

OFFICE OF CLARK COUNTY CORPORATION COUNSEL

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January 23, 2014

To: Wisconsin Department of Justice
PO Box 7857
Madison, WI 53707-7857

Re: County assessed special charge for fire protection

As corporation counsel for Clark County, I respectfully request advice pursuant to Wis. Stat. 59.42(1)(c) on the following matter:

A town in Clark County has adopted an ordinance that charges all real property within the town a fire protection special charge based on a domestic used equivalent (DUE) defined within an adopted fee schedule. This ordinance was adopted pursuant to Wis. Stats. 60.55, 66.0301, and 66.0627 to provide funding for fire protection within the town. The assigned DUE is based on the size and type of real property. The annual charge per DUE varies depending on the town's annual obligation to the fire commission. The fire commission does charge a fire call fee in addition to the fire protection special charge. The ordinance also indicates that delinquent special charges will become a lien on the real property. Clark County has received bills for fire protection pursuant to the aforementioned ordinance. Also, the town does not have a local levy for the next tax year.

In light of these facts, I have the following questions with my analysis:

1. Can Clark County, as a tax exempt entity, be an assessed fire protection special charge by a town?

I believe the town cannot assess such a charge and Clark County does not have to pay the assessed fire protection special charge as the fire protection special charge is a tax rather than a fee and Clark County is a tax exempt entity. The property subject to the assessed fire protection special charge is owned by Clark County is exempt from property taxes per Wis. Stat. 70.11(2). The fire protection special charge is sought by the town for the purpose of "providing for the funding" of fire protection within the town. The Wisconsin Supreme Court (Court) has explained the difference between taxes and fees as a tax is utilized 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. *State v. Jackman*, 211 N.W.2d 480, 485 (1973). Further, the Court has determined a tax as an enforcement of proportional contributions from persons and property, imposed by a state or municipality in its governmental capacity for the support of its government and its public needs. *Buse v. Smith*, 247 N.W.2d 141, 153 (1976). The Wisconsin Court of Appeals in *City of River Falls v. St. Bridget's Catholic Church of River Falls*, 513 NW2d 673 (1994) ruled that a failure to pay a special charge that results in a lien on the subject real property is really a tax. In this case, the fire protection special charge is dependent on the size and type of real property with delinquent charges becoming liens on the real property. Further, the fire protection special charge is not covering the expenses of services actually provided but instead providing revenue to cover the town's financial obligation to the fire commission to make fire protection available. Therefore, the fire protection special charges are a tax and Clark County, as a tax exempt entity, does not have a legal obligation to pay the fire protection special charge.

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2. Can the town assess a fire protection special charge without actually performing fire protection services?

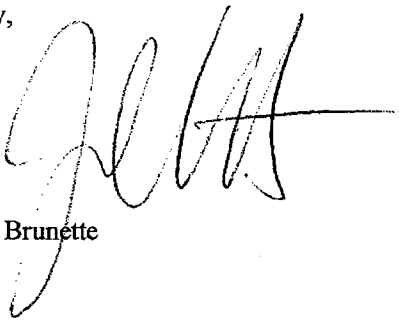
I believe the town cannot. The ordinance was adopted pursuant Wis. Stat. 60.55(2)(b), which allows a town to fund fire protection by charging property owners a fee for the cost of fire protection provided to their property according to a written schedule established by the town. The ordinance was also adopted pursuant to Wis. Stat. 66.0627(2), which allows a town to impose a special charge against real property for current services rendered. The Wisconsin Court of Appeals in *Town of Janesville v. Rock County*, 451 N.W.2d 436 (1989) concluded that a special charge for fire protection could not be charged against a county as the town can charge only for services actually provided and not for services that are made available and not utilized. In this case, the fire protection special charge is being assessed to generally fund fire protection rather than for the funding of the expenses for fire protection actually provided or rendered to the county. Therefore, the town cannot assess Clark County a fire protection special charge without actually providing fire protection services to the county.

3. If the town can assess such a charge, what can the funds be used for?

I believe the fund collected from the fire protection special charges can only be used to provide fire protection within the town. Again referring to Wis. Stat. 60.55(2)(b) and 66.0627(2), the statutes allow the town to impose special charges to fund fire protection that is provided to a property. From the plain language of the statute, it appears the collected funds from the fire protection special charge can only be used to fund fire protection and nothing else. Any other use of the funds would be counter to the plain language of the statute and would again appear to be more of a tax for collecting revenue. The town does not have a local levy and the collected funds from the fire protection special charge very likely will be used outside fire protection but this particular issue needs to be further investigated.

Please contact me if additional information is needed.

Sincerely,



Jacob C. Brunette