STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Town of Hoard,

Plaintiff-Respondent,

v. **APPEAL NO. 2015AP678**

Clark County,

Defendant-Appellant.

RESPONSE BRIEF OF RESPONDENT TOWN OF HOARD

Appeal of Final Order of Circuit Court for Clark County,
The Honorable Jon M. Counsell, Presiding
Circuit Court Case No. 2014CV134

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STATEMENT OF ISSUES

The Town of Hoard is part of a fire district and adopted an ordinance for funding fire protection services based on a Domestic User Equivalent (DUE) fee applicable to all properties within the district, including property owned by Clark County.

Issue I: Is the fire protection fee charged to Clark County a valid fee under Wis. Stat. § 60.55(2)(b) (2013-14)[1]?

Answered by circuit court: The circuit court ruled that—as explained by the court of appeals in *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 451 N.W.2d 436 (Ct. App. 1989) and Wis. Att'y Gen. Op., OAG-01-15 (Jan. 2, 2015)—the 1987 amendment to § 60.55(2) specifically allows a municipality to charge property owners for the cost of having fire protection services available, and does not limit a town to charging for the cost of responding to fire calls to each property.

Issue II: Is the fire protection fee independently valid as a special charge under Wis. Stat. § 66.0627(2)?

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[1] Unless otherwise noted, statutory references are to the versions in effect in 2013-14.

Answered by the circuit court: Although it did not directly address whether the fee was also valid as a special charge pursuant to Wis. Stat. § 66.0627(2), the circuit court ruled that the legislature expressly allowed municipalities to collect fire service fees via a lien on real property pursuant to § 66.0627(4).

Issue III: Does the fee imposed on Clark County constitute a tax, such that Clark County is exempt from payment pursuant to Wis. Stat. § 70.11(2)?

Answered by the circuit court: The circuit court ruled that the fee assessed to Clark County was not a tax because "the amount charged by the Town is not used to obtain general revenue for general government purposes. The amount charged is used solely for fire protection services—it covers the cost of making fire protection services available."[2]

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary, as the issues involved in this appeal are straightforward and can be addressed adequately by the parties' briefs. While the result in this case should be

[2] R.25:5; S-App 7.

fairly self-evident in light of the 1987 amendment to § 60.55, the discussion in *Town of Janesville*, and the aforementioned Attorney General Opinion, the Court's decision in this matter should be published to clarify the law relating to the above issues, as they affect all municipalities in this state and are likely to recur.

STATEMENT OF THE CASE

The Town of Hoard brought this action to collect an unpaid fee assessed to Clark County for fire protection services under a new ordinance adopted in 2013—Town of Hoard Ordinance No. 091113 ("the Ordinance" or "fire ordinance"). The Town of Hoard is statutorily obligated to provide fire protection services to property within its jurisdiction. *See* Wis. Stat. § 60.55(1)(a). To satisfy this obligation, the Town joined with other municipalities to create a regional fire district pursuant to an intergovernmental cooperation agreement. The fire district does not levy property taxes, and instead requires each municipality to contribute towards its costs equally. Before 2014, the participating

municipalities funded the fire district via general property tax levies. In 2013, municipalities within the district considered adopting a model ordinance to fund the district through a DUE cost-recovery approach, under which each property is assessed a fee based on the number of DUE units assigned to the property. Hoard adopted this model ordinance.

Clark County owns and operates the Clark County Medical Center, which is located in the Town of Hoard. As such, it was assessed a fee for fire protection services under the Ordinance for 2014. Clark County did not pay the fee and it became a lien on the Medical Center property. The County contests Hoard's ability to impose the charge claiming: 1) the Ordinance is unlawful under § 60.55(2) because the County believes this statute allows for charges to be imposed only for actually responding to fire calls; 2) the Ordinance is not lawful under § 66.0627(2) for the same reason; and 3) the fee is really a tax from which the County is exempt under § 70.11(2). None of these arguments have any merit.

First, the plain text of § 60.55(2)(b)[3] authorizes municipalities to impose fees to fund the provision of fire protection services in accordance with a written fee schedule established by a town board. There is no dispute that the fee in this case covers the cost of providing fire protection services to property in Hoard and that the fees are imposed as set forth in a written schedule adopted by the town board.

An earlier version of this statute, Wis. Stat. § 60.55(2) (1985-86)[4] allowed municipalities to impose charges only for the cost of actually responding to fire calls. Such was the holding of *Town of Janesville.* However, while the *Town of Janesville* case was pending, § 60.55(2)(a) was amended specifically to remove the "per call" limitation and to allow municipalities to impose fees for the cost of making fire protection services generally available. As reflected in the drafting files for 1987 Wis. Act. 399,[5] the statutory change was, in fact, requested by the Town of Janesville precisely for this purpose.

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[3] The current version of Wis. Stat. § 60.55 is located at S-App 63.
[4] Located at S-App 62.
[5] *See* S-App 77-82.

Moreover, this change was recognized by the court of appeals' decision in *Town of Janesville*, 153 Wis. 2d 538 at 541 n.2. And, if that was not enough, Clark County specifically requested an opinion from the Wisconsin Attorney General on this question while the present lawsuit was pending. *See* Opinion of Wis. Att'y Gen. OAG-01-15 (Jan. 2, 2015).[6] Based on the above authorities, the Attorney General concluded that the current version of § 60.55(2) allows a municipality to impose a special charge for the cost of making fire protection services generally available.[7]

Second, the fire protection fee is independently justified as a special charge under Wis. Stat. § 66.0627(2). Contrary to what the County argues, *Town of Janesville* does not hold otherwise. While the court in *Town of Janesville* held that an earlier version of § 66.0627(2) (Wis. Stat. § 66.60(16)(a) (1985-86))[8] did not authorize charges for making fire protections services generally

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[6] S-App 69, *available at* http://docs.legis.wisconsin.gov/misc/oag/recent/oag_01_15

[7] S-App 69-76.

[8] S-App 65-67. Since Wis. Stat. § 66.60(16)(a) no longer exists, all cites to this statute are to the 1985-86 version.

available, it did so due to the per call limitation in the older version of § 60.55(2)(b)—i.e. it ruled the former statute could not be used to accomplish what the latter prohibited *at the time*. 153 Wis. 2d 538 at 546-47. The per call limitation present in § 60.55(2)(b) (1985-86) no longer exists; thus, this concern is no longer valid.

Finally, there is no basis for the County to argue that the fire protection fee is a tax. It is undisputed that the monies collected from the fee do not go into the Town's general revenue fund and are instead used *solely* to offset the costs of operating the fire district. The DUE collection method is *not* akin to a property tax, as it is not based on properly value and it is not used to fund general municipal obligations. Instead, it is a valid estimate of the cost of making fire services available to each property within Hoard and used only for that purpose. The fact that unpaid charges become a lien on the property does not convert the fire service charge into a tax because § 66.0627(4) expressly provides that delinquent special charges becomes a lien

on the property on which it is imposed. Thus, none of the County's arguments have any merit.[9]

In short, the fire protection fee imposed under Ordinance No. 091113 is valid under both § 60.55(2)(b) and § 66.0627(2). Moreover, the legislature expressly authorized Hoard to collect delinquent fire service charges via a property tax lien pursuant to Wis. Stat. § 66.0627(4). The fee is not a "tax" such that the County is exempt from payment under § 70.11(2). For these reasons, the circuit court's judgment should be affirmed.

Factual Background

The following facts are undisputed and have been conceded by Clark County.[10] The Town of Hoard is a Wisconsin town located in Clark County and organized under Wis. Stat. Ch. 60.[11]

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[9] Hoard is surprised by the number of conspicuous omissions and outright misstatements made by the County in its appeal brief. The County: 1) fails to fully address the footnote in *Town of Janesville* discussing the effect of the amendment to § 60.55(2); 2) outright ignores the existence of the Attorney General Opinion it requested for this case; 3) falsely states that there is no pertinent legislative history; and 4) falsely states that Hoard conceded the fire protection charge is equivalent to a tax.

[10] The facts are based on Plaintiff's proposed findings of fact (R.8; S-App 10) and Defendant's responses thereto (R.11; S-App 17.)

[11] S-App 10, ¶ 1; S-App 17, ¶ 1.

Clark County owns and operates the Clark County Medical Center, located in the Town of Hoard.[12]

Pursuant to Wis. Stat. § 60.55(1)(a), Hoard is obligated to provide fire protection to properties within its geographic boundaries.[13] To fulfill this statutory mandate, Hoard joined with other municipalities—the City of Owen, the Villages of Withee and Curtiss, and the Towns of Hixon, Longwood, and Green Grove—to create the Owens-Withee-Curtis Fire District for the purpose of providing fire protection services to the areas within each municipality.[14] The Fire District was created on December 17, 2012, pursuant to an "Intergovernmental Cooperation Agreement" between these municipalities.[15]

The Fire District does not levy property taxes to fund its operations. Instead, the majority of financial support for the Fire District is provided by the municipalities.[16] Pursuant to the

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[12] S-App 13, ¶ 25; S-App 18, ¶ 25.
[13] S-App 10, ¶ 2; S-App 17. ¶ 2.
[14] S-App 11, ¶¶ 3, 5; S-App 17, ¶¶ 3, 5.
[15] S-App 11, ¶ 4; S-App 17, ¶ 4.
[16] S-App 11, ¶ 6; S-App 17, ¶ 6.

Cooperation Agreement, each municipality is required to contribute an equal share towards the cost of operating the district and to fund its capital needs.[17] Funding from the municipalities allows the district to acquire equipment and facilities for the suppression of fires and to employ experienced and trained personnel to provide fire protection services.[18] In other words, the funding from the municipalities pays the cost of operating and maintaining the Fire District—that is, the cost of making fire protection services available.[19]

Before 2014, the municipalities in the Fire District funded their respective contribution by general tax levies.[20] Properties within each municipality that were exempt from local taxation were not subject to the levy and instead paid only for charges

[17] S-App 11, ¶ 7; S-App 17, ¶ 7.
[18] S-App 11, ¶ 8; S-App 17, ¶ 8.
[19] To avoid confusion, Hoard notes that the County utilizes the phrase "fire protection services" to mean the act of actually responding to individual fire calls. Consistent with its Ordinance and Wis. Stat. § 60.55(2)(b), Hoard uses the phrase "fire protections services" to mean the act of operating and maintaining an efficient fire protection service, separate from responding to individual fire calls.
[20] S-App 11, ¶ 9; S-App 17, ¶ 9.

associated with responding to actual fire calls.[21] The municipalities asked the Fire District to research alternative funding methods to a general tax levy that would fairly distribute the cost of fire protection services among all property owners within each municipality.[22]

The Fire District's research identified two alternative methods for cost recovery: (1) a fire protection charge based on a Domestic User Equivalent (DUE); and (2) a fire protection charge based on property valuation.[23] The district also provided model ordinances reflecting each method and recommended that each municipality adopt one of them.[24]

Under the DUE cost-recovery method, each property in a municipality is assigned a numerical value expressed in DUE units. The "base" DUE unit is an average single family residence, such that as the size of a house or other structure on a given

[21] S-App 11, ¶ 10; S-App 17, ¶ 10.
[22] S-App 12, ¶ 11; S-App 18, ¶ 11.
[23] S-App 12, ¶¶ 12-13; S-App 18, ¶¶ 12-13.
[24] S-App 12, ¶¶ 14-15; S-App 18, ¶¶ 14-15.

property increases, the number of DUE units increases as well.[25] The total yearly amount of the municipality's contribution to the Fire District is divided by the number of DUE units within its jurisdiction to reach a dollar amount per DUE unit.[26] Once this amount is calculated, the special fee applicable to any given property within the municipality is determined by multiplying the dollar amount per DUE unit by the number of DUE units assigned to that property.[27]

On September 11, 2013, Hoard's town board enacted Ordinance No. 091113,[28] which imposes a special annual charge on properties located within Hoard for the provision of fire protection services according to a written schedule based on the DUE method of cost-recovery.[29] Under the written schedule of charges, 1.0 DUE equals 1500 square feet of floor space in structure. A single-family residence of 1500 square feet is

[25] S-App 12, ¶¶ 16-17; S-App 18, ¶¶ 16-17.
[26] S-App 12, ¶ 18; S-App 18, ¶ 18.
[27] S-App 12, ¶ 19; S-App 18, ¶ 19.
[28] S-App 13, ¶¶ 20-23; S-App 18, ¶¶ 20-23.
[29] *See* S-App 58-59 (Ordinance) and S-App 60-61 (schedule of charges).

assigned a DUE of 1.0, while a hospital is assigned a DUE of 1.5 per 1,000 square feet.[30]

The monies collected through the Ordinance are "used solely for fire protection services—it covers the cost of making fire protection services available."[31] The fees generated by the Ordinance are "not used to obtain general revenue for general governmental purposes" and are not "used for anything other than providing fire protection services."[32]

Procedural Posture

Acting pursuant to the Ordinance, Hoard charged the County—as owner of the Clark County Medical Center—$3,327.68 for fire protection services, payable by January 31, 2014.[33] The County refused to pay this amount.[34] Shortly before payment was due, Clark County Corporation Counsel requested an opinion from the Wisconsin Attorney General as to the legality

[30] S-App 60.
[31] R.25:5; S-App 7.
[32] *Id.*
[33] S-App 13, ¶ 26; S-App 18, ¶ 26.
[34] S-App 13, ¶¶ 27-28; S-App 18-19, ¶¶ 27-28.

of the Ordnance and whether the County was exempt from the charge.[35]

Hoard filed suit on July 30, 2014, seeking a declaration that Ordinance No. 091113 is valid, that it lawfully imposed the special charge for fire protections services on Clark County, and ordering Clark County to pay said charges.[36] Hoard then moved for summary judgment, and the parties submitted proposed findings of fact, conclusions of law, affidavits, and briefs relating to the motion.[37]

On January 2, 2015, the Wisconsin Attorney General issued OAG-01-15 opining that: 1) pursuant to Wis. Stat. § 60.55(2)(b), a town may assess a fire protection charge for making fire protection services generally available; and 2) that a County is not exempt from such a charge.[38] The Attorney General opinion was provided to the circuit court.[39]

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[35] R.23:7; S-App 75-76.
[36] R.2; S-App 52.
[37] R.6 through R.20.
[38] R.22; S-App 69-74.
[39] R.28.

On February 19, 2015, the circuit court entered its decision granting Hoard's motion for summary judgment.[40] The Court ruled that the current version of § 60.55(2) allows towns to impose special charges for the cost of providing fire protection services generally and that they are not limited to charging for the actual cost of responding to fire calls.[41] The court explained that the holding in *Town of Janesville,* 153 Wis. 2d 538, did not apply because the version of the statute in effect at the time that case was decided had been amended to remove the limitation on charging fees for responding to fire calls:

> There is absolutely no reference to a town charging only for calls made to a particular property [in the current statute]. That language in the older statute has been removed and replaced. Under the new language, the town can charge the cost of having fire protection made available to all properties in the town.[42]

The circuit court also explained that the analysis in the recent Attorney General Opinion, which examined the legislative

[40] R.25; S-App 3.
[41] R.25:2; S-App 4.
[42] R.25:3; S-App 5.

history of § 60.55(2), supported its holding.[43] "[T]he legislature changed what a town can collect and how it can collect."[44]

In addition, the circuit court ruled that the special fire protection charge was not a tax. It rejected the County's argument that the manner of collecting the fee—a lien on real property—rendered it a tax because § 66.0627(4) specifically authorizes special charges to be collected via a lien on real property.[45] The court also rejected the County's argument that the DUE fee structure was an arbitrary fee and equivalent to a property tax, explaining "[t]his argument ignores the change in the statutory language enacted by the legislature [in § 60.55]."[46]

As such, the circuit court entered judgment in favor of the Town of Hoard on March 5, 2015, declaring: 1) the Town had legal authority to impose a special annual charge on Clark County for fire protection services under §§ 60.55 and 66.0627; 2) Ordinance No. 091113 is legally valid and enforceable; and 3) the

[43] R.25:6-7; S-App 8-9.
[44] R.25:6; S-App 8.
[45] R.25:5; S-App 7.
[46] R.25:6; S-App 8.

County is required to pay the $3,327.68 charge for 2014, plus interest.[47]

For the reasons set forth below, the judgment should be affirmed.

STANDARD OF REVIEW

This case involves application of several statutes to a relatively undisputed set of facts. As such, this Court's review is de novo. *Bank Mut. v. S.J. Boyer Constr., Inc.,* 2010 WI 74, ¶ 21, 326 Wis. 2d 521, 785 N.W.2d 462.

ARGUMENT

I. Section 60.55(2)(b) Was Amended Specifically To Permit Municipalities to Impose Fees For The Cost of Providing Fire Protection Services Generally And To Remove The "Per Call" Charge Limitation.[48]

Wisconsin Stat. § 60.55(1)(a) requires a town to provide fire protection for its residents and allows it to join together with other municipalities for the purposes of establishing a joint fire

[47] R.26; S-App 1.

[48] Clark County's Brief begins its analysis by discussing whether the Ordinance was valid under Wis. Stat. § 66.0627(2). However, Hoard has always relied upon § 60.55(2)(b) as the principal means by which the Ordinance is valid, although it is also supportable under § 66.0627(2). As such, this Response Brief first addresses § 60.55(2)(b).

department. Wis. Stat. § 60.55(1)(a)2. Subsection (2) of the statute provides four means by which a town may fund such a fire department:

> (a) Appropriate money to pay for fire protection in the town.
> (b) Charge property owners a fee for the cost of fire protection provided to their property under sub. (1) (a) according to a written schedule established by the town board.
> (c) Levy taxes on the entire town to pay for fire protection.
> (d) Levy taxes on property served by a particular source of fire protection, to support the source of protection.[49]

The question here is whether the Town of Hoard Ordinance No. 091113 is authorized by the second option. Applying the established rules of statutory construction, it is clearly is.

> Statutory interpretation begins "with the language of the statute." Statutory language "is given its common, ordinary, and accepted meaning." If the statute's meaning is plain, there is no ambiguity, and the statute is applied according to its terms. However, if a statute "is capable of being understood by reasonably well-informed persons in two or more senses," the statute is ambiguous, and we may consult extrinsic sources, such as legislative history.

County of Dane v. Labor & Indus. Rev. Comm'n, 2009 WI 9, ¶ 21, 315 Wis. 2d 293, 310, 759 N.W.2d 571 (internal citations omitted) (quoting *State ex rel. Kalal v. Cir. Ct. for Dane County*,

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[49] S-App 63 (emphasis added).

2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). Town of Hoard Ordinance No. 091113 is authorized by plain language of § 60.55(2)(b) in that it imposes a fee on property owners in the Town for the cost of fire protection, as set according to a written schedule that was adopted by the town board. Indeed, Clark County expressly conceded these facts.[50] On its face, the Ordinance complies with the statute.

Clark County argues that subpara. (b) means that a town may impose a fee only for the cost of actually responding to fire calls to specific properties. However, the statute does not say this. There is no language in the statute that can be construed as limiting a municipality to imposing charges only for the cost of responding to fire calls to specific properties. That textual limitation simply does not exist. Rather, the statute refers to "protection provided." The common definition of "protection" is:

> : the state of being kept from harm, loss, etc. : the state of being protected
> : something that keeps a person or thing from being harmed, lost, etc. : something that protects someone or something
> . . . .

[50] *See* R.8, ¶¶ 20-23; S-App13/R.11, ¶¶ 20-23; S-App 17.

Merriam-Webster Online, *available at* http://www.merriam-webster.com/dictionary/protection. That is precisely what the Fire District does. It provides fire protection for the properties located in the district. By participating in the Fire District, Hoard is ensuring that the properties within its jurisdiction are in a "state of being protected" for fire and "being kept from harm, loss" due to fire.

There is no ambiguity in the statute. But, even if there were, Clark County's argument is not tenable in light of the clear legislative history of § 60.55(2)(b). The fundamental problem for Clark County is that the per-call limitation it wants the Court to read into the statute was present in a previous version of § 60.55(2), and was removed for the express purpose of allowing municipalities to charge for the cost of making fire protection generally available.

Prior to 1987, § 60.55(2) (1985-86) read as follows:

> The town board may:
> (a) Appropriate money to pay for fire protection in the town.
> (b) Charge property owners a fee for the cost of fire calls made to their property.

(c) Levy taxes on the entire town to pay for fire protection.
(d) Levy taxes on property survived by a particular source of fire protection, to support the source of protection.[51]

By virtue of 1987 Wis. Act 399,[52] the underscored portion of the statute was replaced with the current language such that "calls made" was replaced with "protection provided." As shown below, this change was made for the express purpose of authorizing the type of charge imposed by Hoard in this case.

A. *Town of Janesville* Addressed a Previous Version of § 60.55(2) That Limited Fees to Responding to Fire Calls.

The former version of § 60.55(2) was at issue in *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 540, 451 N.W.2d 436 (Ct. App. 1989). There, the Town of Janesville contracted with the City of Janesville to provide fire protection services to the town. Several properties owned by Rock County were located in the town. *Id.* at 540-41. Although the town did not initially bill the county for fire service charges, it began doing so after the city substantially increased its fees. *Id.* at 541. The town calculated

[51] S-App 62 (emphasis added).
[52] S-App 83-85.

the amount of the charges to Rock County based on the property values of the various county parcels located in the town. *Id.* at 545.

Janesville agreed that § 60.55(2)(b) limited it to charging for fire services "on a per call basis"; however, it claimed that the charges were proper under then § 66.60(16)(a),[53]—now § 66.0627(2)—which provided general authority for municipalities to impose special charges for municipal services.[54] The court disagreed, ruling that "[i]t is sec. 60.55 that obligates the town to provide these services for the county, and it is under that statute the town should proceed." *Id.* at 547. In a footnote, the court explained that it was addressing only the applicability of the older version of § 60.55(2)(b), and not the recent amendment to the statute, which had substantively altered the meaning of this provision:

> Section 60.55(2)(b) currently reads: "Charge property owners a fee for the cost of fire protection provided to their property under sub. (1)(a) according to a written schedule established by the town board." However, the applicability of the current sec. 60.55(2)(b) was neither briefed nor addressed by the trial court.

[53] S-App 67.
[54] S-App 64.

> Therefore, this decision only concerns itself with the period from January 1, 1987, until May 16, 1988. We also reject both parties' arguments that the current sec. 60.55(2)(d) is merely a clarification of the old statute. The present language regarding a schedule of fees and the removal of the "per call" limitation are substantive changes with no retroactive effect.

Id. at 541 n.2 (emphasis added). Clark County inexplicably ignores this footnote in its brief.

In short, the holding in *Town of Janesville* is not applicable to the present case. The court in *Town of Janesville* recognized that the result *would* be different under the current version of the statute, as the 1987 amendment[55] effected a "substantive change" by "removal of the 'per call' limitation." *Id.* The legislative history of § 60.55(2) confirms this.

B. Section 60.55(2) Was Amended Specifically in Response to *Town of Janesville* to Allow Charges For The Cost of Making Fire Services Generally Available.

While recognizing the change to § 60.55(2), Clark County disingenuously argues that the change from "fee for the cost of fire calls made to their property" to "fee for the cost of fire protection provided" was not meant as a substantive change and

[55] Section 60.55(2) was amended via 1987 Wis. Act. 399, § 200j, eff. May 17, 1988. *See* S-App 83-85.

has no impact on this case.[56] That is, Clark County argues that the change to § 60.55(2) was not meant to allow municipalities to charge for the cost of providing fire protection services in general, rather than the cost of responding to individual fire calls at specific properties. In making this argument, the County states that there is a "lack of informative legislative history" as to § 60.55(2) and that the drafting records "shed little to no light on the legislature's intent."[57] These assertions are demonstrably false.

Clark County willingly ignores the fact that § 60.55(2) was amended in response to a request by the Town of Janesville to expressly allow the charges at issue in the *Town of Janesville* lawsuit. Indeed, the drafting files for 1987 Wis. Act 399 include a letter from the Town of Janesville to the State Senator Gary Gorke explaining the need for the change in the statutory language *because of the lawsuit*.[58] The letter includes proposed statutory language that is identical to the present statute and,

[56] App. Br. at 20.
[57] App. Br. at 20.
[58] S-App 78.

more importantly, indicates that the Senator Gorke was provided with a copy of the summons and complaint from the *Town of Janesville* lawsuit. The letter provides:

> Gary R. Goyke
> 22 North Carroll
> Madison, WI 53703
>
> Re: Town of Janesville
>
> Dear Mr. Goyke:
>
> On behalf of my client, the Town of Janesville, I can report to you that all members of the Town Board of the Town of Janesville are in agreement and urge the following revision to existing Wisconsin Statute Section 60.55(2)(b):
>
> > "60.55. Fire Protection (2) Funding. The Town Board may:
> > (b) Charge property owners for the cost of fire protection provided to their property under sub (1)(a)."
>
> I am also enclosing at your request two additional copies of the Summons and Complaint filed by the Town of Janesville in the Circuit Court for Rock County against the County of Rock.
>
> We would appreciate it if you would keep us closely posted on behalf of our client as your assistance continues there in Madison.

[59]

Unsurprisingly, the analysis of the statutory change from the Legislative Reference Bureau indicates that the intent of the amendment was to remove the "per call" limitation and allow municipalities to charge for the cost of providing fire protection services generally:

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[59] S-App 84.

> Analysis by the Legislative Reference Bureau
>
> Under current law, towns may charge property owners a fee for fire calls made to their property. This bill authorizes towns to charge property owners a fee for fire protection provided to their property.
>
> For further information, see the local fiscal estimate which will be printed as an appendix to this bill.[60]

Note that the LRB analysis indicates that the change was expected to affect the finances of local municipalities. In other words, the LRB analysis indicates that the intent of the statutory change was to broaden the scope of the charges authorized under § 60.55(2) from charges relating to responding to specific fire calls to charges for the cost of providing fire protection in general.

In short, the legislative history wholly supports Hoard's interpretation of § 60.55(2). The statute previously allowed municipalities only to charge fees for the cost of responding to actual fire calls to specific properties. But, it was amended while *Town of Janesville* was in litigation to allow municipalities to impose special charges for the cost of providing fire protection generally.

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[60] S-App 86 (emphasis in original).

C. The Attorney General Agrees That The Fees Imposed Under Hoard's Ordinance Are Permissible Under § 60.55(2).

While an opinion from the Attorney General is not binding on this Court, it is "entitled to such persuasive effect as the court deems the opinion warrants." *Hahner v. Bd. of Educ.,* 89 Wis. 2d 180, 192, 278 N.W.2d 474 (Ct. App. 1979). Here, opinion OAG-01-15 is persuasive as it was specifically requested by Clark County relating to the facts of this case, the analysis follows established methods of statutory interpretation, and the opinion is consistent with the legislative history of § 60.55(2).[61]

The Attorney General opinion explains: "The legislature's use of the term 'protection' in the statute suggests that it was contemplating the assessment of fees for general fire safety rather than for individual fire calls actually made."[62] Moreover, the opinion explains that the fact that the legislature authorized municipalities to charge a fee for fire protection in accordance

[61] Oddly, despite specifically requesting this opinion, Clark County does not even bother mentioning it to this Court or attempt to explain why it believes the Attorney General's rational is incorrect.
[62] R.22:2; S-App 71.

with a written schedule indicates that the fee was not restricted to a per-use fee: "If the statute were intended to allow a charge only for fire calls actually made, the town would not have the ability to calculate charges based on 'a written schedule.' The 'written schedule' language would be superfluous."[63]

Next, examining the legislative history of § 60.55(2) and the analysis from the LRB discussed above, the Attorney General correctly concludes that "when the legislature changed the law, it intended to permit a town to assess a fee for the costs of fire protection services generally, even if no fire calls have been made to that property."[64] The Attorney General further notes that the LRB analysis "treats the term 'fire protection' as permitting charges relating to the costs of fire protection as distinct from the cost of a fire call at a particular property."[65]

Thus, the Attorney General Opinion is persuasive authority that supports Hoard's position and the circuit court's judgment.

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[63] R.22:2-3; S-App 70-71.
[64] R.22:3; S-App 71.
[65] R.22:4; S-App 72.

D. Clark County's Statutory Arguments Are Not Persuasive.

Clark County makes two principal arguments in favor of interpreting the current version of § 60.55(2) to mean the same thing as its predecessor. First, Clark County argues that "under [the Town's] interpretation, subsection 2(c) is subsumed by subsection (2)(b) and rendered meaningless."[66] Second, Clark County argues that under the Town's interpretation "the language 'provided to their property' is not only rendered meaningless, it is rendered meaningless *and* creates needless confusion."[67] Neither argument has merit.

First, there is no danger that the Town's interpretation of § 60.55(2) results in subpara. (c) being subsumed by subpara. (b). These subparagraphs provide two distinct methods of cost recovery:

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[66] App. Br. at 16.

[67] *Id.* Both arguments involve the assertion that Hoard has somehow conceded that the fee charged by the Ordinance is the same as a tax because the fee is "calculated and collected in the exact same manner as a property tax." *Id.* This assertion is false. However, as this mischaracterization also features prominently in the County's argument that it should be exempt from the fee under § 70.11(2), Hoard addresses it in section III, *infra.*

> (b) Charge property owners a fee for the cost of fire protection provided to their property under sub. (1)(a) according to a written schedule established by the town board.
> (c) Levy taxes on the entire town to pay for fire protection.

Wis. Stat. § 60.55(2). The Ordinance does not purport to "levy taxes on the entire town." Rather, it charges property owners a set fee in accordance to a written schedule based on the DUE methodology, which has nothing to do with the value of the property. The County's argument that "[s]ubsection 2(b) already authorizes the funding method set forth in subsection 2(c)"[68] simply makes no sense. Section 60.55(2)(b) does not authorize funding via property taxes, plain and simple.

Moreover, as the Attorney General recognized, it is Clark County's interpretation of § 60.55(2)(b) that renders the statutory language superfluous.[69] If the County is correct that the statute limits municipalities to imposing fees based solely on the actual cost of responding to fire calls at a particular property, then the added language "according to a written schedule" is meaningless. That is, the statute expressly contemplates that the "written

[68] App. Br. at 17.
[69] R.22:2-3; S-App 70-71.

schedule" of fees will be different than the actual cost of responding to calls at a particular property—otherwise, there would be no need for a schedule.

The County's next argument—that the Town's interpretation of § 60.55(2)(b) is overbroad and will create confusion—is similarly illogical and without merit. The County's "confusion" argument is based on the erroneous assertion that the Town's interpretation of § 60.55(2)(b) "greatly expands" the statute and allows "fees calculated using any other method and collected exactly as property taxes."[70] This hyperbole is flatly inconsistent with the statutory text. A charge under § 60.55(2)(b) is limited to "a fee for the cost of fire protection provided to their property under sub. (1)(a) according to a written schedule established by the town board." The statute requires that the fee be based on a set written schedule. It does not allow a fee to be imposed "using any other method."

The County is also concerned that an unpaid fire protection fee becomes a lien against real property and can be added to the

[70] App. Br. at 18.

property tax role, thereby, in its view, making the fee indistinguishable from a tax. However, as the circuit court recognized, this argument is a non-starter because the legislature specifically chose to allow fees *and* taxes to be collected via a lien of real property.[71] Section 66.0627(4) provides, in pertinent part: "A delinquent special charge becomes a lien on the property against which it is imposed as of the date of delinquency. The delinquent special charge shall be included in the current or next tax roll for collection and settlement under ch. 74."

Finally, the County's argument that the Town's interpretation of the statute renders the phrase "provided to their property" meaningless[72] is meritless. This argument is based on the erroneous notion that the there is no fire protection being provided to a property absent a response to an actual fire call. However, it is undisputed that the ongoing maintenance and operation of the Fire District itself provides fire protection to the properties located in Hoard. Clark County has conceded that

[71] R.25:5; S-App 7.
[72] App. Br. at 19.

"[f]unding from the Municipalities allows the Fire District to acquire equipment and facilities for the suppression of fires, and to employ experienced and trained personnel to provide fire protection services."[73] Stated differently, the mere existence of the Fire District provides fire protection to properties within each municipality. Thus, the phrase "fire protection provided to their property" is not rendered meaningless by allowing municipalities to charge a fee for the cost of making that protection available.

Thus, none of the County's textual arguments that attempt to limit the scope of § 60.55(2)(b) have any merit. The statutory text, legislative history, and caselaw all support the circuit court's conclusion that the fire protection fee imposed under Hoard's Ordinance is permissible under § 60.55(2)(b) and the charges imposed on Clark County were lawful.

[73] R.8, ¶ 8, S-App 11; R.11, ¶ 8, S-App 17.

II. Section 66.0627(2) Independently Authorizes Special Charges For The Cost of Providing Fire Protection Services.

Independent of § 60.55(2)(b),[74] the charges imposed by the Ordinance are lawful pursuant to § 66.0627(2).[75] This section states:

> (2) Except as provided in sub. (5) [pertaining to storm water management], 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. The authority under this section is in addition to any other method provided by law.

A list of "services" is enumerated in § 66.0627(1)(c). While fire protection is not expressly included on the list, it is established that "Wisconsin Stat. § 66.0627 has been broadly interpreted. The examples given in the statute are not meant to limit its application in any way, but merely to highlight possible uses." *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶ 17, 298 Wis. 2d 407, 727 N.W.2d 358.

Indeed, in *Town of Janesville*, the court specifically ruled

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[74] If the Court concludes that the Ordinance is lawful under § 60.55(2)(b), it need not address whether it is valid under § 66.0627.
[75] *See* S-App 64.

that the predecessor to this statute, § 66.60(16)(a),[76] was broad enough to cover fire protection. 153 Wis. 2d at 546 ("we cannot draw a principled distinction between services such as snow removal and fire protection"). There is no material difference between the language of § 66.60(16)(a) and § 66.0627 in this respect.[77] *Town of Janesville* indicated that courts construed § 66.60(16)(a) "quite broadly" and "approved levying charges on a district basis, even when a property is not specially benefited by the service." 153 Wis. 2d at 546.

Nonetheless, the court in *Town of Janesville* held that the town's fire charges could not be justified in that case under this provision because "the statute allows a special charge only for services which are actually performed." *Id.* at 546. That is, the court held that the Town of Janesville could not use § 66.60(16)(a) to justify charging Rock County for the cost of providing fire protection beyond the cost of responding to actual fire calls.

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[76] *See* S-App 65.

[77] 199 Wis. Act 150, § 170 restated, renumbered, and expanded the scope of § 66.60(16)(a)—now § 66.0627. *See* S-App 86-87.

While Clark County asserts that *Town of Janesville* forecloses Hoard's reliance on § 66.0627(2), it ignores the fact that the versions of § 60.55(2) and § 66.0627(2) currently in effect are different than those considered in *Town of Janesville*. Recall that at the time, § 60.55(2) (1985-86) allowed only fire charges relating to responding to actual fire calls. Reading the two provisions *in pari materia*, the court concluded that the language in § 66.60(16)(a) "limits the town to charging only for services actually provided and not for services that may be available but not utilized." 153 Wis. 2d at 546. Essentially, the court in *Town of Janesville* held that the town could not use § 66.60(16)(a) to accomplish what it could not under then § 60.55(2). *See id.* at 547 ("this case is best served by proceeding under sec. 60.55(2)(b). Section 66.60(16)(a) provides no more than an equivalent remedy . . . .").

As discussed above, § 60.55(2) was expanded to allow municipalities to charge for the cost of providing fire protection—not just responding to fire calls. Thus, the "service" at issue in the

present case is entirely different than that "service" at issue in *Town of Janesville*. The "service" at issue here is the continued operation and maintenance of the Fire District. Likewise, the Note to 1999 Wis. Act 150, § 170, specifically indicates that § 66.0627(2), was intended to "expand" the types of services covered by special charges beyond those contained in § 66.60(16)(a).[78] And, § 66.0627(2) states: "The authority under this section *is in addition to* any other method provided by law." (Emphasis added).

For these reasons, the holding in *Town of Janesville* relating to § 66.60(16)(a) does not control, and current § 66.0627(2) provides an independent basis for ruling that fees imposed under Hoard's Ordinance are lawful.

III. The Special Charge is Not a Tax Because it is Used Solely To Offset The Costs of Providing Fire Protection Services To Properties in The Fire District.

Clark County's final argument is that even if the fire protection fee was lawfully imposed under either § 60.55(2)(b) or § 66.0627(2), the County is nonetheless exempt from paying by

[78] S-App 87.

virtue of Wis. Stat. § 70.11(2) because the fee is no different than a tax. While Hoard does not dispute that Clark County is immune from general property taxes under § 70.11(2), the fire protection fee charged under the Ordinance simply is not a tax.

Before addressing the test established by caselaw to determine if a charge is a fee or a tax, Hoard must address the County's repeated false statement that Hoard has conceded that the fee charged by the Ordinance is the same as a tax and that fee is "calculated and collected in the exact same manner as a property tax."[79] Hoard has not conceded that the fee imposed by the Ordinance is the same as a property tax or that it is calculated in the same manner based on the value of the property.

The portion of the record to which Clark County cites for this supposed "concession"[80]—the Fire District's analysis of the two proposed model ordinances—shows the exact opposite. As

[79] *See, e.g.* App. Br. at 16.

[80] Clark County cites to R.9, pp. 4-6 for this erroneous proposition. R.9 is the Affidavit of Mark Renderman. There is no page 4-6 of the affidavit. Hoard assumes the County is referring to the analysis of the proposed model ordinance that was attached to Mr. Renderman's affidavit.

noted above, the Fire District initially proposed two distinct alternatives to funding the district in a manner other than a property tax: the DUE method which was eventually adopted, and a property valuation method.[81] The analysis of these two separate methods of cost recovery indicates that the DUE methodology is based on square footage. "The intent is to equate [a single DUE] with a single-family residence. The basis of the equation is for the number of square feet. . . . As the size of the house increases, the number of DUEs increases."[82] In fact, Clark County conceded that the charge imposed under the Ordinance is based on a written schedule and *"[t]he schedule apportions the special charge on the basis of the size and nature of the property*."[83]

In contrast, the *second* proposed model ordinance, which was not adopted by Hoard, utilized a methodology based on property value.[84] Thus, contrary to what the County asserts, the

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[81] R.9, Ex. 1 at 1-3; S-App 42-44.
[82] R.9, Ex. 1 at 2; S-App 43.
[83] R.8, ¶ 22, S-App13; R.11, ¶ 22, S-App 17 (emphasis added).
[84] R.9., Ex. 1 at 2-3; S-App 43-44.

record illustrates that the DUE methodology is not based on property value and that this methodology was developed specifically to distinguish it from a property tax.

The analysis courts utilize to distinguish a fee from a tax demonstrates that the fire protection charge is not a tax. "[T]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities." *City of River Falls v. St. Bridget's Catholic Church*, 182 Wis. 2d 436, 441-42, 513 N.W.2d 673 (Ct. App. 1994). That is, "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. *See also Bentivenga v. City of Delavan*, 2014 WI App 118, ¶ 6, 358 Wis. 2d 610, 856 N.W.2d 546 ("The purpose, and not the name it is given, determines whether a government charge constitutes a tax.").

The court in *City of River Falls* held that the municipal fire protection charge at issue there was a fee and not a tax, explaining:

> Because the purpose of the PFP charge 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, its substance is consistent with a fee, not a tax.

182 Wis. 2d at 443.

In contrast, in *Bentivenga*, 2014 WI App 118, the court concluded that a "fee in lieu of a room tax" imposed by the City of Delevan was actually a tax. The "fee" was calculated utilizing a base monthly charge "and linked future increases to the consumer price index or to the average room tax collected from the units rented to the public at the resort." *Id.*, ¶ 3. This Court determined that the "fee" was actually a "tax" because the primary purpose of the charge was to raise general revenues for the city and because the charge was enforced proportionally:

> We find that the City's "fee in lieu of room tax" is a tax. The "fee" is enforced proportionally by the City against the Owners (via the Association) by unit based on their decisions to not rent those units to the public. The revenue collected from the Owners is not dedicated to the provision of any service or regulation but purely for general government revenue. Indeed,

> the revenue collected from the Owners has been designated to supplant taxes that the City contends it would otherwise be able to lawfully collect if the Owners rented out their units to the public. Increases in the fee are linked to increases in the consumer price index or average room tax collections at the resort, not the expense of any specific governmental services.

Id., ¶ 7.

Here, based on a "primary purpose" test, it is clear that the fire charge imposed under the Ordinance is a fee, not a tax. It is undisputed that the monies generated from the challenged fee are used solely for purposes of covering the expenses of the fire district. "Funding from the Municipalities allows the Fire District to acquire equipment and facilities for the suppression of fires, and to employ experienced and trained personnel to provide fire protection services."[85] As explained by the circuit court:

> It is clear that the amount charged by the Town is not used to obtain general revenue for general government purposes. The amount charged is used solely for fire protection services—it covers the cost of making fire protections services available. The County has produced no evidence to show that the fees the Town collects are used for anything other than providing fire protection services.[86]

[85] R.8, ¶ 8, S-App 11; R.11, ¶ 8, S-App 17.
[86] R.25:5; S-App 7 (emphasis added).

In short the undisputed facts show that "the primary purpose of [the] charge is to cover the expense of providing [fire protection] services." *City of River Falls,* 182 Wis. 2d at 442.

Nonetheless, Clark County argues that the fire protection fee has other characteristics of a tax. It claims that the fee becomes a lien on property if not paid. While this is certainly *one* characteristic of a tax, this fact is meaningless here because, as explained above, the legislature expressly allows special charges to be collected via this method under § 66.0627(4). Indeed the very definition of a "special charge" is "an amount entered in the tax roll as a charge against real property to compensate for all or part of the costs to a public body of providing services to the property." Wis. Stat. § 74.01(4). To hold that a special charge is a tax because it is entered on the tax roll when delinquent would eviscerate the definition of the term.

Clark County also unconvincingly argues that "aside from being calculated using a DUE method rather than a property valuation method, the fire protection charge is indistinguishable

from a property tax[.]"[87] However, this distinction makes all the difference.[88]

The DUE methodology attempts to estimate the cost of providing fire protection services to each property based on the nature of the property and its size in comparison to a single family home. Increases in the fee are not based on a proportional land valuation or a floating metric, as was the case in *Bentivenga*, 358 Wis. 2d 610, ¶ 7. Rather, variations in the fee are based on an estimate of the expense of providing fire protection to each property. *Compare id.* ("Increases in the fee are linked to increases in the consumer price index or average room tax collections at the resort, not the expense of any specific governmental services").

Moreover, it is significant that the legislature expressly recognized that a municipality could raise money for providing fire protection in one of four ways—only two of which involve levying taxes:

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[87] App. Br. at 25.

[88] Clark County again falsely claims that "the Town concedes the lone difference is immaterial." App. Br. at 25. Hoard has done no such thing.

> (a) Appropriate money to pay for fire protection in the town.
> (b) Charge property owners a fee for the cost of fire protection provided to their property under sub. (1) (a) according to a written schedule established by the town board.
> (c) Levy taxes on the entire town to pay for fire protection.
> (d) Levy taxes on property served by a particular source of fire protection, to support the source of protection.

Wis. Stat. § 60.55(2). Under statute, a fee based on a written schedule established by the town board is not a tax. The fact that the legislature provided four different options for funding demonstrates that it recognized a fundamental distinction between fees and taxes. To conclude that a fee imposed under § 60.55(2)(b) is a tax would eliminate one of the four options the legislature specifically provided.

Finally, there is no indication that the legislature intended to exempt municipalities from contributing to the cost of providing fire protection services. Indeed, *Town of Janesville* indicates that the legislature was well aware of the need for municipalities to contribute to the cost of fire protection, as the court there explained:

> The intent of sec. 60.55 appears clear; the legislature decided that towns should provide adequate fire service and have the ability to fund it. Although we cannot say exempting other governmental units from fire call fees would render the

> accomplishment of these intentions impossible, it would place a heavy burden on some towns. . . . The town's ability to fund and provide adequate fire protection services, as mandated by the state, would be similarly hampered if it were forced to bear the full cost of serving county properties within its boundaries.

Town of Janesville, 153 Wis. 2d at 544-45.

As such, there is no basis for the Court to conclude that the fire protection fee Hoard charged to Clark County is a tax, such that the County is exempt from payment.

CONCLUSION

For these reasons, this Court should affirm the circuit court's judgment.

Dated this 15th day of July, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) & (c) as to form and certification for a response brief and appendix produced with a proportional serif font (Century 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this Brief is 8487 words.

Dated this 15th day of July, 2015.

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I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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I further certify, pursuant to Wis. Stat. § 809.19(13)(f) that the text of the electronic copy of the Supplemental Appendix is identical to the text of the paper copy of the same.

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