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09-04-2026
Clerk of Circuit Court
Waukesha County
2024CV001584

BY THE COURT:

DATE SIGNED: September 4, 2026

Electronically signed by Zachary A. Wittchow
Circuit Court Judge

STATE OF WISCONSIN

**: CIRCUIT COURT:
BRANCH 6**

WAUKESHA COUNTY

**Hawthorne Place LLC et al
Plaintiff,**

VS.

CASE NO. # 2024CV1584

**Village of Dousman et al
Defendants**

DECISION AND ORDER

Plaintiffs brought this lawsuit to challenge two separate but similar ordinances enacted by Defendants which implement certain charges for fire protection and emergency medical services. In their complaint, Plaintiffs claim the charges are invalid special charges under Wis. Stat. § 66.0627(2) (Claims 1.A & 2.A); that they are unconstitutional and otherwise unlawful property taxes (Claims 1.B & 2.B); that they violate and are preempted by Wis. Stat. § 66.0628 (Claims 1.C & 2.C); and that they are preempted by Wis. Stat. § 70.11 (Claims 1.D & 2.D). The issues have been joined by Defendants' answers which admit that both defendants have imposed a special charge, Doc. 8 at ¶ 27 & Doc. 17 at ¶ 27, but generally deny any wrongdoing by either defendant.

Plaintiffs moved the Court for summary judgment, asking the Court to (1) declare Defendants' fire-protection charges as unlawful, invalid, and unenforceable; (2) permanently enjoin Defendants from levying, enforcing, or collecting these fire-protection charges; and (3) grant any such other relief as the Court deems appropriate. Doc. 46. Defendants also moved for summary judgment, as well as declaratory judgment, seeking dismissal of Plaintiffs' claims along with costs. Docs. 59 & 62.

As a preliminary matter, Defendants request denial of Plaintiffs' motion for summary judgment because Plaintiffs filed no proposed findings of fact to support their motion. *See* Doc. 69 at 10-11. Pursuant to Waukesha Civil Local Rule 3.3, Defendants filed their own proposed findings of fact in support of their motion for declaratory judgment and summary judgment. Doc. 58. They also filed supplemental proposed findings of fact in support of their opposition to Plaintiffs' motion for summary judgment. Doc. 68. Plaintiffs filed a response to Defendants' proposed material facts, Doc. 70, in which they admitted every fact proposed in Defendants' proposed facts. Pursuant to Waukesha Civil Local Rule 3.3(5), the Court will deem Defendant's proposed facts as admitted solely for the purpose of deciding summary judgment. The Court will also decline to deny Plaintiff's motion for summary judgment on this basis.¹

¹ Defendant's argument on this issue would fail even without the local rule. "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." *Wis. State Legislature v. Kaul*, 2025 WI App 2, ¶ 18. As the parties here filed cross-motions for summary judgment, the material facts are undisputed.

UNDISPUTED MATERIAL FACTS

In October of 2023 the Village of Dousman passed Ordinance 419, an Ordinance to Create Section 3.15 of the Village of Dousman Municipal Code to Implement a Fee for Village Fire Protection Services. Dousman Ordinance § 3.15 was implemented on November 12, 2023.

Dousman Ordinance § 3.15 is entitled “Village Fire Protection Fees” and its stated purpose is to provide funding for fire protection services provided to the Village through the Western Lakes Fire Department. The ordinance imposes an annual charge on all real property in the Village. The charge is intended to be sufficient to pay Dousman’s annual contribution for those services. The charge is calculated through Domestic Use Equivalents and variables including acreage, building square footage, and outbuilding square footage. Each parcel in the village – developed or not – is charged a flat fee for land, an additional fee for land above one acre, additional fees based on the square footage of outbuildings, residential, and commercial manufacturing, and further modifiers for things such as out building improvements. According to the language of the ordinance, the actual number of fire calls for service to a specific property is not considered in calculating the charge imposed on that property.

The Village of Pewaukee contracts with the City of Pewaukee for fire and emergency medical services. Pewaukee adopted Chapter 93 of its municipal code, entitled “Fire-EMS Protection fee,” to provide a sustainable source of funds for fire and EMS services to properties within the Village. The Pewaukee charge is calculated through Emergency Service Equivalents, assigns different values by property type and square

footage, and is placed on annual property tax bills as a special charge. Unlike the Dousman ordinance, Pewaukee's ordinance charges only developed property within the village, generally assigning one ESE to each residential unit per property while assigning an ESE-multiplier to commercial, industrial, and institutional properties based on square footage. The Village's public materials describe the charge as an alternative funding method to pay for fire and EMS services rather than relying on property tax funds.

The Village of Dousman held a referendum in August of 2022 seeking authority to exceed levy limits for fire protection. The referendum failed. Dousman then pursued a fire fee, and its consultant noted that a fee would apply to all properties, including tax-exempt properties, unlike a tax.

The Village of Pewaukee likewise considered referendum funding, but Village Council members noted concerns about tax-exempt properties and the possibility that a referendum would fail. Pewaukee then implemented a fee schedule.

Both villages now contend that the charges are lawful fees used to pay third-party fire-service bills, not taxes.

SUMMARY JUDGMENT STANDARD

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. § 802.08(2). In making this determination, this Court must apply a two-step test. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15 (1987). Under the first step, this Court asks if the movant stated a claim for relief. *Id.* at

315. Under the second step, this Court applies the summary judgment statute and asks if any factual issues exist that preclude summary judgment. *Id.*

The purpose of summary judgment is “to avoid trials where there is nothing to try.” *Transp. Ins. Co. v. Hunzinger Const. Co.*, 179 Wis. 2d 281, 289 (Wis. Ct. App. 1993) (citation omitted). The present motions are based upon undisputed facts and involve facial challenges to two similar village ordinances. *Cf. Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44 n. 9 (discussing facial versus as-applied challenges to ordinance). Because “the validity of an ordinance is a question of law,” *Kaiser, v. City of Mauston*, 99 Wis. 2d 345, 353 (Ct. App. 1980), overruled on other grounds by *DNR v. City of Waukesha*, 184 Wis. 2d 178 (Wis. 1994), a court may decide the validity of an ordinance on summary judgment. *See Wis. Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, ¶¶ 1-2.

ANALYSIS

The fire protection and emergency charges in this case represent a source of revenue collected from citizens and utilized by local governments. The need for that revenue in light of growing costs is a legislative determination not before this Court. Instead, the ultimate question before the Court is under what authority, if any, did the Defendant Villages implement these fire protection and emergency charges? To answer this question, the Court accepts the parties’ invitation to first determine what these charges are – a special charge, a property tax, a fee, or some combination of these. The Court then must determine whether the charges are lawful. For the reasons set forth below, the Court concludes that these charges are invalid special charges, and they are also unlawful property taxes.

I. THE FIRE PROTECTION/EMS CHARGES ARE INVALID SPECIAL CHARGES.

Art. XI, § 3 of the Wisconsin constitution authorizes local governments to regulate local affairs. However, in Wisconsin, municipalities have no inherent powers. *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 461 (Wis. 1989). A municipality's authority in enacting an ordinance is limited by its enabling statute. *Laskaris v. City of Wisconsin Dells*, 131 Wis. 2d 525, 531 (Ct. App. 1986). When an ordinance fails to comply with the empowering statute, it is invalid. *Id.* However, an ordinance is presumed valid and lawful and the party asserting its invalidity bears the burden of proving it is invalid beyond a reasonable doubt. *Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis. 2d 397, 400-01 (1991).

All parties agree that Defendants' fire protection and EMS charges exacted via their respective ordinances are special charges. Plaintiffs argue the special charges are invalid because they fail to comply with the enabling statute, Wis. Stat. § 66.0627. Defendants contend that the special charges are within the scope of Wis. Stat. §§ 61.34, 66.0301, 66.0627, and 74.01.

To determine who is correct, we begin with the statutory language. Wis. Stat. § 74.01(4) defines a special charge as “a charge against real property to compensate for all or part of the costs to a public body of providing services to the property.”² Wis. Stat. § 66.0627(2) authorizes a governing body of a city, village or town to “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.”³ As already discussed, there is no dispute this case involves “special charges.” There is also no dispute those charges are levied against “real property.” Thus, the question is whether the *availability* of fire/EMS services constitutes “current services rendered.”

² According to Wis. Stat. § 74.01, this definition applies to Chapter 74 (“In this chapter . . .). Chapter 66 of the Wisconsin Statutes does not explicitly define “special charge.” However, there are precisely three instances within Chapter 66 where the legislature chose to clarify that the term “special charge” should be interpreted “as defined under s. 74.01(4).” See Wis. Stat. §§ 66.0305(2), 66.0809(3)(a)&(b), and 66.0907(3)(f). Nothing in Chapter 66 suggests that the term should be defined in any way other than as set forth in § 74.01(4). Furthermore, in *Rusk v. City of Milwaukee*, 2007 WI App 7, the Wisconsin Court of Appeals employed § 74.01(4)’s definition of “special charge” in the context of § 66.0627. For all these reasons, § 74.01(4)’s definition of “special charge” applies in this case.

³ As used within Wis. Stat. § 66.0627(1)(c), the term “service”

includes snow and ice removal, weed elimination, street sprinkling, oiling and tarring, repair of sidewalks or curb and gutter, garbage and refuse disposal, recycling, storm water management, including construction of storm water management facilities, tree care, removal and disposition of dead animals under s. 60.23 (20), loan repayment under s. 70.57 (4) (b), soil conservation work under s. 92.115, and snow removal under s. 86.105.

Id. The list does not include fire or EMS protection. However, “[t]he examples given in [§ 66.0627] are not meant to limit its application in any way, but merely to highlight possible uses.” *Rusk*, 2007 WI App 7 at ¶ 17. See also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) (“[T]he word ‘include’ does not normally introduce an exhaustive list . . .”).

A. Under *Town of Janesville v. Rock County*, the Fire/EMS Charges are Invalid Special Charges.

To answer this question, both sides address *Town of Janesville v. Rock County*, 153 Wis. 2d 538 (Ct. App. 1989), in which the Wisconsin Court of Appeals analyzed the town's attempt to impose special charges for fire protection on the county under the authority granted to the town by Wis. Stat. §§ 66.60(16)(a) (1987-88) (the precursor to the modern special charge statute, § 66.0627(2), which authorized towns, villages, and cities to impose special charges "for current services rendered") and 60.55(2)(b) (1985-86) (a statute authorizing a Town Board to charge property owners a fee for the cost of fire calls made to their property). The town contracted with the City of Janesville to provide fire protection services to the town. *Id.* at 436-37. When the city changed its policies, substantially increasing the cost of fire protection to the town, the town attempted to pass along the additional costs to the county since the town encompassed several county properties. *Id.* at 437.

The circuit court granted summary judgment to the county dismissing the town's claims under both statutes. The Court of Appeals affirmed the part of the circuit court's summary judgment decision dismissing the town's claims premised on § 66.60(16)(a), but reversed the summary judgment on the claims under § 60.55(2)(b) and directed the trial court to enter summary judgment in favor of the town on the issue of liability. *Id.* at 549. But in affirming the trial court's dismissal of the claims premised on § 66.60(16)(a), the *Town of Janesville* court clarified that "Section 66.60(16)(a) provides no more than an equivalent remedy, the costs of fire services on a per call basis." *Id.* at 547.

If *Town of Janesville* controls, then Defendants' ordinances do not comply with the enabling statute. This is because *Town of Janesville* stands for the proposition that Wisconsin law does not permit the villages to use special charges as a village-wide substitute for ordinary property-tax funding. See *Town of Janesville*, 153 Wis. 2d at 546-47. More specifically, 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." *Id.* at 546. Here, Defendants' fire/EMS services are always available, but not necessarily utilized by every property owner who pays the charge.

Defendants argue that *Town of Janesville* does not control because the case involved a town, not a village, and that the court's decision relied on a statute applicable only to towns, not villages. Indeed, the court specifically clarified, "We hold that sec. 60.55(2)(b) allows the town to charge the county for fire protection on a per call basis, but that sec. 66.60(16)(a) is not applicable to the facts of this case." *Id.* at 436. Defendants argue that, as a result, any discussion of sec. 66.60(16)(a) is *dicta*, and as such, "has no precedential value". Doc. 62 at 26 (citing *Steinke v. Steinke*, 126 Wis. 2d 372, 382 (Wis. 1985)).

In support of this argument, Defendants claim that when the *Town of Janesville* court wrote that special charges are not "a municipality-wide funding mechanism for items such as public schools, libraries and other municipality-wide services that are not necessarily utilized by every property owner[.]" the court was "referr[ing] to Wis. Stat. § 60.55(2)(b)[.]" Doc. 62 at 26 (citing *Town of Janesville*, 153 Wis. 2d at 546-47).

This claim is puzzling given the actual text from the *Town of Janesville* opinion: “**Section 66.60(16)(a)** 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.” *Town of Janesville*, 153 Wis. 2d at 546-47 (emphasis added). Contrary to Defendants’ assertion, this sentence undoubtedly referred to the special charges authorized by sec. 66.60(16)(a), not sec. 60.55(2)(b). And because § 66.60(16)(a) – as it existed at the time of *Town of Janesville* – was not substantively changed when it was renumbered to the modern § 67.0627(2), *Town of Janesville’s* analysis of § 66.60(16)(a) applies equally to § 66.0627(2).

Returning then to the question of whether the availability of fire/EMS services in this case constitutes “current services rendered,” under *Town of Janesville*, the answer is no. Dousman charges all real property based on acreage and building square footage, not based on fire calls made to each respective property. Pewaukee charges every developed property through an ESE formula based on property class, units, and square footage, not on actual fire calls made to each respective property. These charges are therefore not charges for services actually rendered to particular properties. Instead, they are village-wide funding formulas in conflict with the enabling statute’s requirement that “all or part of the cost” “for current services rendered” be allocated “to the property served.” See Wis. Stat. § 66.0627(2). In summary, Defendants’ ordinances do what *Town of Janesville* forbids: they spread fire-protection costs across the property tax roll without tying the charge to fire services actually rendered to the charged property.

B. Even if *Town of Janesville* Does Not Control, the Fire/EMS Charges are Still Invalid Charges.

If, as Defendants contend, *Town of Janesville* does not control here, then this case presents a question of first impression as to whether § 66.0627 authorizes a special charge for fire/EMS protection. The Court must then engage in a plain-meaning analysis of the statute. See *Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45. Defendants argue that the question is whether fire/EMS protection constitute services anticipated by the special charge statute even though they are not always in active use but are perpetually available upon demand.

Even if *Town of Janesville* does not control, the fact remains that the Court of Appeals in that case concluded that “services rendered” meant “services actually done or performed.” *Town of Janesville*, 153 Wis. 2d at 546. The “Prior-Construction Canon” of statutory interpretation mandates that *Town of Janesville’s* interpretation carries through to this case.

The Wisconsin Supreme Court explained the prior-construction canon in *Estate of Miller v. Storey*, 2017 WI 99:

"If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts . . . they are to be understood according to that construction." Scalia & Garner, *supra* ¶35, at 322-26 (Prior-Construction Canon). "A statute will be construed to alter the common law only when that disposition is clear," and "[r]epeals by implication are . . . 'very much disfavored.'" *Id.* at 318-19 (Presumption Against Change in Common Law); *id.* at 327-33 (Presumption Against Implied Repeal). In other words, legislative inaction in the wake of judicial construction of a statute indicates legislative acquiescence.

Id. at ¶ 51.

Here, following the *Town of Janesville* decision published in 1989, the Legislature understood how courts would interpret the phrase “services rendered.” With this notice, the Legislature used the exact same language when it enacted § 66.0627. This legislative inaction in the wake of judicial construction of a statute indicates legislative acquiescence, so “services rendered” as that phrase is used in § 66.0627 means the same thing here as it did in *Town of Janesville*. And as discussed above in § I.A., the availability of fire/EMS services does not fall within the meaning of providing a service actually rendered.

C. *Town of Hoard* Does Not Control.

Defendants further argue that *Town of Hoard v. Clark County*, 2015 WI App 100, makes clear that Defendants were authorized to enact the ordinances at issue here pursuant to Wis. Stats. § § 61.34, 66.0627, 66.0603, and 74.01. They note that the *Town of Hoard* court “allowed a fire protection fee to be calculated using ‘domestic user equivalents’ to assign value to properties within a town – just as was done by the villages.” Doc. 62 at 27 (citing *Town of Hoard*, 2015 WI App 100 at ¶ 6, 29.).

But while *Town of Janesville* expressly analyzed why a municipality could not rely on § 66.60(16)(a) (again, the predecessor to the modern § 66.0627(2) which applied to towns, villages, and cities) to impose a special charge for anything other than “services done or actually performed, *id.* at 546, *Town of Hoard* upheld a town’s fire-protection charge under § 60.55(2)(b), which applied only to towns. *Town of Hoard* declined to consider whether the charge was authorized under Wis. Stat. § 66.0627(2). Clearly, §

60.55(2)(b) allows towns to do what § 66.0627(2) does not allow villages. Thus, *Town of Hoard* does not aid in this Court's analysis.

II. THE CHARGES ARE UNLAWFUL PROPERTY TAXES

Plaintiffs argue in the alternative that if the Dousman and Pewaukee fire and EMS charges are not special charges, they are unlawful property taxes; and if they are not unlawful property taxes, they are unlawful fees. Defendants argue in response that the charges are fees authorized by statute.

All parties agree the fire and EMS charges are special charges. The facts support this conclusion. Having already determined that the special charges are unlawful, the Court need not address these alternative arguments. However, the record makes clear that in addition to being invalid special charges, the charges at issue in this case are also unlawful property taxes, not statutorily-authorized fees.

A. The Dousman and Pewaukee Fire/EMS Charges are Property Taxes, Not Fees.

Plaintiffs present their alternative arguments as though the Dousman and Pewaukee fire/EMS charges are either special charges, or they are unlawful property taxes, or they are invalid fees. But the Court is not so sure these classifications are mutually exclusive. In summary, the Court concludes the charges are invalid special charges, but they are also unlawful property taxes.

Wis. Stat. § 66.0627 does not indicate whether the special charges are taxes or fees. Statutes in other chapters provide some clues. Wis. Stat. § 75.001(1) defines “tax” to mean “real property taxes, special assessments as defined under s. 74.01(3), *special charges* as

defined under 74.01(4) and special taxes as defined under s. 74.01(5).” (emphasis added). “Special tax” is defined by Wis. Stat. § 74.01(5) to mean “any amount entered in the tax roll which is not a general property tax, special assessment or *special charge*.” (emphasis added).⁴ Thus, a special charge is a “tax,” but not a “special tax.”

If those statutory definitions do not resolve the issue, the caselaw does. “The purpose, and not the name it is given, determines whether a government charge constitutes a tax.” *Bentivenga v. City of Delevan*, 2014 WI App 118, ¶ 16 (citing *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d 299 (Wis. 1959)). A “fee” imposed for the purpose of generating revenue for the municipality is a tax, and without legislative permission it is unlawful. *Town of Buchanan*, 2023 WI 58 at ¶ 10 (citations omitted). 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 v. St. Bridget’s Catholic Church*, 182 Wis. 2d 436, 441 (Wis. Ct. App. 1994).

The parties extensively briefed the primary purpose test and how the facts in this case produce the parties preferred outcomes. This Court need not detail each point made by the parties. Instead, the issue boils down to the following: to distinguish taxes from fees, Wisconsin Courts distinguish “governmental” functions (funded by taxes) from “proprietary” functions (funded by fees). *See, e.g. Bargo Foods North Inc. v. Department of Revenue*, 141 Wis. 2d 589, 596-98 (Wis. Ct. App. 1987). Fire protection is a governmental

⁴ As note above in fn. 2, these definitions apply within their respective chapters, while Chapter 66 defines neither “tax” nor “special charge.” But without evidence to the contrary, and given the cross-references between Chapters 67, 74, and 75 throughout the statutes, there is no reason to question that the definitions hold true here.

function. See *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533 (Wis. 1982) (noting “fire protection” and “ensur[ing] health” are “governmental” functions). Irrespective of the anticipatory nature of the revenue, or the distinction between “general” revenue and that which is earmarked for a specific purpose, the inevitable conclusion is that the fire/EMS special charges in this case fund the governmental function of fire and EMS protection, and that governmental function benefits the entire community (including visitors), not just those who pay the special charge. The special charges in this case are therefore taxes, and because they are assessed against real property, they are property taxes.

B. The Property Taxes are Unlawful.

Having established that the special charges at issue in this case are property taxes, the Court next determines whether the property taxes are lawful.

Plaintiffs argue that the property taxes are unlawful because they violate the Uniformity Clause in Article VIII, § 1 of the state constitution. They also argue that these taxes are unlawful property taxes because they violate state statutes, and because they lack explicit statutory authority. Plaintiffs developed these arguments in both their initial brief in support of summary judgment, doc. 49, as well as their responsive brief in opposition to Defendants’ motion for summary judgment, doc. 64. Defendants had the opportunity to respond to these arguments in their responsive and reply briefs, respectively. Defendants argued exclusively that the special charges in this case were not taxes. Perhaps for strategic reasons, however, Defendants’ declined to refute the arguments that, if the special charges were deemed a “tax,” they were illegal. “Unrefuted

arguments are deemed conceded.” *State v. Verhagen*, 2013 WI App 16, ¶ 38. Because Defendants did not dispute that the special charges at issue are illegal if they are deemed a tax, the Court determines that the special charges are illegal for all the reasons articulated in Plaintiffs’ briefs.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that Plaintiffs’ motion for summary judgment (Doc. 46) is **GRANTED** and Defendants’ motion for declaratory judgment and summary judgment (Doc. 59) is **DENIED**. Plaintiffs are to prepare and file an Order for Judgment granting them judgment declaring that Defendants’ fire-protection charges, imposed pursuant to Village of Dousman Ordinance § 3.15 and Chapter 93 of the Village of Pewaukee’s Village Code, are unlawful, invalid, and unenforceable; and permanently enjoining Defendants from levying, enforcing, or collecting these fire-protection/EMS charges.