

MEMORANDUM

TO: Fire Board of the Waunakee Area Fire District

FROM: Jared W. Smith

DATE: March 20, 2025

RE: Current Structure of the Waunakee Area Fire District

Summary

We have been retained by the Fire Board (“Board”) of the Waunakee Area Fire District (“District”) to provide an independent review of the current structure of the District, an analysis of compliance of that structure with Wisconsin law, and, for any areas of non-compliance, recommendations on how the District could come into compliance.

In reviewing this memo, it is important to recognize that the organizations and associations that provide fire protection services have some of the longest histories in our state. When fire protection works, like it has for the District, it is not uncommon for these organizations and their relationships to municipalities to drift out of strict statutory compliance. Review tends to only happen then when there are issues in providing service—issues that are not present here—or when one or more participants in the fire protection seek change. Therefore, a finding of statutory noncompliance is not a condemnation of the District, any participating member community, or the Waunakee Volunteer Fire Department.

For the reasons set forth in this memo, my opinion is as follows:

1. The District was organized as an intergovernmental body authorized to exercise the statutory authority of the member communities to contract with a chapter 213, Wis. Stat., fire company.
2. The Waunakee Volunteer Fire Department is likely a ch. 213 village fire company.

3. The intent of the parties under the intergovernmental agreement was to jointly contract with the Waunakee Volunteer Fire Department to utilize a fire company to provide fire protection services.
4. As established, a board of fire commissioners is not legally required for the operation of the District in this manner.
5. The intergovernmental agreement between the member communities insufficiently provides for a contractual relationship with the Waunakee Volunteer Fire Department:
 - a. The Waunakee Volunteer Fire Department is not a proper party to a Wis. Stat. § 66.0301 intergovernmental agreement; and
 - b. The intergovernmental agreement provides no expectations related to governance, performance of duties, payment of compensation, and allocation of liabilities.
6. The Waunakee Volunteer Fire Department's governance is not in compliance with ch. 213, including the election of trustees and the confirmation of elected officers by the Village.
7. If the current model were to continue:
 - a. The District should enter into a valid contract with the Waunakee Volunteer Fire Department; and
 - b. The Waunakee Volunteer Fire Department's bylaws and governance should be updated to reflect its status as a ch. 213 village fire company.
8. Conversely, if the District needs to start employing non-volunteer firefighters to provide fire protection services, then the communities would need to create a joint board of fire commissioners.
9. Under the current intergovernmental model, establishing a joint board of fire commissioners would require an amendment to the intergovernmental agreement between the four member communities.
10. Alternatively, any community could establish its own fire department and then contract with one or more other communities to provide fire protection services.

If the Village creates its own fire department, it must have a board of fire commissioners.

11. Moving towards a non-volunteer model requires careful calibration of the existing relationship with the Waunakee Volunteer Fire Department to ensure an orderly transition without disruption to fire protection services.
12. Each member community must make an individualized assessment and determine what future structure is in their best interests.
13. The options available to each member community will also depend on the decisions made by the other member communities.
14. Regardless of how the member communities proceed, the Board's primary responsibility remains to provide for the orderly administration of fire protection for the District. To the extent possible, the District should use its knowledge of the District's operation and its relationship with the Waunakee Volunteer Fire Department to act as a mediator as the communities work out their future relationship.

Background

The Waunakee Area Fire District is comprised of representatives from the Village of Waunakee ("Village"), the Town of Westport ("Westport"), the Town of Springfield ("Springfield") and the Town of Vienna ("Vienna") (Westport, Springfield, and Vienna are collectively the "Towns"). The District provides financial management of assets and receives fire protection services from the Waunakee Fire Department No. 1 ("WFD").¹

In preparing this memo, I have met with the Board, the Chair of the Board, the Administrator and Attorney for the Village of Waunakee, and Robert Whitaker of McMahon Associates, Inc. I have reviewed the Waunakee Area Fire Protection Operating Agreement (dated 5/21/2012) ("Operating Agreement"); the Waunakee Fire Department Constitution & Bylaws ("Bylaws"); the Village of Waunakee Code of Ordinances (as of 3/6/2025) ("Waunakee Code"); and the Fire District Organizational Review & Future Needs Analysis dated August 19, 2024, prepared by McMahon Associates, Inc. for Village of Waunakee & Waunakee Area Fire District ("Needs Analysis"). I also reviewed the WFD and Village websites. At times I reference the

¹ The Waunakee Fire Department No. 1 is also referred to as the Waunakee Volunteer Fire Department, the Waunakee Fire Department, or the Company No. 1, Waunakee Area Fire Department, and is described in more detail later in this memo.

Handbook for Wisconsin Police and Fire Commissioners, revised December 2019, published by the League of Wisconsin Municipalities (“Handbook”) and the Wisconsin Fire Service Guidebook, revised July 2019, published by the Wisconsin Department of Safety & Professional Services, revised July 2019 (“Guidebook”)². I requested additional historic WFD organizational records that may exist, but did not receive anything else.

Statutory Requirements for Fire Protection in Villages and Towns

Both the Village and the Towns are required to provide fire protection services in their communities.³ The Village and the Towns share similar options on how to provide these services: (1) establish a fire department, (2) contract for fire protection services with another town, village, or city, (3) establish a joint fire department with one or more other municipalities, or (4) utilize a fire company organized under ch. 213.^{4, 5} The Towns also have the option of “contracting with any person,” providing broader options to obtain fire protection services than are available to a Village.⁶

Joint Fire Department

Villages and towns are required to have a “board of fire commissioners” (“BFC”) when they establish a joint fire department.^{7, 8} Unless optional powers are granted to it⁹, a BFC exercises the power to appoint the fire chief, approve the fire chief’s appointments of subordinates, and exercise jurisdiction over disciplinary actions against subordinates.¹⁰ Financial power remains with the member communities and may be delegated to an intergovernmental body per agreement.

² Available at <https://dsps.wi.gov/Documents/Programs/FirePrevention/SBD9405P.pdf>.

³ Wis. Stat. §§ 61.65(2)(a) and 60.55(1), respectively.

⁴ *Id.*

⁵ Both may also create a combined protective services department, although that is not at issue here. See Wis. Stat. §§ 60.55(1)(a)5 and 61.65(3g).

⁶ A “person” includes any association or any nonstock corporation. Wis. Stat. § 990.01(26).

⁷ Wis. Stat. §§ 61.65(2)(b)2 and 60.55(1)(a)2.

⁸ The Village is also required to have a BFC when creating its own fire department. Wis. Stat. § 61.65(2)(b)1. A Town may, but is not required to, have a BFC if it creates its own fire department. Wis. Stat. § 60.57(1).

⁹ Optional powers under Wis. Stat. § 62.13(6) may only be granted by referendum. See Wis. Stat. § 61.65(3g)(d)2.

¹⁰ Wis. Stat. § 62.13(3)-(5).

Fire Company

Neither the Village nor the Towns are required to have a BFC if utilizing a fire company organized under ch. 213.¹¹ The organizational requirements for a fire company differ on whether it was established in a village or in a town.¹² A town fire company should organize as a ch. 181 nonstock corporation and establish its own governance, subject to applicable statutes.¹³ A fire company organized in a village is typically chartered by the village under ch. 213 but adopts its own bylaws.¹⁴ The village fire company is required to elect between 3 and 9 “trustees” who have statutory powers, and all officers elected by the fire company must be approved by the village.¹⁵ Both the trustees and a fire chief¹⁶ elected by a fire company qualify as “officers” requiring village board confirmation. A village board may disband a fire company “for misconduct or when they consider it proper.”¹⁷ The relationship between a municipality or a collection of municipalities and a fire company should be defined by contract.¹⁸

While a municipality is not required to have a BFC when contracting with a fire company, it is also not prohibited from establishing a BFC. In this instance, there may be a municipal “fire chief” as well as a fire company “fire chief” elected by the company.¹⁹ This dual structure presents its own problems unless the roles, responsibilities, and relationships are clearly spelled out by contract. The BFC and municipal fire chief may exercise control over subordinates retained by the municipality, but that control would not extend to the fire company’s fire chief or subordinates.

Intergovernmental Agreements

In the exercise of their powers, Wis. Stat. § 66.0301(2) allows both villages and towns to enter into intergovernmental agreements (“IGA”) with other villages and towns to either contract for the receipt of furnishing of services or to jointly exercise any power or duty, including providing fire protection services. Municipalities with disparate

¹¹ Wis. Stat. §§ 61.65(2)(b) and 60.57(1).

¹² See Wis. Stat. §§ 213.02 (village and cities) and 213.05 (town).

¹³ Wis. Stat. § 213.05.

¹⁴ While not expressly provided for in ch. 213, some village fire companies have historically formed ch. 181 nonstock corporations that remain subject to the limited ch. 213 village oversight. *See Handbook*, page 9.

¹⁵ Wis. Stat. § 213.02.

¹⁶ Wisconsin Statute section 213.02 requires a company to elect officers “required by law” and grants a village board authority to confirm elected officers. Based on Wis. Stat. § 213.095 granting police powers to a fire chief or other “person in charge” of a fire company it is likely that a fire chief is such an officer.

¹⁷ Wis. Stat. § 213.04.

¹⁸ *Handbook*, page 9.

¹⁹ *Id.*

powers may act under the IGA to the extent of each municipality's powers. In jointly exercising powers, the municipalities may create a joint commission that acts on behalf of the signatories. A fire company is not a defined "municipality" under Wis. Stat. § 66.0301(1) and therefore lacks authority to enter into an IGA.²⁰

A village or town that contracts for fire protection services with another municipality (i.e., does not establish a joint fire department) is also not required to have a BFC.²¹

Board of Fire Commissioners

A village with a population of more than 5,500 that establishes a fire department individually or a establishes a joint fire department with other municipalities is required to have a BFC.²² Towns are only required to form a BFC when establishing a joint fire department with a village, otherwise a BFC is optional.²³

Where a joint body that includes a village intends to employ firefighters rather than contract for services with a fire company, then a joint fire department, and a BFC, is necessary.

Village, town, and joint BFC's are subject to the provisions of Wis. Stat. § 62.13(2), (3) to (5) and (7) to (12), to the extent that the provisions apply to 2nd and 3rd class cities.

Organization of the Waunakee Fire Department

In determining the obligations of the District (and its respective communities) it is first helpful to understand the organization of the WFD. After review, it is my opinion that the WFD was organized as a Wis. Stat. ch. 213 fire company and more likely than not remains a fire company with certain ch. 213 compliance issues.²⁴

This opinion is based on the following:

²⁰ Although a fire company still has authority to enter into contracts.

²¹ Wis. Stat. §§ 61.65(2)(b) and 60.57(1).

²² Wis. Stat. § 61.65(2)(b)1 & 2.

²³ Wis. Stat. §§ 60.55(1)(a) & 60.57(1)(b).

²⁴ This is not uncommon. Where fire districts/departments and volunteer fire companies/associations have worked as successfully as here, there is usually little cause to review their operation. The passage of time often results in numerous small changes that end up deviating from statutes.

- The provisions of Wis. Stat. ch. 213 regarding the establishment, operation, and abolishment of fire companies have remained largely the same since at least 1878.²⁵
- In 1895, the Village of Waunakee Board created the WFD as a fire company.²⁶
- When the Village and the Towns created a joint fire district in 1933, the Village entered into a 25-year contract with the fire company.²⁷
- There is no indication that the fire company was ever disbanded by the Village.²⁸
- Current Village ordinances refer to the WFD as “The Company No. 1, Waunakee Area Fire Department” and has “authorized and directed” the WFD “to adopt a constitution and bylaws for the control, management, government and regulation of its business and proceedings” recognizing a degree of Village direction over the WFD’s operation.²⁹
- There is no indication that the current WFD is not a continuation of the original fire company.³⁰
- The Operating Agreement provides that “[i]t is the intention that this document shall establish a contractual arrangement between the several parties hereto and the Waunakee Volunteer Fire Department as an independent fire-fighting organization, and that no ‘employer-employee relationship’ shall be deemed to exist.”³¹

²⁵ Revised Wisconsin Statutes of 1878, Chapter 90, Sections 1980-1982 are similar to Wis. Stat. § 213.01-.03 (2023-24). For example, Section 1980 provides in part that, “[t]he members of any ... fire company, in any city or village, which shall have been duly organized and shall have elected such officers as they are by law required to do, and who organization and election of officers shall have been confirmed or sanctioned by the ... board of trustees of such village, may, when assembled at their usual place of meeting, and according to the rules of such company, elect annually not less than three nor more than nine trustees to take charge ...”

²⁶ See Waunakee Fire Department website, available at <https://www.waunakeefire.net/our-history> (“On February 25, 1895, a meeting was called by the Village Board to organize a fire company.”) Unfortunately, the Village does not have any records of minutes from before 1900.

²⁷ *Id.*

²⁸ Verifying this would require an exhaustive search of over 100 years of meeting minutes.

²⁹ Village of Waunakee Code of Ordinances sec. 30-23(a) and (e).

³⁰ There are no Wisconsin Department of Financial Institution records showing that the WFD has organized as a ch. 181 nonstock corporation—although a fire company could also organize as a nonstock corporation.

³¹ Operating Agreement, § 7.06.

As a fire company, the WFD is subject to the provisions of Wis. Stat. ch. 213 related to governance by a board of not less than 3 and not more than 9 trustees elected by the members, with all officers requiring Village confirmation. The WFD Bylaws do not provide for governance by a board of trustees, but leave authority to the entire membership.³²

As far as the WFD's fire chief, prior to December 16, 2024, Village ordinances provided that "[t]he fire chief shall be appointed pursuant to the bylaws of the fire department."³³ This may have been taken as the Village's confirmation of prior fire chiefs but, whether or not general confirmation by ordinance was in compliance with ch. 213, that ordinance is no longer effective.³⁴ The replacement Village ordinance, however, also does not follow the structure of ch. 213 for confirmation of fire company-elected fire chiefs as such confirmation must be exercised by the Village's governing body.

Structure of the Waunakee Area Fire District

There are two principal interpretations of the Wis. Stat. § 66.0301 intergovernmental agreement between the Village and the Towns: (1) that it forms an intergovernmental body that is responsible for fiscal management of firefighting equipment and for contracting with a third-party for firefighting services; or (2) that it creates a "joint fire department" as that term is used under Wis. Stat. chs. 60, 61, and 62.

It is my opinion that the Operating Agreement created an intergovernmental body providing for the fiscal management of fire protection services and also recognized that a contractual relationship exists between the intergovernmental body and an "independent" fire company.

This opinion is based on the following:

- When the current District was created in 1933, the Village entered into a contract with the fire company for the provision of fire protection services.³⁵

³² Bylaws, Article 3.

³³ Village of Waunakee Code of Ordinances sec. 30-54 (2024).

³⁴ See Ordinance No. 24-8 (amending Section 30-54 to provide: "The fire chief shall be appointed by the Fire Commission pursuant to applicable Wisconsin Statutes, including, but not limited to, Wis. Stat. § 61.65(2)(b) and (3g), as may be amended from time to time.")

³⁵ See Waunakee Fire Department website, available at <https://www.waunakeefire.net/our-history>.

- Per discussions with the District and the Village, the Waunakee Area Fire Protection Operating Agreement executed in 2012 was not materially different than prior agreements.
- The terms of the Operating Agreement indicate that it establishes a contractual relationship with a fire company rather than facilitates the creation of a joint fire department requiring a BFC:
 - The Operating Agreement states that it is formed pursuant to Wis. Stat. § 66.0301 but makes no mention of Wis. Stat. chs. 60, 61, or 62.
 - The Operating Agreement creates an IGA board to govern the District made of governing-body appointees.
 - Contrary to Wis. Stat. §§ 61.65(2)(b)2, 61.65(3g)(d)1.b., and 60.55(1)(a)2, the Operating Agreement provides for no mechanism for the creation of a joint board of fire commissioners, including commissioner appointments, numbers, or terms.
 - Section 7.06 of the Operating Agreement provides that “[i]t is the intention that this document shall establish a contractual arrangement between the several parties hereto and the Waunakee Volunteer Fire Department as an independent fire-fighting organization, and that no ‘employer-employee relationship’ shall be deemed to exist.”
- Until the end of 2024, Waunakee’s Code of Ordinances provided that the fire chief was to be selected pursuant to the bylaws of the WFD, recognizing a semblance of independence of the WFD that would not exist if the parties had intended to establish a statutory “joint fire department” requiring a BFC.
- The only factor in favor of an intent to establish a statutory “joint fire department” is section 1.1 of the Operating Agreement: “Creation. The purpose of this agreement is to be engaged in the joint operation of a fire department hereinafter referred to as the ‘District,’ consisting of the Village of Waunakee, Town of Vienna, Town of Westport and the Town of Springfield.”
 - In light of the other factors, however, “joint operation of a fire department” is more likely a common descriptor of the generalized function of the District than a legal term of art intended to mean a Wis. Stat. ch. 60, 61, or 62 “joint fire department.”

McMahon Needs Analysis

The Needs Analysis provides some recommendations related to restructuring the District that increase the Village's input. These recommendations inform the District as to what structural changes the Village desires—including the establishment of a BFC.

As stated in the Needs Analysis, a joint BFC provides greater control over the leadership of a fire department than what currently exists. A BFC is also necessary for a shift from only volunteers to a hybrid volunteer/employee model, and, therefore, would be in the interests of the member communities if or when that shift is needed. The composition of a joint BFC, including the number and appointment of commissioners, is up to the member communities. Therefore, I make no recommendation as to control, but note that the Needs Analysis suggests an alternative where neither the Village nor the Towns have complete control.³⁶

However, based on my review and discussions, the recommendation that a joint BFC must be created is an operational and oversight *recommendation* to the Village for future planning rather than a *legal requirement* for the District as it currently operates. It only becomes a legal requirement if the parties shift to creating a joint fire department that intends to employ firefighters.

Outside of governance, the Needs Analysis provides other future planning recommendations that the District and member communities should evaluate regardless of the governance structure.

Compliance Issues

Based on the foregoing conclusion that the District is exercising the statutory authority of its members to contract for fire protection services with a ch. 213 fire company, it is my opinion that a Board of Fire Commissioners is not legally required for the operation of the District and regulation of the WFD as currently structured.

Nevertheless, there remain legal compliance and best practices issues. As a ch. 213 fire company, the governance of the WFD is—unintentionally—not in conformance with ch. 213. The fire company has not elected trustees and the Village has not exercised confirmation authority for elected officers of the fire company.

³⁶ Needs Analysis, page 27.

While I find that the WFD is most likely a fire company, the District, and the member communities, should approach any changes in consultation with the WFD. Any change to operations of the WFD may not statutorily require the buy-in of all parties, but practically will require such buy-in in order to avoid unnecessary disruptions to operations or creation of conflict.

There is also a contractual issue. The WFD cannot be a member of an IGA. While it is possible that the Operating Agreement could be interpreted as both an IGA and a separate but limited contract with the WFD (regardless of its structure), the Operating Agreement fails to properly establish the relationship between the District and the WFD, including but not limited to expectations regarding governance, performance of duties, payment of compensation, and allocation of liabilities. It is therefore insufficient regardless of enforceability against the WFD.

Were the District to continue to operate as currently structured, I would recommend that as a minimum:

1. The District members amend the Operating Agreement to recognize the structure, including the Village's confirmation role related to a village fire company; and
2. The District and the WFD enter into a separate contract defining the relationship and obligations of the parties.

However, as the Village has submitted its notice to withdraw and expressed its desire to establish a BFC, it is unlikely that the current structure continues. If, as the Needs Analysis opines, there is a need to shift to having full-time employees rather than volunteers, there will also be the need to establish a BFC.

Regardless of the current structure or questions of compliance, the Board's primary responsibility remains to provide for the orderly administration of fire protection for the District. As a creation of four communities, the District is subject to the intergovernmental agreement creating the District and Board. And the future of the District depends on the current and future agreements—or lack of agreement—between those communities. Where or how the District chooses to proceed may be wholly dependent upon the decisions made by each of the four communities over the next few weeks and months. Whatever choices are made, the Waunakee Volunteer Fire Department is a critical party. The communities and the District should consider that, as an organization of volunteers, those volunteers should have a seat at the table as changes are made.