



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 2, 2015

OAG—01—15

Jacob C. Brunette
Clark County Corporation Counsel
517 Court Street, Room 206
Neillsville, WI 54456

Dear Mr. Brunette:

¶ 1. You ask for an opinion about whether a town can assess a fire protection special charge in the absence of an actual fire call, and whether it can assess a special charge against a county, a tax-exempt entity.

¶ 2. I conclude that, pursuant to Wis. Stat. § 60.55(2)(b), a town may assess a fire protection special charge for making fire protection services generally available, and not based on the incidence of fire calls at a property. I further conclude that the special charge is a fee, not a tax. Its primary purpose is to recover costs for fire protection services, supervision or regulation, not to obtain general revenue for the government. Therefore, the special charge may be assessed against the county. I decline to answer your third question concerning the purpose for which the town may use the special charge funds because you have provided no facts to indicate that the town is using these funds for an improper purpose.

¶ 3. You explain that a town in Clark County has adopted an ordinance that charges all real property within the town a fire protection special charge using a fee schedule based on the size and type of property (called a domestic user equivalent). The ordinance was adopted pursuant to Wis. Stat. §§ 60.55, 66.0301, and 66.0627 to provide funding for fire protection within the town. The annual charge varies depending on the town's annual obligation to the fire commission. The ordinance also indicates that delinquent special charges will become a lien on the real property. The fire commission charges a fire call fee in addition to the fire protection special charge. You note that Clark County has received bills for fire protection pursuant to the ordinance.

¶ 4. The ordinance at issue was adopted, in part, pursuant to Wis. Stat. § 60.55(2)(b), which allows a town to fund fire protection by charging all property owners a fee:

The town board may:

....

(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.

Wis. Stat. § 60.55(2)(b). The cross reference to subsection (1)(a) refers to the town board's authority to "provide for fire protection for the town." You ask if this provision allows a town to assess a special charge against a property owner if it makes no fire call to that property. I conclude that it does.

¶ 5. Statutory interpretation begins with the text of the statute, and if the meaning of the text is clear, the inquiry generally ends there. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Because the phrase "fire protection" is not defined in the statute, we accord the phrase its common, ordinary and accepted meaning by consulting a dictionary. *See Xcel Energy Servs., Inc. v. Labor & Indus. Review Comm'n*, 2013 WI 64, ¶ 30, 349 Wis. 2d 234, 833 N.W.2d 665 (determining ordinary meaning of undefined words, appropriate to consult dictionary to aid in statutory construction). Statutory language should be read "to give reasonable effect to every word, in order to avoid surplusage." *See Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 6. "Protection" is defined as "the act of protecting," "the state or fact of being protected," and "shelter from danger or harm." *Webster's Third New International Dictionary* 1822 (1986). 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.

¶ 7. The mechanism created by the legislature to assess each property owner's charge confirms that a town may charge for fire protection services regardless of whether a fire call is made. The statute provides for fire protection "according to a written schedule established by the town board." Wis. Stat. § 60.55(2)(b). A "written schedule" contemplates a list of graduated fees, as opposed to a per-use fee. *See Webster's Third New International Dictionary* 2028 (1986) (defining "schedule" as a "list"). Here, the town's fee schedule is based on the size and type of real property. If the statute were intended to allow a charge only for fire calls

actually made, the town would not have an ability to calculate the charges based on “a written schedule.” The “written schedule” language would be superfluous.

¶ 8. This interpretation of the statutory language is consistent with the statutory history. The current language of Wis. Stat. § 60.55(2)(b) was created by 1987 Wis. Act 399, made effective May 17, 1988. 1987 Wis. Act 399, § 200j. Before that time, section 60.55(2)(b) allowed a town to fund fire protection by charging property owners a “fee for the cost of fire calls made to their property.” Wis. Stat. § 60.55(2)(b) (1985-86).

¶ 9. In *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 451 N.W.2d 436 (Ct. App. 1989), a town sought to collect fire protection charges from a county under the previous version of Wis. Stat. § 60.55(2)(b) (1985-86). The Town of Janesville argued that the statute authorized it to collect fees based on property owned, regardless of fire calls made. By the time the case reached the appellate court, the new statute had been passed. Although the new statute did not apply to the charges at issue, the Town argued that it was merely a clarification of the old law. *Id.* at 541 n.2.

¶ 10. The court concluded that the former version of Wis. Stat. § 60.55(2)(b) permitted the town to charge the county only for fire calls made. In so concluding, the court rejected the notion that the “fire protection” language in the new statute was merely a clarification of the old “fire calls made.” The court indicated that the new provision removed the limitation to charge only for fire calls actually made: “The present language regarding a schedule of fees and the removal of the ‘per call’ limitation are substantive changes with no retroactive effect.” *Id.* *Town of Janesville* supports the conclusion 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.

¶ 11. The statute’s legislative history confirms that plain-meaning interpretation. *See Kalal*, 271 Wis. 2d 633, ¶ 51 (legislative history may be consulted to confirm a plain-meaning interpretation). I have reviewed the drafting records for the relevant statutory change. The analysis by the Legislative Reference Bureau, which is included in the drafting records, reads in relevant part:

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.

Analysis by the Legislative Reference Bureau, LRB-2980/1, LRB Drafting File to 1987 Wis. Act 399. This analysis emphasizes that the new statute is more than just a clarification of the old statute. The analysis treats the term “fire protection” as permitting charges related to the costs of fire protection as distinct from the cost of a fire call at a particular property.

¶ 12. Therefore, I conclude that Wis. Stat. § 60.55(2)(b) allows a town to assess a fire protection special charge for making fire protection services available without actually making a fire call. Because I conclude that the ordinance was properly adopted under section 60.55(2)(b), I do not address whether it was legally implemented under section 66.0627(2).

¶ 13. You ask whether a town may assess this special charge against a county. County property is exempt from property tax, but that exemption does not extend to fees. *See* Wis. Stat. § 70.11(2). Thus, whether a town can assess the special charge against a county depends on whether it is a tax imposed on property owners or a fee assessed for services provided.

¶ 14. “A tax is an enforcement of proportional contributions from persons and property, imposed by a state or municipality in its government capacity for the support of its government and its public needs.” *City of River Falls v. St. Bridget’s Catholic Church of River Falls*, 182 Wis. 2d 436, 441, 513 N.W.2d 673 (Ct. App. 1994) (citing *Buse v. Smith*, 74 Wis. 2d 550, 575, 247 N.W.2d 141 (1976)). The *River Falls* court explained the difference between taxes and fees: “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.” *Id.* at 441-42 (citing *State v. Jackman*, 60 Wis. 2d 700, 707, 211 N.W.2d 480 (1973)).

¶ 15. The legislature appears to have recognized this distinction in drafting Wis. Stat. § 60.55(2), creating separate funding mechanisms designated “taxes” or “fees.” “One of the basic tenets of statutory interpretation is that the legislature is presumed to act with full knowledge of existing laws, including prior statutes.” *Milwaukee Fed’n of Teachers, Local No. 252 v. Wis. Emp’t Relations Comm’n*, 83 Wis. 2d 588, 598, 266 N.W.2d 314 (1978). Section 60.55(2) gives the town four options for funding fire protection services. Two specifically authorize the town to levy taxes to pay for those services. *See* § 60.55(2)(c), (d). In contrast, section 60.55(2)(b) allows the town to “[c]harge property owners a *fee* for the cost of fire protection.” The legislature presumably provided these funding options with full knowledge of the difference between a tax and a fee. It seems reasonable that the legislature would provide a

mechanism for towns to recover the cost of fire protection services from counties and other tax-exempt entities. The fire protection fee explicitly set forth in section 60.55(2)(b) provides such a mechanism.

¶ 16. The legislature's use of the term "fee" does not end the inquiry; the amount charged must also function as a fee. Importantly, a fee is not limited to charges for "commodities actually consumed." *City of River Falls*, 182 Wis. 2d at 442. In *City of River Falls*, a church appealed a judgment ordering it to pay the city charges associated with the cost of providing water for public fire protection under Wis. Stat. § 196.03(3)(b) (1993-94). *Id.* at 438. Among the services the city provided were water production, storage, and transmission for public fire protection. *Id.* at 439. The city elected to collect fire protection charges as part of each utility customer's water bill as calculated by the customer's property value, and the church argued that the statute improperly imposed a tax, not a fee, on tax-exempt properties. *Id.* at 438-39, 441-43.

¶ 17. The court of appeals concluded that the public fire protection charge, which covered the expense of making water available, storing the water, and ensuring the water would be delivered in case it was needed to fight fires, was a fee, not a tax. The court discussed several relevant factors in assessing whether a special charge was a fee or a tax, including whether the statute's administration was an integral part of the property taxing process, whether the municipality was carrying out a governmental or a proprietary function, and whether nonpayment of the charge resulted in a lien on the property. *Id.* at 442-43. Ultimately, however, the court emphasized that the dispositive question for determining whether a charge is a fee or a tax is whether the charge raises revenue or recoups costs for "services, supervision or regulation." *Id.* at 442.

¶ 18. Here, the legislature classified the special charge under Wis. Stat. § 60.55(2)(b) as a fee, not a tax. Based on the information you have supplied, the town has adopted an ordinance pursuant to this statute which has as its primary purpose the recoupment of services to cover the expenses of providing fire protection to property in the community and is not designed to raise general revenue. Although the charge might have some of the qualities of a tax discussed by the *City of River Falls* court, such as the imposition of a lien for nonpayment, on balance it appears to be a fee not a tax.

¶ 19. Finally, I decline to answer your third question concerning the purpose for which the town may use the fire protection special charge funds. As discussed above, Wis. Stat. § 60.55(2)(b) allows a town to charge a fee for making fire protection

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generally available. And section 66.0627(2) permits the 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.” You have not provided any facts which indicate that the town is not abiding by these standards. Accordingly, this question is premature.

¶ 20. I conclude that Wis. Stat. § 60.55(2)(b) authorizes a town to assess a charge for fire protection services based on the property owned, even if no fire calls are made. The charge is a fee and may be assessed against tax-exempt entities.

Sincerely,

J.B. VAN HOLLEN
Attorney General

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