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To Brett Hebert, Director of Public Works

From Matthew Dregne, City Attorney

Date September 25, 2019

Re Tree Removal on Private Property

In response to our December 18, 2018 memorandum to you regarding the City's Public Nuisance Ordinances, you asked us to address a number of follow-up questions related to nuisance tree removal activities. Specifically, you asked:

1. Can surveying costs associated with determining the location of a nuisance tree be assessed on a property as a "special charge"?

2. Can the removal of nuisance tree—either by City personnel or by contractor—be assessed on a property as a "special charge"?

In our opinion, the City may specially charge a property owner for all of these activities—as well as administrative and other *related* costs associated with overseeing a nuisance tree program—provided that the costs are reasonably related to the activity, and the special charge does not exceed the actual costs associated with administering the program. Our analysis follows.

I. A Special Charge Must Provide a "Service" to the Property Owner

A special charge is a property tax charged "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. Accordingly, "the special charge need only provide a service, not a benefit to the property owner." *Rusk v. City of Milwaukee,* 2007 WI App 7, ¶ 17, 298 Wis. 2d 407, 727 N.W.2d 358. Encouraging compliance with City ordinances is considered a "service." *Id.* at 19 ("it is in the property owner's best interest to keep the property up to the standards of

the building code. By ensuring proper maintenance, the owner takes preventative measures to safeguard against future unexpected evidence."). Thus, we believe a City ordinance authorizing the collection of fees for various activities related to the removal of nuisance trees, meets the standard necessary to show that the activity provides a "service" to the property against which a special charge is assessed.

II. Special Charges May Be Imposed for a Variety of Nuisance Tree Removal Activities

Wis. Stat. § 66.0627(1)(b) enumerates a number of services for which special charges may be assessed by the City. "Tree care" is listed among those specifically enumerated services. *Id.* The term "tree care" is not defined. However, the services described under Wis. Stat. § 66.0627(1)(b) are non-exhaustive and are intended to be broadly construed. *Rusk* at ¶¶ 17-18 (the statute is to be broadly interpreted and the services described are only intended as examples of the types of possible service charges that may be levied). There is nothing in the statute—or elsewhere—that indicates the allowable services for which a special charge may be assessed are limited to the enumerated services in Wis. Stat. § 66.0627(1)(b). *Grace Episcopal Church v. City of Madison*, 129 Wis. 2d 331, 336, 385 N.W.2d 200 (Ct. App. 1986).

Thus, although the term "tree care" is not defined elsewhere in the statute, it is likely that tree removal, treatment, maintenance, surveying costs, among others, are eligible special service charges. *See, e.g. Rusk* at ¶ 17 (reinspection fees of private buildings previously found to be in violation of municipal building code ordinances are eligible for special charge); *Grace* at 334 (bus shelter and fixture maintenance on mall concourse eligible special charges).

Further, Wis. Stat. § 66.0267 is silent on the method by which—or by whom—the services are rendered. More important is that the costs imposed by the special charge are reasonably related to actual cost of the service rendered. For instance, Subsection 2 states, in relevant part, that "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." (Emphasis added). Accordingly, we believe that whether the service is provided directly by City employees or by contracted parties is immaterial and that it would not be improper for a contractor to provide services for which special charges are assessed. *See also* Section III for additional discussion.

III. Special Charge Must Relate to the Actual Cost of the Service

A special charge assessed on a property must bear a reasonable relationship to the actual cost of the service rendered. *See* Wis. Stat. § 66.0628(1)(b). Courts have analyzed the reasonableness of a special charge by determining whether the special charge is imposed for a regulatory purpose, rather than as a tax. *Rusk* at ¶ 15. If a special charge is

imposed to regulate, and not as a means by which to generate revenue, and it bears a reasonable relationship to the actual cost associated with the service rendered, then it is not a tax and is an allowable special charge. *Id.* A special charge that is imposed to motivate property owners to bring their properties into compliance with municipal ordinances and is enforced with the aim of protecting the basic needs of the public, the special charge is regulatory in nature. *Rusk* at ¶ 9. Stated otherwise, if the special charge has some reasonable relation to the protection of the public health, safety, or welfare, its purpose is likely regulatory in nature. *Id.*

The actual cost of the service rendered may include administrative fees and is evaluated based on the costs associated with the program as a whole, not simply one individual actions taken as part of the program. *Rusk* at ¶ 10. In essence, if revenues from the program do not outweigh the costs associated with administering it, "it is a valid exercise of the City's police power to regulate, not an illegal tax." *Rusk* at ¶ 15.

Thus, provided the special charge assessed on property owners for surveying the location of a nuisance tree and/or for removal of a nuisance tree reasonably relates to the actual costs incurred by the City to enforce the ordinance, it is likely to be considered a valid special charge.