, the court held that special charges are allowed “only for services actually provided and not for services that may be available but not utilized.” *Town of Janesville*, 153 Wis. 2d at 546. Because special charges are not “a municipality-wide funding mechanism,” they may be imposed for “the costs of fire services rendered on a per call basis.” *Id.* at 546–47. The Villages cannot escape that holding simply by using a formula besides property value to calculate their municipality-wide funding mechanism.

The Villages assert that a charge can be a fee even if it funds a service that is not “actively consumed,” citing *City of River Falls v. Saint Bridget’s Catholic Church of River Falls*, 182 Wis. 2d 436, 513 N.W.2d 673 (Ct. App. 1994). (Dkt. 69:17.) But the Taxpayers already explained why that point has no bearing on whether the Fire Charges comply with the special-charge statute. (Dkt. 64:12–13.) Special charges are allowed “only for services actually provided and not for services that may be available but not utilized.” *Town of Janesville*, 153 Wis. 2d at 546. The court of appeals in *City of River Falls* did not—and could not—overrule that holding.

In passing, the Villages assert that “Wis. Stat. § 66.0627 is to be broadly interpreted to permit the financial vehicles available to a village to pay for it.” (Dkt. 69:16.) But the Taxpayers already explained why this resort to broad construction does not save the Fire Charges or get around *Town of Janesville*. (Dkt. 64:13.)

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

The Taxpayers will first address why the Dousman and Pewaukee Fire Charges are property taxes (if not special charges) and then will explain why, as property taxes, they are unlawful.

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

The Taxpayers have thoroughly explained why the Fire Charges are property taxes. (Dkt. 49:13–24; *see also* Dkt. 64:14–22.) The Villages’ contrary arguments are not persuasive.

1. The Villages misunderstand the primary purpose test.

The Villages argue that the test for distinguishing taxes from fees “is not whether a charge was proprietary or governmental, or whether it benefits a private individual or the general population.” (Dkt. 69:19.) They claim the “test is whether the primary purpose of the charge generates general revenue for the government (tax), or if it covers the expenses of providing a service or the regulation or supervision of certain activities (fee).” (Dkt. 69:19.) For support, they cite *State v. Jackman*, 60 Wis. 2d 700, 707, 211 N.W.2d 480 (1973).

The Villages misunderstand the “primary purpose” test in key respects. *Jackman* does not say that taxes must raise “general revenue.” It simply says that “[a] tax is one whose primary purpose is to obtain revenue.” *Jackman*, 60 Wis. 2d at 707. In addition, the Villages do not explain their apparent view that revenue for funding a fire department is not “general revenue.” Government revenue is “general” if it pays for governmental activity that benefits the community in general, such as fire protection. (Dkt. 64:18.)

This is why Wisconsin courts distinguish governmental functions (which benefit the public) from proprietary functions (which mainly provide a private

benefit) when deciding whether a charge is a tax or a fee. (Dkt. 49:14–15.) *See, e.g., City of River Falls*, 182 Wis. 2d at 442–43. In *City of River Falls*, the court noted that “if the primary purpose of a charge is to cover the expense of providing services, supervision or regulation, the charge is a fee and not a tax.” *Id.* at 442 (citing *Jackman*, 60 Wis. 2d at 707). In the very next sentence, the court said that “the purpose of the [charge at issue there] is to cover the public utility’s expense of making water available, storing the water and ensuring that water will be delivered in case it is needed to fight fires at the utility customers’ properties.” *Id.* at 442–43. Then, in the very next sentence, the court said that “[m]aking water available, storing it and ensuring its delivery is a proprietary function, not a governmental function.” *Id.* at 443. The distinction between governmental and proprietary functions is thus an important guidepost when applying *Jackman*’s primary purpose test.

The Villages try to downplay *City of Milwaukee v. Milwaukee & Suburban Transport Corp.*, 6 Wis. 2d 299, 94 N.W.2d 584 (1959). (Dkt. 69:19.) But the court of appeals has explained that the charge imposed on trolleys in *Milwaukee & Suburban Transport* was a tax rather than a fee because “control of streets is a governmental function.” *Bargo Foods N. Inc. v. Dep’t of Revenue*, 141 Wis. 2d 589, 597 n.5, 415 N.W.2d 581 (Ct. App. 1987). The court in *Bargo* distinguished *Milwaukee & Suburban Transport*, holding that an airport user charge was a fee rather than a tax because “the operation of the Milwaukee county airport is a proprietary function.” *Id.* at 597 & n.5. The court emphasized 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 Villages assert that *Bargo* and *City of River Falls* do not “establish that *Jackman*’s primary purpose test is not the proper analysis.” (Dkt. 69:20.) The Taxpayers do not argue otherwise. *Bargo* and *City of River Falls* show that, when applying the primary purpose test, courts consider the distinction between governmental and proprietary functions.

When the Villages block quote from *City of River Falls*, they use an ellipsis to omit the language that refers to governmental and proprietary functions. (Dkt.

69:20.) The Villages then suggest that the court in *City of River Falls* held that “providing water” was a “government function.” (Dkt. 69:22.) As just explained, however, the court held that providing water “is a proprietary function, not a governmental function.” *City of River Falls*, 182 Wis. 2d at 443. That distinction was crucial to the court’s conclusion that “the purpose” of the charge was “consistent with a fee, not a tax.” *Id.*

Regarding voluntariness, the Villages argue that *City of De Pere v. Public Service Commission*, 266 Wis. 319, 63 N.W.2d 764 (1954), does not mean that “a fee cannot be mandatory.” (Dkt. 69:21.) They argue that *City of De Pere* at most means that a charge “that is not mandatory, is not a tax.” (Dkt. 69:21.) The Villages thus seem to concede that voluntariness is a relevant (but not dispositive) factor when distinguishing fees from taxes. And they do not dispute that their Fire Charges are involuntary.

Without citing any authority, the Villages claim that “a fee that pays for a bill that it receives for services provided to its citizens ... is the definition of a fee.” (Dkt. 69:21.) If that were correct, then virtually every tax would be a fee. After all, virtually everything the government does is a service for its citizens.

This is why courts consider who pays the charge and who benefits from the charge (*i.e.*, whether the function is governmental or proprietary) when applying the primary purpose test. Without that consideration, the primary purpose test would be impossible to apply. Under this test, “the 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.” *City of River Falls*, 182 Wis. 2d at 441–42. If this test were viewed in isolation, virtually every government charge would be both a tax and a fee. On the one hand, virtually every government charge obtains revenue for the government. On the other hand, virtually every government charge pays for the cost of some government service. A charge obtains revenue for the government if it supports a governmental function; a charge covers the expense of a service if it supports a proprietary function. *See id.* at 442–43.

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

The Taxpayers have explained why the Fire Charges are property taxes under *Wisconsin Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100, and *Wisconsin Manufacturers & Commerce, Inc. v. Village of Pewaukee*, 2024 WI App 23, 411 Wis. 2d 622, 5 N.W.3d 949 (hereafter “*WMC*”). (Dkt. 49:17–19, 23–24; 64:18–20.) The Villages fail to distinguish those cases from this one.

The Villages falsely assert the supreme court in *Wisconsin Property Taxpayers* “never ruled on whether the disputed charge was a fee or tax because the parties stipulated that the charge was a tax.” (Dkt. 69:30; *see also* Dkt. 69:22.) The Villages made the same suggestion in their brief-in-chief (Dkt. 62:30–31), and the Taxpayers already corrected them (Dkt. 64:20). The Villages’ argument is borderline frivolous. Represented by the same law firm that is representing the Villages here, Pewaukee made that same exact argument in *WMC*—and the court of appeals rejected it. *WMC*, 2024 WI App 23, ¶8. The court explained that *Wisconsin Property Taxpayers* “explicitly held” that the charge was a tax. *Id.*

The Villages are thus wrong to say that the court in *WMC* “[i]nexplicably ignored that [Pewaukee] did not stipulate that its fee was a tax as had been stipulated in *Town of Buchanan*.” (Dkt. 69:22.) The court in *WMC* addressed and rejected Pewaukee’s argument for circumventing *Wisconsin Property Taxpayers* based on the Town of Buchanan’s concession.

The Villages argue their Fire Charges are fees because they do not “create a surplus of money” or “general additional general revenue.” (Dkt. 69:24.) But the Taxpayers already explained why this fact is legally irrelevant: many taxes are earmarked so they do not create a surplus of revenue, including the taxes in *Wisconsin Property Taxpayers* and *WMC*. (Dkt. 64:15–19.)

The Villages next suggest that the courts in *Wisconsin Property Taxpayers* and *WMC* held the charges there were taxes because they raised “general, anticipatory revenue, rather than payment of a bill either municipality had received.” (Dkt. 69:22–23.) But the Villages do not cite to anything in either opinion to support that

characterization. Relying on *Wisconsin Property Taxpayers*, the court in *WMC* held the charge there was a tax based on three facts: (1) the charge paid for transportation facilities within the municipality; (2) the charge was imposed on all developed property; and (3) the charge was based on a generalized formula. *See WMC*, 2024 WI App 23, ¶7. Neither decision relied on the allegedly “anticipatory” nature of those charges. (*See* Dkt. 64:19.)

Besides, as the Taxpayers explained, the Pewaukee Fire Charge and Dousman Fire Charge both seem to be anticipatory. (Dkt. 64:19.) The material the Villages cite does not show otherwise. (*See* Dkt. 69:23 (citing Dkt. 58:10–11 ¶¶74, 78; Dkt. 58:20–21 ¶¶150–152).) For example, the cited material states that “the City [of Pewaukee] provides an *estimated* budget for services *to be provided* to the Village of Pewaukee based upon data from the prior year.” (Dkt. 58:20 ¶150 (emphasis added).) More importantly, the Villages do not develop an argument explaining what they mean by “anticipatory,” why exactly they think the taxes in *Wisconsin Property Taxpayers* and *WMC* were “anticipatory,” why they think that characterization mattered in those cases, or why exactly they think their Fire Charges are not “anticipatory.”

The Villages also claim that “the use of a generalized formula was never addressed by either court.” (Dkt. 69:30.) Not so. In *Wisconsin Property Taxpayers*, the court noted that “[u]nder the Town’s funding scheme, all residential properties must pay the same fee, while commercial properties must pay a variable fee based on the size and type of business and the number of estimated ‘trips’ on municipal roads the business is expected to generate.” *Wisconsin Property Taxpayers*, 2023 WI 58, ¶4. Similarly, in *WMC*, the court noted that Pewaukee’s charge consisted of a “base fee” that was “equal for all utility accounts” and a “usage fee” that was based on “estimated trips.” *WMC*, 2024 WI App 23, ¶4. In holding that Pewaukee’s charge was a tax just like the Town of Buchanan’s, the court discussed the funding formula in *Wisconsin Property Taxpayers*. *Id.* ¶7. Although the courts did not use the phrase “generalized formula,” the funding formulas in those two cases can only be described as “generalized.” And the court in *WMC* clearly gave legal significance to the nature of the formula. *Id.* The Villages are wrong to suggest otherwise.

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

The Taxpayers have explained why *Town of Hoard v. Clark County*, 2015 WI App 100, 366 Wis. 2d 239, 873 N.W.2d 241, does not compel the conclusion that the Fire Charges are fees rather than taxes. (Dkt. 49:19–24; 64:20–22.)

The Villages mischaracterize the Taxpayers’ argument. According to the Villages, the Taxpayer argue that *Town of Hoard* “is inapplicable because the case involved a town, not a village.” (Dkt. 69:28.) The Taxpayers, however, “argue that *Town of Hoard* is distinguishable because its ordinance was enacted pursuant to a statute that applies only to towns.” (Dkt. 64:21.)

In arguing that *Town of Hoard* does not conflict with precedent, the Villages once again incorrectly suggest that the governmental–proprietary distinction is irrelevant to the primary purpose test. (Dkt. 69:28–29.) It is highly relevant. If *Town of Hoard* suggests otherwise, it conflicts with binding precedent. (Dkt. 49:14–15, 21.) And if *Town of Hoard* was implying that fire protection is a proprietary service, it conflicts with binding precedent for this reason. (Dkt. 49:20–21.)

The Villages next try to dismiss the *City of River Falls* court’s observation that the water-utility fee there did not pay for “equipment needed to fight fires,” noting that the court did not “further address that sentence elsewhere in its decision.” (Dkt. 69:29.) So what? A court does not need to make the same point multiple times for it to be precedential. The Villages are effectively urging this Court to dismiss that language as dicta, but this Court is not free to do so. (See Dkt. 64:8.)

The Villages argue that, by dismissing the significance of a lien for nonpayment, *Town of Hoard* does not conflict with *City of River Falls*. (Dkt. 69:29.) The Villages suggest that “the dispositive issue [in *City of River Falls*] was that the charge was used to cover expenses incurred by the city, and that it did not generate general revenue.” (Dkt. 69:29.) But *City of River Falls* clearly relied on the lack of a lien when concluding the charge was a fee, citing *City of De Pere*. (Dkt. 49:22–23.) And, contrary to the Villages’ assertion, *City of River Falls* never used the phrase “general revenue.” Oddly, the Villages cite *Town of Hoard* for the notion that a lien

for nonpayment is irrelevant to the tax–fee distinction. (Dkt. 69:30.) That citation misses the Taxpayers’ point: by suggesting a lien for nonpayment is irrelevant, *Town of Hoard* conflicts with *City of River Falls* and *City of De Pere*.

The Villages claim that “*Town of Hoard* was not overruled by *Town of Buchanan* [sic], a case that did not need to rule on the fee vs. tax question.” (Dkt. 69:31.) But “need” is irrelevant: the court did rule on the tax–fee question, and its holding is precedential. *WMC*, 2024 WI App 23, ¶¶8, 11.

The Villages assert that the Taxpayers are asking this Court to overrule *Town of Hoard*. (Dkt. 69:31.) Not true. This Court “must first attempt to harmonize” *Town of Hoard* with other Wisconsin precedent. *See Garfoot v. Fireman’s Fund Ins. Co.*, 228 Wis. 2d 707, 723, 599 N.W.2d 411 (Ct. App. 1999). So if the Court addresses whether the Fire Charges are fees or taxes, it should distinguish *Town of Hoard* because that case relied on a statute specific to towns. (Dkt. 49:19–20; 64:20–22.) This reading of *Town of Hoard* would avoid any tension between that case and other precedents.

And if the Court disagrees with this basis for distinguishing *Town of Hoard*, it should conclude that *Town of Hoard* is not good law because it conflicts with supreme court and earlier court of appeals precedent in several ways. (Dkt. 49:20–24.) Perhaps most notably, the Villages seem to read *Town of Hoard* as standing for the notion that a charge is a fee (rather than a tax) if it is earmarked to avoid creating a surplus of revenue. But that notion conflicts with *Wisconsin Property Taxpayers* and *City of Plymouth v. Elsner*, 28 Wis. 2d 102, 135 N.W.2d 799 (1965). (*See* Dkt. 49:23–24 & n.9; 64:18 & n.10.) By concluding *Town of Hoard* is not good law, the Court would “not overrule” that case. *See State v. Noll*, 2002 WI App 273, ¶16 n.4, 258 Wis. 2d 573, 653 N.W.2d 895. Instead, the Court would do “nothing more than reiterate the law under previous supreme court and court of appeals precedent.” *See id.*

Regarding *Elsner*, the Villages claim the Taxpayers rely on *Elsner* “to assert that earmarked charges are considered a tax.” (Dkt. 69:31.) Not quite. The Taxpayers merely cited *Elsner* for the well-established principle that an earmarked charge *can* be a tax—that is, an earmarked charge is *not necessarily* a fee.

The Villages note that “*Elsner* was decided before *Jackman*.” (Dkt. 69:31.) So what? The Villages do not develop an argument on that point, so the Court should not consider it. Besides, *Jackman* did not create the primary purpose test; it cited cases that long pre-dated *Elsner* for this test. *Jackman*, 60 Wis. 2d at 707.

The Villages make the misleading assertion that “the dispute in *Elsner* was whether the tax under review was [a] property tax or an excise tax.” (Dkt. 69:31.) Actually, the *Elsner* court found “it unnecessary to determine whether the tax imposed by the ordinance [was] an excise tax or a general property tax,” because it was illegal either way. *Elsner*, 28 Wis. 2d at 105. Trying to avoid that conclusion, the city argued the disputed charge was “a special assessment.” *Id.* at 108. The court held 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. *Elsner* thus shows that an earmarked charge can be a tax. The Taxpayers already explained all these points. (Dkt. 64:18 n.10.) If *Town of Hoard* suggests that an earmarked charge cannot be a tax, it conflicts with *Elsner* (and *Wisconsin Property Taxpayers*).

* * * * *

In sum, if the Fire Charges are not special charges, they are property taxes.

B. As property taxes, the Fire Charges are unlawful.

The Taxpayers have explained that if the Dousman and Pewaukee Fire Charges are property taxes, they are unlawful for several reasons. (Dkt. 49:24–27.) Notably, the Villages do not seem to argue their Fire Charges are lawful *if they are property taxes*. (See Dkt. 69.) “Unrefuted arguments are deemed conceded.” *Verhagen*, 2013 WI App 16, ¶38. The Villages thus concede their Fire Charges are unlawful if they are property taxes. Because the Villages do “not dispute” that their Fire Charges are illegal if they are “a tax,” this Court should declare them invalid if it concludes they are “indeed a tax.” See *WMC*, 2024 WI App 23, ¶11.

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

If the Fire Charges are fees (rather than special charges or property taxes), they violate the text of Wis. Stat. § 66.0628(2) 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).

The Villages first argue that Wis. Stat. § 66.0628(2) does not apply to the Fire Charges. They alternatively argue the Fire Charges satisfy this statute if it applies. Both arguments are unavailing.

1. Wisconsin Stat. § 66.0628(2) applies here if the Fire Charges are fees, as the Villages claim they are.

The Villages argue that Wis. Stat. § 66.0628(2) does not apply here, citing *Mary Lane Area Sanitary District v. City of Oconomowoc*, 2023 WI App 48, 409 Wis. 2d 159, 996 N.W.2d 101. (Dkt. 69:32.) The Villages misunderstand *Mary Lane*. Unlike the Fire Charges, the charges in *Mary Lane* were not imposed on property owners via ordinances, nor were they actual fees. They were charges that municipalities owed a city under intergovernmental agreements.

In *Mary Lane*, “the City of Oconomowoc entered into written intergovernmental agreements with several neighboring municipalities and affiliated sanitary districts under which the City agreed to accept, treat, and dispose of their wastewater.” *Mary Lane*, 2023 WI App 48, ¶1. The agreements required those municipalities “to pay certain charges for sewerage treatment and capital costs,” in addition to a so-called “annual ‘license fee.’” *Id.* The municipalities sued the City of Oconomowoc and argued that the “license fee” violated Wis. Stat. § 66.0628(2). *Id.*

The court held that Wis. Stat. § 66.0628(2) did not apply to the license fees for two reasons. *Id.* ¶31. First, the license fees “were included in agreements the City negotiated with the municipalities,” so the fees were not “imposed” within the meaning of § 66.0628(2). *Id.* The court observed that in cases applying this statute, fees were imposed “unilaterally through legislative enactments.” *Id.* Second, the license fees were actually “consideration” in intergovernmental contracts. *Id.* ¶33.

The court thus observed that “the parties’ description of this consideration as a fee is somewhat misleading because it is not imposed in exchange for a service or to regulate or supervise an activity.” *Id.*

Mary Lane is inapplicable here. As the Taxpayers have explained, the Fire Charges are imposed through legislative enactments (ordinances), and the Taxpayers assume *arguendo* that the Fire Charges are fees. (Dkt. 49:28.)

Under *Mary Lane*, Wis. Stat. § 66.0628(2) would not apply to the charges that Pewaukee agreed to pay to the City of Pewaukee for fire protection. Nor would it apply to the charges that Dousman agreed to pay to the Western Lakes First District for fire protection. But this lawsuit is not between Pewaukee and the City of Pewaukee—or between Dousman and the Western Lakes Fire District. Unlike *Mary Lane*, this case does not challenge the consideration included in a contract.

Instead, several property owners brought this lawsuit to challenge the validity of charges that Pewaukee and Dousman imposed on them via ordinances. Because the Fire Charges were not “negotiated” with property owners, the Villages “unilaterally” imposed the Fire Charges on property owners. *See Mary Lane*, 2023 WI App 48, ¶31. Assuming *arguendo* that the Fire Charges are not special charges or property taxes, this case challenges a “fee that is imposed by a political subdivision.” Wis. Stat. § 66.0628(2).

In short, if the Fire Charges are fees—as the Villages repeatedly say they are—then they are subject to Wis. Stat. § 66.0628(2).

2. On their face, the Ordinances violate Wis. Stat. § 66.0628(2).

The Villages next argue their Fire Charges satisfy Wis. Stat. § 66.0628(2), but they fail to develop a response to the heart of the Taxpayers’ argument.

As the Taxpayers explained in their brief-in-chief, “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.” (Dkt. 49:29.) The Taxpayers explained why this Court should interpret § 66.0628(1)(b) and (2) consistently with Wis. Stat. § 66.0627(2). (Dkt. 49:28–30.) Because § 66.0627(2) does

not allow village-wide *special charges* for the availability of fire protection, § 66.0628(2) forbids village-wide *fees* for the same. (Dkt. 49:28–30.)

The Villages briefly assert that every member of their communities “consumes” the “availability” of fire protection “every day.” (Dkt. 69:33.) But that assertion does not directly respond to the Taxpayers’ argument. Again, the Taxpayers explained why § 66.0628(2) forbids village-wide fees for the mere availability of a service. (Dkt. 49:28–30.) The Villages’ argument confirms that their Fire Charges are for the *availability* of fire protection. (See Dkt. 69:33.)

The Villages offer just one sentence that directly responds to the Taxpayers’ argument. Specifically, the Villages assert that § 66.0628(2) “does not require ‘consumption’ or ‘per call’ billing as [the Taxpayers] urge.” (Dkt. 69:33.) The Court should reject that one-sentence assertion because courts “will not address undeveloped arguments.” *Clean Wisconsin, Inc. v. Pub. Serv. Comm’n*, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768.

Because the Villages failed to develop an argument on whether § 66.0628(2) allows fees for the mere availability of a service, they have tacitly conceded that it does not. Again, “[u]nrefuted arguments are deemed conceded.” *Verhagen*, 2013 WI App 16, ¶38. The Villages have not developed a refutation of the Taxpayers’ argument that § 66.0628(2) does not allow fees for the availability of a service.

Contrary to the Villages’ characterization, the Taxpayers are not arguing that the cost of operating fire districts on any given day should “come[] off the bill” of the property owners who do not receive fire-protection service on that day. (Dkt. 69:33.) Instead, the Taxpayers are arguing that the Ordinances do not lawfully impose the Fire Charges on anyone. The Fire Charges are for the mere availability of a service, and § 66.0628(2) forbids such fees. Property owners in Dousman and Pewaukee may receive a separate bill for fire protection only in one instance: if they are assessed special charges for “the costs of fire services rendered on a per call basis.” *Town of Janesville*, 153 Wis. 2d at 547.

The Villages raise another red-herring argument. They assert that the Fire Charges satisfy § 66.0628(2) on a macro level because they “total less than or no more

than the bill the municipality receives from the third-party provider of fire and EMS services.” (Dkt. 69:33.) The Villages further contend that the Taxpayers have not produced evidence “to prove at a micro level that any individual was charged an amount that exceeded the services that were provided.” (Dkt. 69:33.)²

The Villages’ macro-level argument has a fatal flaw: it ignores that § 66.0628(2) does not allow village-wide fees on all property owners to pay for the availability of fire protection. Even if the Fire Charges do not produce a surplus of revenue, they still violate § 66.0628(2) because they undisputedly are for the mere availability of services. A closely-related statute, Wis. Stat. § 66.0627(2), allows special charges “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 66.0628(2) applies the same limitation to fees, as the Taxpayers have explained. (Dkt. 49:28–30.) The Villages do not develop a response to that argument. And this limitation in §§ 66.0627(2) and 66.0628(2) does not at all hinge on whether a special charge or fee produces a surplus of revenue.

The Villages’ micro-level argument has the same fatal flaw. Contrary to the Villages’ suggestion, the Taxpayers are not arguing that an “individual was charged an amount that exceeded the services that were provided.” (Dkt. 69:33.) Instead, the Taxpayers are arguing that the Fire Charges violate § 66.0628(2) because they are *not* imposed for any services that were provided. The Fire Charges are unlawful because, as the Villages recognize, they are for “availability” of services. (Dkt. 69:33.)

The Taxpayers are bringing a facial challenge to the Ordinances, yet the Villages’ macro and micro-level arguments treat it like an as-applied challenge. “[I]n an as-applied challenge, the court assesses the merits of the challenge by considering the facts of the particular case before it.” *State v. Roundtree*, 2021 WI 1, ¶18, 395 Wis. 2d 94, 952 N.W.2d 765. A facial claim, by contrast, alleges a law is illegal “on its face.”

² Which party bears the burden of proof under Wis. Stat. § 66.0628 is not relevant here because the Taxpayers’ claim under this statute raises a question of law. Nevertheless, the Taxpayers note that this statute places the burden of proof on municipalities. *See* Wis. Stat. § 66.0628(4)(b).

Id. ¶17. Facial claims are “purely legal.” *See State v. Thiel*, 2012 WI App 48, ¶7, 340 Wis. 2d 654, 813 N.W.2d 709. As a facial challenge, the Taxpayers’ claim under Wis. Stat. § 66.0628(2) does not depend on the dollar amount that any given property owner is charged or how much revenue the Villages raise. Instead, this claim is a matter of statutory interpretation and application, which are “questions of law.” *State v. Alger*, 2015 WI 3, ¶21, 360 Wis. 2d 193, 858 N.W.2d 346.

There is one answer to these questions of law: the Ordinances are invalid. As a matter of statutory interpretation, Wis. Stat. § 66.0628(2) forbids fees for the mere availability of a service. The Villages do not develop a contrary argument, and they concede the Fire Charges are imposed for the “availability” of fire protection. (Dkt. 69:33.) So, in terms of statutory application, the Ordinances violate § 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 have explained, if the Fire Charges are fees, they also violate the spirit and purpose of statutes that limit property taxes. (Dkt. 49:30–32.)

The Villages argue this Court may consider only the tax-exemption statute (Wis. Stat. § 70.11) rather than Wis. Stat. ch. 70 more generally or the levy-limit statute. (Dkt. 69:34.) The Villages’ reasoning is that the Taxpayers’ complaint alleged preemption under Wis. Stat. §§ 66.0628 and 70.11 only. (Dkt. 69:33–34.)³

That argument has no merit. “A complaint need not identify legal claims; rather, it must set forth the basic facts giving rise to the claims.” *Apple Hill Farms Dev., LLP v. Price*, 2012 WI App 69, ¶17, 342 Wis. 2d 162, 816 N.W.2d 914. So, “a plaintiff is not required to aver a specific statute in order to state a valid claim.” *Hubbard v. Neuman*, 2025 WI 15, ¶11 n.6, 416 Wis. 2d 170, 20 N.W.3d 720. Because the Villages have “had the opportunity” to respond to the Taxpayers’ preemption arguments, “it is proper to decide the merits” of those arguments. *Murray v. City of Milwaukee*, 2002 WI App 62, ¶12 n.6, 252 Wis. 2d 613, 642 N.W.2d 541.

³ The Villages’ argument is somewhat misleading. The Taxpayers’ complaint noted that Wisconsin law requires property taxes to be based on property value, known as ad valorem property taxes. (Dkt. 3:23–24.) The preemption claims incorporated the previous allegations of the complaint. (Dkt. 3:26, 32.)

Turning to the merits, the Villages argue that Wis. Stat. § 70.11 cannot preempt the Fire Charges because this statute is inapplicable to fees. (Dkt. 69:35.) The Taxpayers already refuted that argument. (Dkt. 64:26–28.) If the Fire Charges are fees, they violate the spirit and purpose (though not the text) of § 70.11.

The Villages note that the Taxpayers “raise several hypotheticals arguing that villages would no longer need to tax anything because they could fund their entire government with various charges under the guise of being fees.” (Dkt. 69:35.) The Villages brush off this concern by baldly asserting that “courts have established strict rules to avoid abuses as hypothesized by [the Taxpayers].” (Dkt. 69:35.) But the Villages do not cite any legal authority for that notion or otherwise develop that argument. They just make a vague reference to unidentified “checks and tests” for municipal power to impose fees. (Dkt. 69:36.) Indeed, in the same paragraph of their brief, the Villages claim that they may “fund their municipal services through broad funding options including fees.” (Dkt. 69:35–36.) They assert that their power to impose fees should be “broadly interpreted.” (Dkt. 69:36.) That assertion of broad authority to impose virtually any “fee” is precisely why the Fire Charges violate the spirit and purpose of statutes that restrict property taxes.

The Villages suggest they were “not acting in bad faith or illegally taxing their citizens under the guise of a fee.” (Dkt. 69:35.) But a municipality’s motives are irrelevant to a preemption claim. *See City of Weyauwega v. Wisconsin Cent. Ltd.*, 2018 WI App 65, ¶32, 384 Wis. 2d 382, 919 N.W.2d 609. And if motives were relevant, the Villages’ conduct can hardly be described as good faith. The Villages concede that Dousman enacted its Fire Charge ordinance after Dousman voters rejected a referendum to raise their property taxes. (Dkt. 58:4–6.) And they concede that Pewaukee adopted its Fire Charge ordinance after village board members expressed concern that voters might reject a referendum to raise their property taxes. (Dkt. 58:13–17.) These facts highlight why the levy-limit statute preempts the Fire Charges. (See Dkt. 49:32.)

The Villages next claim that under the Taxpayers’ logic, “municipalities can never be allowed to implement any fees, because all fees generate ‘revenue’ by

definition, and [the Taxpayers] argue that any revenue is ‘general revenue’ as would be the product of taxes.” (Dkt. 69:35.) Not so. As an initial matter, in arguing preemption, the Taxpayers are not arguing that the Fire Charges are taxes. Instead, the Taxpayers assume *arguendo* that the Fire Charges are fees.

And the Taxpayers are not arguing that every fee is a tax. A government charge is a tax if it is used to benefit the general public. (Dkt. 64:14–15, 18.) A charge for using a municipal swimming pool, by contrast, is a fee because it benefits only users of the pool. (Dkt. 64:15.)

Under the Villages’ logic, every earmarked tax would be a fee. This slippery slope helps show why state law preempts the Fire Charges: if villages could impose “fees” on all property owners and earmark them to pay for various government departments, the statutory restrictions on property taxes would be meaningless.

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

The Fire Charges lack statutory authority and are unlawful for this reason, too.

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

The Villages concede they cannot rely on constitutional home-rule authority to defend their Fire Charges. (Dkt. 69:14, 36.) They instead argue the Fire Charges are authorized under the village home-rule statute, Wis. Stat. § 61.34. The Taxpayers already refuted that notion in past briefs. (Dkt. 49:33–35; 64:28–34.) The Villages’ response brief does not alter this conclusion.

1. As a type of a tax, a special charge does not come within home-rule authority.

As the Taxpayers explained, special charges are taxes, and “a village may not adopt a tax under its home rule authority.” *WMC*, 2024 WI App 23, ¶9. (Dkt. 49:33–34.) Taxes instead need “clear and express” statutory authority. *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶11. This requirement applies to all taxes. *See, e.g., Elsner*, 28 Wis. 2d at 106–07 (applying this requirement to a possible excise tax); *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶11, 358 Wis. 2d 610, 856 N.W.2d 546 (applying

this requirement to a “fee in lieu of room tax”). Because the Fire Charges are special charges—a type of tax—the Villages cannot adopt them under home-rule authority.

Notably, the Villages do not dispute that the Fire Charges require clear and express statutory authority *if special charges are a type of tax*. Instead, they just incorrectly suggest that special charges are (or can be) fees.

To establish that special charges are taxes, the Taxpayers cited *CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶40 n.17, 380 Wis. 2d 399, 909 N.W.2d 136. (Dkt. 49:34.) In their response brief, the Villages do not seem to dispute that this precedent treats special charges as taxes. (*See* Dkt. 69.)

Citing three court of appeals cases, however, the Villages assert that “[s]pecial charges can be fees.” (Dkt. 69:11.) The Court should reject that argument as “undeveloped.” *Clean Wisconsin*, 2005 WI 93, ¶180 n.40.

That argument is also meritless. Our supreme court has characterized special charges and their cousin, special assessments, as “taxes.” *CED Properties*, 2018 WI 24, ¶40 n.17. This Court cannot dismiss language in a supreme court opinion as dicta. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶57–58, 324 Wis. 2d 325, 782 N.W.2d 682. Besides, that language in *CED Properties* is consistent with older supreme court precedent, which has long viewed assessments as “a species of taxation,” distinct from general property taxes. *Duncan Dev. Corp. v. Crestview Sanitary Dist.*, 22 Wis. 2d 258, 264, 125 N.W.2d 617 (1964); *see also City of Milwaukee v. Taylor*, 229 Wis. 328, 282 N.W. 448, 454 (1938) (noting “‘assessment’ is a special form of taxation,” “distinguished from general taxation” (citation omitted)). Although special assessments are a type of tax, they are not subject to the Wisconsin Constitution’s Uniformity Clause, which applies only to “general taxes.” *Duncan*, 22 Wis. 2d at 264; *see also Williams v. City of Madison*, 15 Wis. 2d 430, 442–43, 113 N.W.2d 395 (1962) (noting “the uniformity requirement does not apply to special assessments” because assessment is a “system of special taxation”).

Because *CED Properties* is a supreme court opinion, it controls over the court of appeals cases that the Villages cite. “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.

At any rate, the three cases cited by the Villages do not hold that special charges can be fees.

In the first case, the court held the charge at issue was a “special charge,” “not a hidden general property tax.” *Grace Episcopal Church v. City of Madison*, 129 Wis. 2d 331, 335, 385 N.W.2d 200 (Ct. App. 1986). That holding applied the longstanding distinction between special charges and *general property* taxes. The court did not hold that the special charges were fees. The majority opinion did not use the word “fee” even once.

In the second case, the court declined to address Wis. Stat. § 66.0627(2), the special-charge statute. *Town of Hoard*, 2015 WI App 100, ¶2 n.1. The court did not use the phrase “special charge” even once.

The third case cited by the Villages also does not hold that special charges are fees. In that case, the court held that a building-reinspection fee did not violate the special-charge statute. *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶16, 298 Wis. 2d 407, 727 N.W.2d 358. But the court was not presented with the question—and did not explicitly decide—whether fees *are* special charges (or vice versa). The court and the parties seemed to proceed under the assumption that the regulatory fees there were special charges. “[A]n opinion does not establish binding precedent for an issue if that issue was neither contested nor decided.” *WMC*, 2024 WI App 23, ¶8. And even if *Rusk* suggests that special charges are fees, it conflicts with the supreme court’s characterization of special charges as taxes in *CED Properties*, 2018 WI 24, ¶40 n.17.

In short, the Fire Charges exceed home-rule authority because they are special charges, a type of tax.

2. The Villages cannot rely on the home-rule statute to circumvent Wis. Stat. §§ 66.0627(2) and 66.0628(2).

When “a specific statute relat[es] to a particular subject,” “it controls over any general statutory language contained in” Wis. Stat. § 61.34. *See Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 462, 280 N.W.2d 166 (1979). As the Taxpayers have

explained, the specific statutes here are Wis. Stat. §§ 66.0627(2) and 66.0628(2). (Dkt. 49:34.) The Villages thus cannot rely on § 61.34 as authority for the Fire Charges.

The Villages argue the “general permission granted by § 66.0627(2) for ‘any other method’ of financing defeats the [Taxpayers’] argument that § 66.0627 is a more specific statute than” § 61.34. (Dkt. 69:40.) That argument fails for three reasons.

First, that argument fails to respond to the Taxpayers’ point that § 66.0628(2) controls over § 61.34. Because “[u]nrefuted arguments are deemed conceded,” *Verhagen*, 2013 WI App 16, ¶38, the Villages tacitly concede they cannot rely on § 61.34 to circumvent § 66.0628(2).

Second, § 66.0627(2) is still more specific than § 61.34. Section 66.0627 specifically addresses special charges; § 61.34 does not. The home-rule statute does not apply if a more-specific statute does. *See Schroeder*, 90 Wis. 2d at 462. So with respect to special charges, the home-rule statute is not an “other method provided by law.” *See* Wis. Stat. § 66.0627(2).

Third, for the other reasons explained by the Taxpayers, § 61.34 does not authorize the Fire Charges. (Dkt. 49:33–35; 64:28–34.) For those reasons as well, § 61.34 does not provide a method for imposing village-wide special charges.

3. The home-rule statute does not authorize fees that sufficiently resemble taxes, including the Fire Charges (if they are fees).

As the Taxpayers explained, the Fire Charges exceed the home-rule statute because they have “sufficient attributes of a tax.” *Jordan v. Vill. of Menomonee Falls*, 28 Wis. 2d 608, 621, 137 N.W.2d 442 (1965). (Dkt. 49:34–35; 64:29–30.) The Villages do not attempt to directly refute this point.

The Villages instead complain that the Taxpayers’ reliance on *Jordan* “attempt[s] to erode the primary purpose test that was established in *Jackman*” eight years after *Jordan*. (Dkt. 69:40.) That argument is misplaced. As an initial matter, *Jackman* did not create the primary purpose test; it cited cases that long pre-dated *Jordan* for this test. *Jackman*, 60 Wis. 2d at 707. More importantly, the Villages are conflating two distinct issues: whether a charge is a fee rather than a tax and whether a fee is within a village’s home-rule authority. The primary purpose test dictates

whether a charge is a fee or a tax but does not determine a charge's legality. *Jordan* helps determine a fee's legality by providing guidance on whether a village may enact the fee under its home-rule authority.

Indeed, the Villages recognize that *Jordan* “was not about whether the examined charges were fees or taxes....” (Dkt. 69:41.) Exactly. *Jordan* addressed the analytically distinct question of whether the “equalization fee” there was within a village's home-rule authority. The court held it was not because the fee “possesse[d] sufficient attributes of a tax.” *Jordan*, 28 Wis. 2d at 621.

In relying on *Jordan*, the Taxpayers assume *arguendo* that the Fire Charges are fees. And if they are fees, they sufficiently resemble taxes to fall outside home-rule authority, just like the fee in *Jordan*. (Dkt. 49:35; 64:30.)

4. The Villages' other arguments on the home-rule statute have no merit.

Citing *City of River Falls*, the Villages assert that “[m]unicipalities may charge residents a fee using municipal home rule authority to recover the costs of services it provides.” (Dkt. 69:15.) Relatedly, the Villages suggest that the municipalities in *City of River Falls* and *Town of Hoard* relied on home-rule authority “to create fire protection fees.” (Dkt. 69:37 & n.6.) But the Taxpayers already explained why *City of River Falls* and *Town of Hoard* do not help the Villages' attempted reliance on home-rule authority. (Dkt. 64:33–34.) In both cases, the court did not even mention home-rule authority. Instead, statutes explicitly authorized the charges in those cases.

The Villages also 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 (besides the general property-tax levy) to fund a basic governmental function.

The Villages baldly assert that the Fire Charges are analogous to charges “for water, sewer, electric, and stormwater services.” (Dkt. 69:37.) The Taxpayers already explained why that argument does not work: (1) that argument is undeveloped; (2) home-rule authority does not necessarily allow things like stormwater charges;

and (3) the Fire Charges are not individually determined or based on the receipt of an actual service, so they are not analogous to those other charges. (Dkt. 64:32–34.)

The Villages also assert, in conclusory fashion, that Wis. Stat. §§ 66.0602 and 66.0628 “recognize municipalities’ authority to charge fees that don’t have explicit statutory authorization.” (Dkt. 69:16.) They do no such thing, and this Court should reject that single-sentence argument as “undeveloped.” *Clean Wisconsin*, 2005 WI 93, ¶180 n.40. Besides, the Villages are framing the dispute far too broadly. The Taxpayers are not asserting that a village may never rely on the home-rule statute for imposing a fee that lacks explicit statutory authority. In a prior brief, the Taxpayers discussed two cases where licensing fees were within a city’s statutory home-rule authority, as well as two cases where non-regulatory fees exceeded statutory home-rule authority. (Dkt. 64:29–32.)

After block quoting from Wis. Stat. § 61.34(1), the Villages assert in conclusory fashion that this provision is “sufficient on [its] face to authorize the Villages to create their fire protection and emergency service fees.” (Dkt. 69:38.) This Court should reject that argument as undeveloped. (*See* Dkt. 64:32.)

The Villages suggest that because Wis. Stat. § 60.55 authorizes towns to impose fees on property owners to pay for fire protection, Wis. Stat. § 61.34 gives the same power to villages. According to the Villages, “Wis. Stat. § 60.55 exists because towns do not have the broad, discretionary municipal funding powers that villages enjoy under home rule and Wis. Stat. § 61.34.” (Dkt. 69:41–42.)

That reasoning has several flaws. First, it incorrectly assumes § 61.34 authorizes villages to enact virtually any fee. At most, § 61.34 authorizes fees if they are part of a police-power regulation. (Dkt. 64:28–32.) Second, towns *do* have home-rule authority under § 61.34 if they adopt village powers. *Town of Grand Chute v. U.S. Paper Converters, Inc.*, 229 Wis. 2d 674, 681, 600 N.W.2d 33 (Ct. App. 1999). Third, the legislature enacted § 60.55 to give towns “broad authority to provide for and fund fire protection. Flexibility in providing fire protection is necessary because of the *widely varying circumstances of towns....*” *Town of Clayton v. Cardinal Const. Co.*, 2009 WI App 54, ¶18 n.6, 317 Wis. 2d 424, 767 N.W.2d 605 (alteration in original)

(emphasis added) (citation omitted). In other words, § 60.55 exists because *towns* need flexibility in providing and funding fire protection. For all these reasons, § 60.55 does not support the Villages’ attempted reliance on § 61.34.

The Villages rhetorically ask, if they cannot rely on § 61.34 for their Fire Charges, “how is the village supposed to pay for the [fire protection] services?” (Dkt. 69:42.) The answer is simple: they may pay for fire protection with “general property tax funds” and with special charges “on a per call basis.” *See Town of Janesville*, 153 Wis. 2d at 547. They may also ask their citizens to increase their property-tax levy limit. *See Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶22.

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

The Villages concede that Wis. Stat. § 62.11 “only applies to cities.” (Dkt. 69:41.) This statute therefore does not authorize the Villages’ Fire Charges.

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

The Taxpayers explained that Wis. Stat. § 61.65 does not authorize the Fire Charges because “it does not speak to fees, taxes, or charges.” (Dkt. 49:36.) In response, the Villages concede this “statute is silent on *how* a village may pay for the provision of” fire protection. (Dkt. 69:14; *see also* Dkt. 69:39.)

The Villages assert that § 61.65(2)(a) has “no limitation to funding on a ‘per call basis.’” (Dkt. 69:15.) But that is because this statute does not authorize—or even mention—funding. Nothing in this statute allows a special charge that contravenes Wis. Stat. § 66.0627(2), which allows special charges for fire protection only “on a per call basis.” *Town of Janesville*, 153 Wis. 2d at 547.

The Villages claim there “are multiple funding mechanisms available to municipalities to recoup the cost of providing” fire protection, but the Villages do not explain what those mechanisms are or how they relate to § 61.65. (Dkt. 69:15.)

D. Wisconsin Stat. §§ 101.141 and 66.0608(2m)(a)2. do not authorize the Fire Charges.

In passing, the Villages seem to cite Wis. Stat. §§ 101.141 and 66.0608(2m)(a)2. as authority for the Fire Charges. (Dkt. 69:16, 39.) This Court should reject that argument as undeveloped.

Besides, that suggestion has no merit. As the Villages seem to concede, those two statutes do not explicitly mention how a village may fund fire protection and emergency services. (Dkt. 69:39.) Section 101.141 gives no authority to municipalities but instead requires them to report certain fires to the U.S. Fire Administration. *See* Wis. Stat. § 101.141(1). The other statute simply requires a local government to certify to the Wisconsin Department of Revenue that it “has maintained a level of fire protective and emergency medical service that is at least equivalent to that provided in the political subdivision in the previous year.” Wis. Stat. § 66.0608(2m)(a)2. Neither statute authorizes a village to impose a special charge on all property owners to fund a fire district.

E. Wisconsin Stat. § 66.0627 does not authorize the Fire Charges.

The Villages argue that “*Rusk* establishes that Wis. Stat. § 66.0627 is to be broadly interpreted and that the provided service is sufficient to support the fee,” so “the Villages need not itemize further benefit to a property.” (Dkt. 69:40.) To be sure, a “special charge need only provide a service, not a benefit, to the property owner.” *Rusk*, 2007 WI App 7, ¶18.

Crucially, though, a municipality may impose a special charge “only for services actually provided and not for services that may be available but not utilized.” *Town of Janesville*, 153 Wis. 2d at 546. So a special charge may be imposed for “the costs of fire services rendered on a per call basis.” *Id.* at 547.

Rusk did not overturn these holdings, nor could it have done so because the court of appeals cannot overturn its own precedents. *Zarder*, 2010 WI 35, ¶54. As the Taxpayers have thoroughly explained, the Fire Charges contravene these holdings from *Town of Janesville*. The Taxpayers have also explained why broad construction does not save the Fire Charges or get around *Town of Janesville*. (Dkt. 64:13.)

Citing *City of River Falls*, the Villages argue that they “need not explicitly demonstrate the consumption of the commodity to charge the fee.” (Dkt. 69:40.) But the Taxpayers already explained why *City of River Falls* does not get the Villages around *Town of Janesville*: (1) *City of River Falls* did not mention the special-charge statute; (2) *City of River Falls* involved a statute that explicitly authorized a fee for

the production and storage of water; and (3) *City of River Falls* did not (and could not) overrule *Town of Janesville*. (Dkt. 64:12–13, 25.)

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

The Villages concede that Wis. Stat. § 66.0301 “does not explicitly authorize charges for fire protection services.” (Dkt. 69:42.) Yet they argue that “an absurd result would follow if § 66.0301 is not read in conjunction with Wis. Stat. §§ 61.34(1) and 66.0627(2) to establish authority for enacting charges to fund the services authorized by statute.” (Dkt. 69:42.) The Villages construct a straw-man argument, suggesting the Taxpayers contend that state law “preclude[s] any way for a village to fund the [fire protection] services.” (Dkt. 69:42.) Not true. Again, the Villages may pay for fire protection with “general property tax funds,” and they may rely on § 66.0627(2) to impose special charges “on a per call basis.” See *Town of Janesville*, 153 Wis. 2d at 547. The Villages may also ask their citizens to increase their property-tax levy limit. See *Wisconsin Prop. Taxpayers*, 2023 WI 58, ¶22.

In short, § 66.0301 does not authorize a village-wide charge on all property owners to pay for fire protection.

* * * * *

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

V. As the Villages recognize, this case is appropriate for summary judgment.

The Villages argue that this Court should deny the Taxpayers’ motion for summary judgment because the Taxpayers “filed no proposed findings of fact” and therefore “cannot establish that no disputes of material fact exist.” (Dkt. 69:11.) That argument gets the Villages nowhere for three reasons. First, the Villages concede that no material facts are in dispute.⁴ Second, if the Villages truly are suggesting this case

⁴ “A ‘material fact’ is one that is ‘of consequence to the merits of the litigation.’” *Midwest Neurosciences Assocs., LLC v. Great Lakes Neurosurgical Assocs., LLC*, 2018 WI 112, ¶80, 384 Wis. 2d 669, 920 N.W.2d 767 (citation omitted). In other words, “[a] ‘material fact’ is one that impacts the resolution of the controversy.” *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 2000 WI 87, ¶32, 236 Wis. 2d 435, 613 N.W.2d 142.

is not appropriate for summary judgment, their argument is undeveloped and baseless. Third, even if the lack of proposed findings by the Taxpayers were a proper basis for denying their motion for summary judgment (it's not), they would still be entitled to summary judgment as opponents of the Villages' motion.

A. Contrary to their own argument about proposed findings, the Villages explicitly conceded that the material facts are undisputed.

Although the Villages assert that the Taxpayers “cannot establish that no disputes of material fact exist” (Dkt. 69:11), the Villages do not seem to be arguing that the material facts are actually disputed. Indeed, the Villages in multiple ways conceded that the material facts are *not* in dispute.

For starters, the Villages filed their own motion for summary judgment (Dkt. 59), and “a motion for summary judgment amounts to an explicit assertion that the material facts are undisputed.” *Fore Way Exp., Inc. v. Bast*, 178 Wis. 2d 693, 702, 505 N.W.2d 408 (Ct. App. 1993). Therefore, “a party who moves for summary judgment is precluded from later asserting that disputed material facts entitle it to a jury trial.” *Id.* By moving for summary judgment, the Villages conceded that the material facts are undisputed. They are precluded from arguing otherwise now.

Removing any doubt, the Villages stated in their brief-in-chief that “there are no issues of material fact.” (Dkt. 62:4.) The Taxpayers agreed with that point. (Dkt. 64:4 n.2.) The Taxpayers even made clear that they “admit every fact proposed in” the Villages' proposed facts. (Dkt. 70:1.)

Because both sides moved for summary judgment (Dkt. 46; 59), the parties agree that the material facts are undisputed. “As here, when both sides have filed cross-motions for summary judgment, *the parties concede there are no issues of material fact*, waive trial, and stipulate to the court's resolution of the legal issues.” *Wisconsin State Legislature v. Kaul*, 2025 WI App 2, ¶18, 414 Wis. 2d 633, 17 N.W.3d 24 (emphasis added) (citation omitted). The filing of such cross-motions is “equivalent to a stipulation of facts, thus permitting the circuit court to decide the case only on legal issues.” *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 533, 576 N.W.2d 245 (1998).

In short, both sides agree that the material facts are undisputed.

B. If the Villages are actually arguing that the material facts are disputed, that argument is undeveloped and baseless.

If the Villages are actually asserting that material facts are disputed—and if they are not precluded from doing so—that assertion is undeveloped and baseless. “Mere allegations of factual dispute cannot defeat [a] motion for summary judgment.” *Jensen v. Sch. Dist. of Rhineland*, 2002 WI App 78, ¶12, 251 Wis. 2d 676, 642 N.W.2d 638. Instead, “[a] party opposing a motion for summary judgment must demonstrate that there exists a genuine issue of material fact.” *N. Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶22, 377 Wis. 2d 496, 898 N.W.2d 741.⁵

The Villages have not even attempted to meet that burden. They have not identified a single disputed fact or explained why any such fact would be material.

C. The Court can (and should) grant summary judgment to the Taxpayers as opponents of the Villages’ motion.

For the reasons just stated, the lack of proposed findings by the Taxpayers is not a proper basis for denying their motion for summary judgment. But even if it were, it does not follow that the Court should grant the Villages’ motion for summary judgment. Indeed, the Villages do *not* claim that the lack of proposed findings is a sufficient basis for granting their motion. (See Dkt. 69:10–11.)

If the Villages are implicitly advancing that argument, it has no merit. A plaintiff’s “failure to contest proposed facts ... does not, by itself, form a basis for granting summary judgment against” the plaintiff. *Hellenbrand v. Hilliard*, 2004 WI App 151, ¶10, 275 Wis. 2d 741, 687 N.W.2d 37. A court must still decide “whether [the defendant] is entitled to summary judgment in light of its proposed undisputed facts and any additional undisputed facts.” *Id.*

If “no material facts are in dispute,” a court must decide: “Is the movant, under the law, entitled to judgment or should judgment be granted as a matter of law to the nonmoving party[?]” *Delmore v. Am. Fam. Mut. Ins. Co.*, 118 Wis. 2d 510, 512–13, 348 N.W.2d 151 (1984). “A court may enter judgment in favor of a party opposing a motion

⁵ In the summary judgment context, “genuine” means “disputed.” *Midwest Neurosciences Assocs.*, 2018 WI 112, ¶80.

for summary judgment when it appears that the opposing party is entitled to summary judgment.” *Moe v. Benelli U.S.A. Corp.*, 2007 WI App 254, ¶7, 306 Wis. 2d 812, 743 N.W.2d 691. Regardless of which side moves for summary judgment, Wis. Stat. § 802.08(2) “mandates summary judgment if the record shows that there is no genuine issue as to any material fact and that judgment is appropriate under the prevailing law.” *Cnty. Dev. Auth. of City of Burlington v. Racine Cnty. Condemnation Comm’n*, 2006 WI App 51, ¶11, 289 Wis. 2d 613, 712 N.W.2d 380.

Here, the Court can enter summary judgment for the Taxpayers independently of their own motion for summary judgment. The Villages filed a motion for summary judgment, and the Taxpayers opposed it. (Dkt. 59; 64.) In the Villages’ supporting brief, they asserted that “there are no issues of material fact.” (Dkt. 62:4.) In response, the Taxpayers agreed with that point. (Dkt. 64:4 n.2.) Because both sides agree that the material facts are undisputed, the Court must decide which side is entitled to judgment “as a matter of law.” *Delmore*, 118 Wis. 2d at 513. In deciding the Villages’ motion for summary judgment, the Court can enter judgment for the Taxpayers as the “opposing party.” *Moe*, 2007 WI App 254, ¶7.

For the reasons explained above and in the Taxpayers’ previous briefs (Dkt. 49; 64), the Taxpayers are entitled to summary judgment as a matter of law—either on their own motion or as opponents of the Villages’ motion.

* * * * *

As the Villages recognize, this case is appropriate for summary judgment. The parties stated in their briefs that no material facts are disputed; the parties effectively stipulated that point by filing cross-motions for summary judgment; and the Villages have not identified any disputed material facts.

CONCLUSION

This Court should enter summary judgment for the Plaintiffs.

Dated this 24th day of October 2025.

Electronically signed by
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