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Attorney General Opinion

—Phillips Borowski, S.C., WCA General Counsel



Attorney General concludes towns can assess a special charge against county property for fire protection services.

The Wisconsin Attorney General recently issued a formal opinion¹ in response to a request from the Clark County Corporation Counsel regarding whether a town can assess a fire protection special charge against county property for providing fire protection services. The attorney general concluded that the special charge was a fee, not a tax, and therefore the fee may be assessed against county property. The attorney general also concluded that the special charge may be assessed for making fire protection services generally available and not based on the incidents of fire calls at a property.

The attorney general noted that although county property is exempt from property taxes under Wis. Stat. § 70.11(2), the property is not exempt from fees. The attorney general then analyzed whether the fire protection special charge assessed by the town was a fee or a tax.

“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)).

The attorney general reasoned the Legislature recognized the distinction between a fee and a tax in drafting Wis. Stat. § 60.55(2),² which allows a town to charge property owners a fee or levy a tax for the cost of providing fire protection services. The Legislature presumably provided these funding options with full knowledge of the difference between a tax and a fee.³ It seemed reasonable to the attorney general that 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 attorney general concluded that the fire protection fee explicitly set forth in section 60.55(2)(b) provides such a mechanism. Therefore, a town could assess a fire protection special charge against county property.⁴

The attorney general also analyzed whether a fire protection fee could be charged on property even if no fire calls were made to the property. The attorney general looked to the language of Wis. Stat. § 60.55(2)(b), which states:

The town board may:

...

(b) Charge property owners a fee for the cost of fire protection provided to their

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property under sub. (1)(a) according to a written schedule established by the town board.

Wis. Stat. § 60.55(2)(b)

Because the phrase “fire protection” is not defined in the statute, the attorney general consulted a dictionary to provide its common, ordinary and accepted meaning. “Protection” is defined as “the act of protecting,” “the state or fact of being protected,” and “shelter from danger or harm.”⁵ The Legislature’s use of the term “protection” in the statute suggested to the attorney general that it was contemplating the assessment of fees for general fire safety rather than for individual fire calls actually made.⁶

The attorney general also reviewed the statutory history of Wis. Stat. § 60.55(2)(b) to confirm his interpretation of the statute. The current language of Wis. Stat. § 60.55(2)(b) was created by 1987 Wis. Act 399, made effective May 17, 1988.⁷ 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).

The old version of the statute was interpreted by the court of appeals in *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 451 N.W.2d 436 (Ct. App. 1989). In *Town of Janesville*, 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.

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* supported the attorney general’s 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.

Finally, the attorney general consulted the legislative history of section 60.55(2)(b) to support his interpretation. The analysis by the Legislative Reference Bureau (LRB) 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.⁸

According to the attorney general, the LRB 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. Therefore, the attorney general concluded section 60.55(2)(b) allows a town to charge a fire protection fee against property for providing fire protection services generally, regardless of whether a fire call was made to the property.

It is important to note that attorney general opinions are not binding on courts, but they do have persuasive authority when courts interpret the same statute under similar facts. Based upon the attorney general's interpretation of section 60.55(2)(b), there is support for a town's authority to assess a fire protection fee against county property for the cost of providing fire protection services generally even if no fire calls were made to the property.

ENDNOTES:

- 1 OAG 1-15
- 2 Wis. Stat. § 60.55(2) states:
 - (2) Funding. 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 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.

3 OAG 1-15, ¶ 15 citing *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) ("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.")

4 The attorney general also noted that the amount assessed against the property must also function like a fee to be considered a fee and not a tax. OAG 1-15, ¶ 16. Based upon the information supplied from the Clark County Corporation Counsel, the attorney general found that the town ordinance adopted pursuant to § 60.55(2)(b) 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. Therefore, the attorney general concluded that, on balance, the special charge functions like a fee not a tax. *Id.*, ¶ 18.

5 OAG 1-15, ¶ 6 citing *Webster's Third New International Dictionary* 1822 (1986).

6 *Id.*, ¶ 6.

7 *Id.*, ¶ 8 citing 1987 Wis. Act 399, § 200j.

8 *Id.*, ¶ 11 citing Analysis by the Legislative Reference Bureau, LRB-2980/1, LRB Drafting File to 1987 Wis. Act 399.



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