STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

BROWN COUNTY,

Plaintiff,

Case No.: 18-CV-640

vs.

BROWN COUNTY TAXPAYERS ASSOCIATION
and FRANK BENNETT,

Defendants/Third-Party Plaintiffs,

vs.

RICHARD CHANDLER, Secretary,
Wisconsin Department of Revenue,

Third-Party Defendant.

**PLAINTIFF, BROWN COUNTY'S, BRIEF
IN OPPOSITION TO DEFENDANTS/THIRD-PARTY PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Brown County, ("Brown County") opposes Defendants/Third-Party Plaintiffs', Brown County Taxpayers Association ("BCTA"), and Frank Bennett ("Bennett") (collectively "Defendants") motion for summary judgment on the grounds that the plain language of Wis. Stat. § 77.70 is unambiguous and does not require a dollar-for-dollar reduction to the property tax levy for sales and use tax revenues. As a result, Brown County is entitled to judgment as a matter of law.

INTRODUCTION

As articulated in the Brief in Support of the County's Motion for Summary Judgment ("County's Initial Brief"), Wis. Stat. § 77.70 is clear. A county is statutorily-authorized to impose a sales and use tax "for the purpose of directly reducing the property tax levy." These are the precise words in the statute. Contrary to Defendants' argument, there is nothing in Wis. Stat. § 77.70, or any other statute, that unequivocally mandates a dollar-for-dollar reduction in the property tax levy based upon either estimates or actual receipt of sales and use tax proceeds. There is no methodology set forth in statute or regulation as to how a county with a sales and use tax is to reconcile sales and use tax revenues against property tax levy, in which year such a reconciliation is to take place and in comparison to which actual or estimated figures. In other words, Defendants are asking this Court to invent from whole cloth all of the rules associated with their so-called mandatory dollar-for-dollar offset. Respectfully, such an exercise is clearly not within the province of the judicial branch.

It is apparent that Defendants believe their only path to victory in this case is to convince the Court to wholly ignore the actual language of Wis. Stat. § 77.70. Indeed, Defendants incredulously suggest that the word "use" is found in Wis. Stat. § 77.70 to describe how the proceeds of a sales and use tax must be "used" or "spent" when it is not.[1] Defendants then recklessly employ the word "use" 35 times throughout their brief in an effort to distract from the statute's actual language and clear meaning. The linchpin of Defendants' proffered interpretation of the statute – that a county is statutorily-mandated to "use" the proceeds of a sales and use tax in a certain manner – is entirely misplaced.

[1] Defendants' comparison of the duly-elected representatives on the Brown County Board of Supervisors to a spoiled child running up credit card debt is absurd.

The plain meaning of Wis. Stat. § 77.70 is consistent with how counties, the Department of Revenue ("DOR"), the Legislature and the Attorney General have all interpreted the statute over the course of the last thirty years. Section 77.70 is not a spending or "use" statute – it is an enabling statute. Unlike other statutes that mandate how a county or taxing authority spends money – *i.e.*, Wis. Stats. §§ 77.705 and 77.706 – a county's "use" of sales and use tax proceeds is confined only by traditional notions of public purpose and spending powers so long as the ordinance authorizing the tax is enacted with the intent to reduce the overall property tax levy.

As the court is aware, this is a substantial dispute with significant financial implications to Brown County's citizens, its budget, and to counties across Wisconsin. What has become abundantly clear through the briefing process is that Defendants disagree with how their duly-elected representatives on the Brown County Board have chosen to provide property tax relief to Brown County taxpayers. Defendants have every right to disagree with a county policy decision and every right to petition their county government for redress. But Defendants do not have the right to ask this Court to ignore a statute that is clear on its face and which has been consistently interpreted by the state and local governments for 30 years. Defendants' motion for summary judgment must be denied.

ARGUMENT[2]

I. The Plain Language of Wis. Stat. § 77.70 Enables Brown County To Impose A Sales And Use Tax Ordinance But Does Not Explicitly Direct How Revenues From The Tax Must Be Spent.

As discussed in Brown County's Initial Brief, statutory analysis in Wisconsin is comprised of a three-part process where a court must read the text of the statute: (1) as part of a whole; (2) in relation to the language of surrounding or closely related statutes; and (3)

[2] For the sake of brevity, the facts set forth in the County's Initial Brief will not be restated here, but are incorporated in their entirety herein by reference.

reasonably, to avoid absurd or unreasonable results. *Bank Mutual v. S.J. Boyer Const. Inc.,* 326 Wis. 2d 521, 534-35, 785 N.W.2d 462 (2010). Absent ambiguity, no analysis of any extrinsic evidence is required.

Brown County agrees with Defendants that the analysis of Wis. Stat. § 77.70 must be limited to the plain language of the statute because it is unambiguous. *State ex rel. Kalal v. Cir. Ct. for Dane County*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004). Contrary to Defendants' argument, however, nowhere does *Kalal* or any other precedent authorize a court to engage in the wholesale substitution of words or phrases into a statute when construing the statute.

In properly reviewing Defendants' arguments regarding interpretation of Wis. Stat. § 77.70, it is important to begin with the actual words in the statute:

> Any county desiring to impose county sales and use taxes under this subchapter **may do so** by the adoption of an ordinance, **stating its purpose** and referring to this subchapter**. The rate of the tax imposed under this section is 0.5 percent of the sales price or purchase price.** Except as provided in s. 66.0621(3m), **the county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy and only in their entirety as provided in this subchapter.** That ordinance shall be effective on the first day of January, the first day of April, the first day of July or the first day of October. A certified copy of that ordinance shall be delivered to the secretary of revenue at least 120 days prior to its effective date. The repeal of any such ordinance shall be effective on December 31. A certified copy of a repeal ordinance shall be delivered to the secretary of revenue at least 120 days before the effective date of the repeal. Except as provided under s. 77.60(9), the department of revenue may not issue any assessment nor act on any claim for a refund or any claim for an adjustment under s. 77.585 after the end of the calendar year that is 4 years after the year in which the county has enacted a repeal ordinance under this section.

(Emphasis added.)

Defendants define the above underlined phrase "directly reducing the property tax levy" as "to diminish the amount of the levy in a manner stemming immediately from the source – the

sales tax revenue – without any intervening steps." (Def's. Br. In Supp. of Summ. J., p. 6). However, as explained below and in the County's Initial Brief, a plain language interpretation conducted in accordance with *Kalal* and *Bank Mutual* does not support Defendants' interpretation.

First, Defendants illogically cherry-pick certain terms in the statute and wrongfully insert other words to cobble together a definition that fits their narrative. Section 77.70 does not contain words such as "diminish the amount of the levy," "stemming immediately from the source," or "without intervening steps." The entire concept of a strict dollar-for-dollar reduction based upon a mathematical equation is found nowhere in statute or administrative regulation. It is entirely Defendants' creation and cannot reasonably be read into the statute.

Second, the County's Ordinance at issue in this case embodies the "purpose" language of Wis. Stat. § 77.70, which provides that a sales and use tax "may be imposed only *for the purpose of* directly reducing the property tax levy…." (Emphasis added.) Specifically, the Ordinance provides that the sales and use tax proceeds "[S]hall be utilized only to reduce the property tax levy by funding the below listed specific capital projects." (Complaint, Ex. B). The Ordinance then guarantees compliance with this purpose by providing for a mill rate freeze, which prohibits any increase in the mill rate during the time in which the temporary sales and use tax is in effect. (Complaint, Ex. B, Section 9.03). Thus, Brown County cannot, under any circumstance, increase the mill rate until the Ordinance expires. If the mill rate increases, the Ordinance automatically sunsets. On its very face, the Ordinance comports with Wis. Stat. § 77.70's mandate that a sales and use tax may be imposed "for the purpose of directly reducing the County's property tax levy" and should be upheld.

Finally, Defendants cannot ignore the second prong of the *Bank Mutual* analysis by simply disregarding statutes within the very same subchapter as Wis. Stat. § 77.70 which actually contain the mandatory offset language missing from Wis. Stat. § 77.70. As Brown County discussed in its Initial Brief, the Legislature has long been aware of its right to direct how local governments and taxing authorities, including counties, spend certain tax revenues. In situations where the Legislature has directed expenditures, it has been clear in its direction. Indeed, in two similar statutes, the Legislature explicitly directed *how* revenues from the Miller Park and Lambeau Field Taxes must be "used."

In Wis. Stat. § 77.705 and Wis. Stat. § 77.706 respectively, the Legislature provided specific language, supplementing the language that authorized the imposition of the tax, to require that monies received under these two statutory provisions be "*used* exclusively to retire the district's debt." (Emphasis added.) Defendants are asking this Court to read that same directive into Wis. Stat. § 77.70 with absolutely no supporting statutory language. There is simply no precedent supporting Defendants' position that such mandatory offset language is capable of being "implied."

In stark contrast to Wis. Stat. §§ 77.705 and 77.706, Wis. Stat § 77.70 is an enabling statute which authorizes the imposition of a sales and use tax by ordinance and does not dictate how the revenues must be spent.[3] The law in Wisconsin is that a county may impose a sales and use tax only "for the purpose of reducing the property tax levy," but once it can be shown that the revenues from the tax are spent on items that are otherwise eligible to be funded by property tax proceeds, the inquiry surrounding compliance with the statute is over. In other words, a county shows its intent to reduce the property tax levy (as required by statute) by imposing the

[3] See *Northwest Properties v. Outagamie County*, 223 Wis. 2d 483, 589 N.W.2d 683 (Ct. App. 1998) for a discussion of how municipal enabling statutes such as Wis. Stat. § 77.70 work in Wisconsin.

tax to pay for items that otherwise could, now or in the future, be funded with the proceeds of the county's property tax levy.

In sum, the actual language of Wis. Stat. § 77.70, when compared with similar surrounding statutes, fails to support Defendants' argument that the statute contains a mandatory offset requirement.

A. Because Defendants Concede That Wis. Stat. § 77.70 Is Unambiguous, Legislative History And Other Extrinsic Sources Need Not Be Consulted In Interpreting The Statute.

Despite contending that Wis. Stat. § 77.70 "is concisely written and easily understandable" (Def's. Br. In Supp. of Summ. J., p. 7) and that legislative history of Wis. Stat. § 77.70 is not necessary to assist in interpretation, Defendants proceed to inundate the record with what amount to campaign statements made by politicians in the 1980's. Given Defendants' filings, the *Kalal* Court's admonition about resort to legislative history in construing a statute bears repeating.

> Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of the inquiry. It is enacted law, not the unenacted intent, that is binding on the public . . . **Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history.**

Kalal, 271 Wis. 2d at 662- 63 (emphasis added); see also *State v. Hayes,* 273 Wis. 2d 1, 49, 681 N.W.2d 203 (2004); *Sutherland*, § 45:14 at 109.

The *Kalal* court emphasized the danger of using extrinsic sources if the meaning of a statute is clear.

> We have repeatedly emphasized that 'traditionally, 'resort to legislative history is not appropriate in the absence of a finding of ambiguity . . .This rule generally 'prevents' courts from tapping legislative history to show that an unambiguous statute is ambiguous. That is, the rule prevents the use of extrinsic sources of interpretation to vary or contradict the plain meaning of a

> statute, ascertained by application of the foregoing principles of interpretation.

Id. at 666.[4] (citing *Seider v. O'Connell*, 236 Wis. 2d 211, 236, 612 N.W.2d 659 (2000)).

Defendants' resort to legislative history and newspaper articles, all extrinsic evidence, is inappropriate and should not be considered.[5] Nonetheless, Brown County will address Defendants' argument surrounding extrinsic sources to avoid accusation that it may have waived its objection to Defendants' attempt to force an interpretation of Wis. Stat. § 77.70 through purely extrinsic sources of extremely limited probative value.

The only relevant legislative history behind Wis. Stat. § 77.70 is that the phrase "for property tax relief" was changed to "directly reducing the property tax levy" on October 16, 1985. That change clearly does not address Defendants' argument concerning how sales and use tax revenues must be *used* to reduce the property tax levy. At best, this change further clarifies the purpose behind Wis. Stat. § 77.70.[6]

On October 30, 1985, the Legislature adopted what became 1985 Wisconsin Act 41, which included Wis. Stat. § 77.70. Since then, the relevant language has remained unchanged and Wis. Stat. § 77.70 has authorized counties to enact a sales and use tax "only for the purpose of directly reducing the property tax levy." Defendants can point to no legislative history suggesting that the statute dictates how counties must *use* revenues derived from a sales and use tax authorized by Wis. Stat. § 77.70 to reduce the property tax levy – both the statute and the entire record of legislative history is void of any mention of a mandatory dollar-for-dollar offset.

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[4] Extrinsic sources are "interpretive resources outside the statutory text- typically items of legislative history." *Id.*

[5] Brown County requests this Court strike all extrinsic evidence submitted by the Defendants, including but not limited to Exhibits G- V as set forth in the December 27, 2018 Affidavit of Thomas J. Kamenick on the grounds that such exhibits are extrinsic evidence and are not appropriate for a statutory analysis interpretation given Defendants' position that Wis. Stat. § 77.70 is unambiguous.

[6] The word "only" was also inserted into Wis. Stat. § 77.70 preceding the phrase "only in their entirety." That language relates back to the amount of sales and use tax, 0.5%, which may be imposed if a county desires to authorize the tax.

Defendants' reference to newspaper articles and public comments of lawmakers prior to the enactment of Wis. Stat. § 77.70, and specifically the statements by then state senator Feingold to the media on what his hopes were for the sales and use tax, together with Dane County and the City of Madison's lobbying efforts, have no bearing on the statute's interpretation.[7] Moreover, Defendants provide an incomplete recitation of Governor's Earl's public statement regarding his "hopes," after signing 1985 Wisconsin Act 41, as purported evidence that the bill was intended to provide a dollar-for-dollar offset is misleading. Governor Earl's full statement is:

> . . . bill would make it easier for local governments to use a source of revenue other than the property tax, and he hoped the county sales tax would become a vehicle to hold down property tax increases rather than a spur to added spending.

(Kamenick Aff., Ex. V).

According to this statement, the Governor "hoped" the sales tax would become a vehicle to hold down property tax increases. If Defendants' interpretation is correct and the dollar-for-dollar offset has always been mandatory, there would have been no need for the Governor to "hope" for decreased property taxes – they would have been mandated. In other words, Defendants' own extrinsic sources belie their fundamental position.

[7] See the following exhibits to the Affidavit of Thomas Kamenick;

- Ex. O (January 22, 1985 Wisconsin State Journal article);
- Ex. P (May 10, 1985 Wisconsin State Journal article);
- Ex. Q (April 4, 1985 Wisconsin State Journal article);
- Ex. R (February 27, 1985 Wisconsin State Journal article);
- Ex. S (October 10, 1985 Wisconsin State Journal article);
- Ex. T (August 27, 1985 Wisconsin State Journal article); and
- Ex. U (October 17, 1985 Wisconsin State Journal article).

B. The Mixed Practice Of Other Counties Does Not Support Defendants' Argument That Sales and Use Tax Revenues Must Be Used Exclusively To Decrease the Property Tax Levy, Dollar-For-Dollar, By The Amount Of The Revenues.

Over the last several months, Defendants apparently conducted a survey of all 66 Wisconsin counties which have enacted the sales and use tax. It is difficult to discern both the intent and the outcome of Defendants' exercise other than to illustrate the different words used by different counties at different times to authorize a sales and use tax.

Notably, Defendants have not pointed to any Wisconsin county, in the late 1980's or otherwise, which adopted a sales and use tax and subsequently *used* the revenues to provide a dollar-for-dollar reduction to their property tax levy. Once again, because Wis. Stat. § 77.70 does not contain any requirement that a county exclusively *use* the revenues to provide a dollar-for-dollar reduction to their property tax levy, there is no reason for any county to do so. Brown County is not aware of any Wisconsin county that has used sales and use tax revenues to provide the dollar-for-dollar reduction Defendants seek here. Defendants' survey merely shows that Wis. Stat. § 77.70 enables counties to adopt a sales and use tax "only for the purpose of directly reducing the property tax levy" but does not mandate how those revenues must be *used*.

II. The Attorney General's 1998 Opinion Unequivocally Supports The Plain Meaning Interpretation of Wis. Stat. § 77.70.

Despite being "persuasive" and "regarded as presumptively correct" *Schill v. Wisconsin Rapids School District,* 327 Wis. 2d 572, 786 N.W.2d 177 (2010),[8] Defendants claim that the Attorney General's statutory interpretation of Wis. Stat. § 77.70 "is not binding on courts and should be disregarded." (Def's. Br. In Supp. of Summ. J., p. 15). As the agency responsible for

[8] See also *Wisconsin Valley Imp. Co. v. Public Service Commission,* 9 Wis. 2d 606, 616-17, 101 N.W.2d 798 (1960)(holding attorney general's opinion is "entitled to considerable weight" when the legislature made no change to two provisions subsequent to the rendering of the opinion.)

rendering advice to state agencies and local governments on the interpretation and application of statutes, the Attorney General's opinions should be afforded weight. *See* Wis. Stat. § 165.015.

Defendants argue the Attorney General's statement that "[i]n my opinion, such funds may be budgeted to reduce the amount of the overall countywide property tax levy or to defray the cost of any item which can be funded by a countywide property tax" (December 27, 2018 Kamenick Aff., Ex. E, p. 1) is tantamount to an opinion by the Attorney General that "the sales tax ought to be available to facilitate or 'spur' new spending." (Def's. Br. In Supp. of Summ. J., p. 13) Such an argument unfairly mischaracterizes the Attorney General's Opinion.

The Opinion does not discuss ways in which spending can be "spurred" by the sales and use tax. Rather, it states that sales and use tax revenues may be budgeted to pay for any item which could otherwise be funded by a countywide property tax.

> The countywide property tax levy is clearly reduced to the extent that the net proceeds of the sales and use tax are shown as a budget item which is subtracted directly from the property tax levy before determining the net property tax that must be levied. That budgeting method directly reduces the amount of the countywide property tax which must be paid by each taxpayer.

(December 27, 2018 Kamenick Aff., Ex. E, p. 2).

Thus, the Attorney General explained precisely how sales and use tax proceeds go toward directly reducing the property tax levy. Furthermore, the Attorney General recognized Defendants' argument regarding how the term "directly" is used in Wis. Stat. § 77.70. He stated

> Insofar as is relevant to your inquiry, Webster's Third New International Dictionary 641 (1986) defines the term "directly" as "without an intermediate step." **The term "directly" has meaning in those instances where budgetary items cannot be funded through a countywide property tax . . . Sales and use tax revenues may not be budgeted as a revenue item used to offset the cost of any specific budget item which cannot be funded through a countywide property tax.**

(December 27, 2018 Kamenick Aff., Ex. E, p. 3)(emphasis added).

Thus, twenty years before Defendants' challenge here, the Attorney General anticipated and effectively eliminated these arguments regarding the budgeting of sales and use tax revenues. Sales and use tax proceeds can be used to defray (*i.e.*, offset or reduce) the costs of items which can be directly funded by the property tax levy, but they cannot be used to defray the costs of items which cannot be funded by the property tax levy. Every county that has adopted a sales and use tax has organized its financial practices around that Attorney General Opinion and the DOR's Levy Limit Worksheet in the budgeting of its sales and use tax revenues.

III. The Enactment of Levy Limits in 2006 Does Not Modify The Plain Language Of Wis. Stat. § 77.70 And Supports The County's Position That No Explicit Dollar-For-Dollar Offset Is Required.

It is apparent that Defendants are confused about the distinction between a county's Operating Levy, which is subject to statutory limitation in terms of the amount that can be raised through property taxes, and Debt Levy, which is not subject to the same statutory limitation.[9] Defendants are also confused by the very important role the Department of Revenue plays in calculating a county's allowable levy and certifying a county's state aid. Finally, Defendants' suggestion that the County's process in adopting the Ordinance fails to support the County's dedication to the "purpose" of the tax is considerably off base. The County will address each of Defendants' misconceptions below.

A. Levy Limits Only Apply To A County's "Operating Levy," Not the "Debt Levy."

Defendants assert that even if the Court adopts the reasoning set forth in the Attorney General's Opinion, the Levy Limit requirements that arose in 2006, and continue to date,

[9] As Defendants' note, a county's debt capacity is limited, but those limits are very high and, as a result, are not relevant here. *See* Wis. Const. Art. XI, Sec. 3 (a county's debt limit is 5% of the total equalized value of taxable property in the county.)

preclude the expenditure of sales and use tax proceeds on anything other than a dollar-for-dollar offset from the property tax levy. They argue "[b]ecause of levy limits, it is no longer true that a county can raise the property tax levy however much it wants to pay for new expenditures." (Def's. Br. In Supp. of Summ. J., p. 16). But Defendants wholly ignore the language of Wis. Stat. § 66.0602(3)(d)(2) that exempts debt service payments from the levy limit calculation. Indeed, Brown County could have issued general obligation debt and passed the interest costs onto county property taxpayers for many years to come to pay for the projects enumerated in the Ordinance. (see December 21, 2018 Klingsporn Aff., ¶¶29-30).

The statutory levy limits only limit increases to a county's operating levy, which is the amount of revenues necessary to support county government operations. As such, Brown County's operating levy could not have been used to pay for the capital improvement projects enumerated in the Ordinance without substantially decreasing other operating expenses such as employee wages. (*see* DOR's Levy Limit Worksheet attached to December 21, 2018 Klingsporn Aff., Exs. C & D; Wis. Stat. § 66.0602(2)). Debt service, as noted above, is specifically exempted from the levy limit calculation.

Contrary to Defendants' assertion, the County did not "evade" the statutory requirements associated with issuing debt by adopting the Ordinance. (Def's. Br. In Supp. of Summ. J., p. 18).[10] Brown County never started the process associated with issuing debt – a process it has utilized on numerous occasions – because the law does not require the County to do so in order to impose a sales and use tax. The fact that the County could have issued debt to pay for the projects enumerated in the Ordinance simply shows that the County is reducing the property tax

[10] The County is not taking the position that the Ordinance, or the County Board's vote on the Ordinance, is a substitute for the three-fourths vote required under Wis. Stat. § 67.045 to authorize borrowing.

levy by eliminating debt service payments,[11] which fall outside the statutory levy limit calculation.

B. Section 66.0602(2m) Does Not Require That A County's Levy Be Negatively Adjusted For Sales and Use Tax Revenues.

In addition to the fact that debt service is exempt from the levy limit calculation, subsection (2m) of Wis. Stat. § 66.0602's Local Levy Limits, titled "Negative Adjustment," requires a negative adjustment to the levy for certain revenues or savings obtained by a county, including one relevant to this discussion: a decrease in a county's debt service. The statute, however, does not require a mandatory reduction from a county's levy limit for sales and use tax revenues. It seems logical that if, as Defendants suggest, a dollar-for-dollar offset from a county's property tax levy for all sales and use tax proceeds is mandated, then the Legislature would have placed that requirement into Wis. Stat. § 66.0602(2m) and thereby authorized the DOR to include such a calculation in the Levy Limit Worksheet.[12] Neither Wis. Stat. § 66.0602(2m) nor any other statute requires an offset from levy limits for sales and use tax revenues.

C. Brown County's Actions Authorizing the Ordinance Show That Revenues From The Sales And Use Tax Directly Reduce The Property Tax Levy.

As indicated above, there is no question that the County could have borrowed to fund the capital projects delineated in the Ordinance. But the County chose not to saddle property taxpayers with interest payments, bond counsel fees and consultant charges, all of which would have significantly increased the cost of completing the identified capital projects. Instead,

[11] As set forth in the County's Initial Brief, the December 21, 2018, Klingsporn Affidavit and the materials appended to the Chintamaneni Affidavit, sales and use tax proceeds are not only funding capital projects, but also eliminating existing debt service, all of which reduce the property tax levy.

[12] This worksheet is critical from a state and local government financial perspective because levy limit compliance is ensured through the state aid process. If a county exceeds its levy limit, as calculated and certified by DOR, the county loses state aid in an amount equal to, dollar-for-dollar, the amount by which the county exceeded its levy limit. Wis. Stat. § 66.0602(6)(d).

Brown County engaged in a lengthy process of public notices and hearings before the Ordinance was enacted on May 17, 2017, all the while demonstrating that the proceeds of the then-proposed sales and use tax would result in significant savings to the County's property taxpayers.

First, the County issued a Public Notice of Meeting in relation to the May 8, 2017, Executive Committee meeting that provided the time, place, and notification of opportunity for the public to provide comments.[13] (Affidavit of Smitha Chintamaneni, Ex. A).[14] In that May 8, 2017, Executive Committee meeting, County Executive Streckenbach presented the "proposed debt reduction, infrastructure, and property tax cut plan." The minutes from the meeting reflect that the following discussion occurred at the meeting:

> First and foremost, the plan represents a six year general obligation debt moratorium and replaces it with a 72 month sales tax. In essence, the County would stop bonding for six years and the net effect of that would take the current $134 million dollar debt and bring it down to $65 million dollars. That represents **close to $70 million dollars of debt reduction**. The cost to the County to pay for the debt is roughly $14 million dollars and Streckenbach explained that **his plan would drop this by not bonding any more. The State of Wisconsin requires the County to drop levy by that amount, so essentially $6 million dollars. Every year the County does not take out any new debt, the net effect is the bonding goes down and as the bonding goes down, the tax levy that is required to pay off the debt goes down with it. By State law, the County cannot take the debt levy that was freed up from the tax payments and transport it back over to the operational budget. This is where the tax relief guarantee is to the residents of Brown County.** As long as it is agreed to stop taking out debt for six years and replace that with the sales tax, by default it is guaranteeing tax relief to the Brown County residents in the tax rate.

(Affidavit of Smitha Chintamaneni, Ex. B, p. 2)(emphasis added).

[13] Citizens of Brown County were provided an opportunity to comment on the items on the Executive Committee agenda. Only two citizens provided public comments – none of whom commented on County Executive Streckenbach's debt relief proposal. (Affidavit of Smitha Chintamaneni, Ex. B, p. 1).

[14] The County requests that the Court take judicial notice of the Exhibits attached to the Affidavit of Smitha Chintamaneni pursuant to Wis. Stat. § 902.01(2)(b).

Importantly, and contrary to Defendants' characterization of how the County is using sales and use tax proceeds, the factual record demonstrates that Brown County is not simply replacing the debt it could have incurred with sales and use tax proceeds. Rather, Brown County is paying down existing debt ***and*** funding capital projects which are eligible for the Debt Levy. Consistent with Wis. Stat. § 65.90(3)(b)(2)'s budgetary requirements,[15] the Ordinance's effect is a decrease in the debt service and thereby an ensuing decrease in the total property tax levy, which is comprised of both the Operating Levy and the Debt Levy. This is precisely what the Legislature envisioned in Wis. Stat. § 77.70.

Shortly after the Executive Board meeting on May 9, 2017, the public was notified that County Executive Streckenbach would hold nine (9) public listening sessions with the citizens over the course of a week (and prior to the May 17, 2017 Board of Supervisors meeting) so the public could learn about the plan and the County Executive could "hear some feedback about the bold proposal to invest $225 million into necessary infrastructure, while cutting property taxes and reducing debt." (Affidavit of Smitha Chintamaneni, Ex. C, p. 2).

The County issued another Public Notice of Meeting prior to the May 17, 2017, enactment of the Ordinance which provided the public with the time, place, and notification of another opportunity to provide comments on the proposed sales and use tax. (Affidavit of Smitha Chintamaneni, Ex. D) Even at the May 17, 2017, Brown County Board of Supervisors Meeting, only two citizens (neither of whom were the Defendants) voiced their opposition to the

[15] Wis. Stat. § 65.90(3)(b)(2) identifies multiple revenue streams which are required to be considered in preparing a county budget. Those revenue streams include taxes, special assessments, intergovernmental revenues, licenses and permits, fines, forfeitures and penalties, public charges for services, intergovernmental charges, miscellaneous revenue, and other financing sources. Taxes, such as the property tax levy, are only one stream of revenue within Brown County's budget. Thus, the budgeting process considers all revenue streams together in determining the budget for next year. There is no statutory mechanism by which sales and use tax revenues are recognized in Wis. Stat. § 65.90(3)(b)(2)'s budget process as applied directly to reduce the property tax levy.

proposed Ordinance. Eleven citizens voiced their support for the proposed Ordinance. (Affidavit of Smitha Chintamaneni, Ex. E, p. 2).

The County's efforts to authorize the sales and use tax in a deliberate and transparent fashion clearly shows the County's compliance with Wis. Stat. § 77.70. Quite simply, the County imposed the sales and use tax "for the purpose of directly reducing the property tax levy."

IV. If Accepted, Defendants' Interpretation Of Wis. Stat. § 77.70 As Requiring An Undefined Offset Process Will Lead to Absurd Results, Inconsistent Application, And Likely Further Litigation.

Defendants' statutory analysis wholly ignores the last prong of statutory construction, *i.e.*, that statutes should be interpreted to avoid absurd or unreasonable results. *Bank Mutual,* 326 Wis. 2d at 535. As stated in the County's Initial Brief, if Defendants' position were to be adopted, the most likely immediate effect would be a dramatic increase in borrowing by the County (pursuant to the county's ability to issue debt through a three-fourths vote of the Board) and the assumption of approximately $47 million in interest payments over the twenty (20) year life of the debt service. (December 21, 2018 Klingsporn Aff., ¶ 30). There can be no dispute that forcing a county to incur such an enormous amount of debt, with no legal or factual basis for doing so, is nothing short of absurd or unreasonable.

But perhaps even more alarming is that Defendants are requesting relief that would lead to statewide confusion and uncertainty as to the application of a mandatory dollar-for-dollar offset. As the Attorney General stated in 1998, counties lack statutory authority to implement a direct tax credit to property owners, but must instead strictly follow DOR guidelines on property

tax billing.[16] DOR's guidelines contain no mechanism to credit property owners for property tax rebates or offsets based upon sales and use tax revenues. Section 77.70's plain language does not direct *how* the DOR, as the agency responsible for county property tax levy limits, is to deduct sales and use tax revenues from the property tax levy because that was not the purpose behind Wis. Stat. § 77.70.[17]

As noted above and in the County's Initial Brief, even DOR's Levy Limit worksheet does not contain any mention of deducting proceeds from sales and use tax from the allowable property tax levy. In other words, there is no statutory or regulatory mechanism for counties to offset sales and use tax revenues against individual property owner taxes, nor is there any mechanism to offset the overall sales and use tax revenues from the overall property tax levy.

Essentially, Defendants are asking the Court to order Brown County to perform an offset calculation and apply the offset with absolutely no guidance. This puts the County and other Wisconsin counties with a sales and use tax in a precarious position. Inevitably, different counties would calculate the offset in different ways. Inevitably, different counties would calculate the timing of the offset in different ways. Inevitably, this would lead to inconsistent application of the law throughout the state. While not inevitable, it seems likely that such disparity in application of the law would lead to litigation. Such a scenario fits squarely into what courts recognize as an absurd or unreasonable construction of a statutory mandate and does nothing to promote uniformity and consistency in an agency's application of a statute.

[16] The Attorney General stated "[c]ounties, however, lack statutory authority to implement a direct system of tax credits to individual property owners through distribution of property tax bills, the contents of which are specified by the Department of Revenue." (December 27, 2018 Kamenick Aff., Ex. E, p. 2).

[17] DOR's decision to not include the dollar-for-dollar reduction into the calculations of the Levy Limit Worksheet for the last twelve years indicates that Wis. Stat. § 77.70 is unambiguous and DOR has left it to counties' discretion on how to reduce the property tax levy through the sales and use tax revenues.

Wisconsin Dept. of Revenue v. Menasha Corp, 311 Wis. 2d 579, 612, 754 N.W.2d 95, 112 (2008).[18]

CONCLUSION

Defendants are clearly dissatisfied with Brown County's decision to enact the Ordinance and authorize collection of a sales and use tax, despite the County's actions being consistent with Wis. Stat. § 77.70. But rather than seeking redress through the ballot box or lobbying the Legislature to change the statute, Defendants are inviting this Court to completely upset a long-standing and consistently-applied interpretation of the law.

The plain language of Wis. Stat. § 77.70 does not require the dollar-for-dollar reduction to the property tax levy for sales and use tax revenues. Furthermore, neither legislative history nor other extrinsic sources support Defendants' desired mandatory dollar-for-dollar reduction under Wis. Stat. § 77.70. Section 77.70 is an enabling statute, which allows counties to enact a sales and use tax. For over thirty (30) years, counties across the state have enacted ordinances authorizing the collection of a local sales and use tax and used the proceeds of the tax to reduce the local property tax, consistent with the Attorney General's Opinion. There is simply no reason to bring that process to a halt based upon a tortured reading of Wis. Stat. § 77.70.

For the reasons set forth above and in the County's Initial Brief, Brown County respectfully requests the Court deny the Defendants' motion for summary judgment.

[18] The *Menasha* court stated "[g]reat weight deference is given to the agency's statutory interpretation when each of the following requirements are met: (1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute." *Id*; see also *Madison Newspapers, Inc. v. Wisconsin Dept. of Revenue*, 228 Wis. 2d 745, 599 N.W.2d 51 (Ct. App., 1999); *Wisconsin Dept. of Revenue v. River City Refuse Removal, Inc.*, 289 Wis. 2d 628, 712 N.W.2d 351 (Ct. App., 2006).

Dated this 21st day of January, 2019.

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