STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

Brown County,

Plaintiff,

Case No. 18-CV-640

v.

Brown County Taxpayers Association, et al.,

Defendants/Third-Party-Plaintiffs

v.

Richard Chandler, Secretary,
Wisconsin Department of Revenue,

Third-Party Defendant.

AMICUS BRIEF OF THE WISCONSIN COUNTIES ASSOCIATION

INTRODUCTION

Wisconsin Counties' Association ("WCA") seeks leave to file this amicus brief for several reasons. First, this case is not simply a case about the legality of a single county ordinance. Instead, it is an attempt to overturn over 20 years of settled law and uniform practice by counties across Wisconsin. Second, adopting Defendants/Third-Party Plaintiffs' (together "BCTPA") unique and unfounded construction of Wis. Stat. § 77.70 would fundamentally change county budget and financial practices and procedures. Finally, and contrary to BCTPA's claim that the sales and use tax is just another mechanism to tax county residents, the sales and use tax provides the very tax relief contemplated by Wis. Stat. § 77.70. Accordingly, the WCA asks this Court to

consider the information provided below as it decides the parties' cross motions for summary judgement.

I. This Court Should Adhere To The Plain Language of Wis. Stat. § 77.70 And The Attorney General's Opinion Which Has Guided Counties' Actions For Over Twenty Years.

As noted in the Parties' opening briefs, the Attorney General issued a formal Opinion interpreting Wis. Stat. § 77.70 in 1998 - over twenty years ago. The Attorney General interpreted the plain language of the statute and correctly concluded that a county sales and use tax "directly reduce[s] the property tax levy …" (section 77.70) if the "funds received from a county sales and use tax [are] budgeted to reduce the amount of the countywide property tax levy or to defray the cost of any budget item which can be funded by a property tax levy." 1998 Wis. Att'y Gen. 2, 2.

This reading of Wis. Stat. § 77.70 comports with its plain meaning. Contrary to BCTPA's arguments, nothing in the actual language of the statute requires a county to set its budget and levy and then conduct a dollar-for-dollar reduction of the property tax levy based upon sales and use tax proceeds, presumably with estimates of the next year's collections or the actual receipts from the prior year.

Under BCTPA's approach, a county would be required to set its levy for a year based on estimated sales and use tax revenues and then hope that the budget would be met by the end of that fiscal year. If the estimated sales and use tax revenues are not met, then the county's budget would not be met. To make matters worse, a county's levy limit would then be artificially low because Wis. Stat. § 66.0602 establishes the prior year's levy as the baseline for the levy limit calculation. This is an absurd result and one that would provide none of the supposed taxpayer protections BCTPA claims its interpretation would yield. The Attorney General's Opinion avoids this absurdity in favor of a rational reading that the only limitation on sales and use tax revenues is that

revenues be allocated to budget items that could otherwise be funded by the property tax levy. The Opinion is faithful to both the language of the statute and the realities of county budgeting.

BCTPA next claims that the enactment of levy limits in 2006 now renders the Attorney Opinion moot. BCTPA has it exactly backwards. In 2005, the legislature enacted Wis. Stat. § 66.0602. That statute has placed a limit on the annual increase of a county's operating levy. A county's debt levy is exempt from levy limits. Wis. Stat. § 66.0602. That statute has been amended over 20 times since its enactment. In most instances, the amendments alter what types of expenditures are exempt from the levy limits. *See* 2005 Wis. Acts. 25 & 484; 2007 Wis. Acts 20, 115 & 129; 2009 Wis. Act 28; 2011 Wis. Acts 32, 63, 75, 140, 145 & 258; 2013 Wis. Act 20; 2013 Wis. Act 165; 2013 Wis. Acts 222 & 310; 2015 Wis. Acts 55, 191 & 256; 2017 Wis. Acts 59, 207, 223, 243, 317 & 365.

For the majority of the amendments, the Legislature has considered how the levy is to be calculated, whether it should be capped, and what expenditures should be excluded from the cap. If the Legislature thought the Attorney General's Opinion was incorrect, it would have taken corrective action. But it did not. In light of this reality, this Court should refrain from adopting BCTPA's new interpretation of Wis. Stat. § 77.70.

Judicial restraint is also what the law requires. In *Schill v. Wisconsin Rapids School District,* 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, the Wisconsin Supreme Court opined that the lack of legislative action to correct an Attorney General's interpretation of a statute coupled with other legislative activity on the same subject means that a court is to "regard [the opinion] as presumptively correct." *Id.* at ¶126, *see also* ¶ 125 (noting that inaction on the specific question coupled with other legislative action "shows that the legislature has "contemplated the specific problem at hand" and "acquiesce[ed] in the attorney general's long-standing opinion …").

The policy undergirding the doctrine of *stare decisis* also supports judicial restraint here. As the Wisconsin Supreme Court has made clear,

> One of the fundamental justifications for the rule of *stare decisis* is to provide a consistent predictable rule of law upon which society ... may properly order its affairs, i.e., engage in rational business decision-making, without the continuous, ominous threat of the legal bases for those decisions being changed.

Progressive Northern Insurance Company v. Romanshek, 2005 WI 67, ¶ 44, 281 Wis.2d 300, 697 N.W.2d 417; *see also Khan v. State Oil Co.*, 93 F.3d 1358, 1367 (7th Cir. 1996) (Ripple, J., concurring) ("[W]e ought to ensure, through strict application of the doctrine of *stare decisis* and precedent, that the law is sufficiently predictable and certain to permit businesses to order their affairs with a clear understanding of what the law requires.")

Sixty-six county governments across this State have organized their affairs (e.g. setting tax levies, approving capital projects, setting mill rates for real property, issuing bonds, incurring debt, etc.) around the well-reasoned opinion of the Attorney General. A change to the interplay between the levy and the sales tax would be catastrophic and would create uncharted territory for county budgeting.

Indeed, since the year 2000 (just 2 years after the Attorney General issued its opinion), fifteen counties have enacted a sales and use tax ordinance. Not a single county had a corresponding dollar-for-dollar reduction in their levy to account for the sales tax revenue. *See* Affidavit of Knapp, Exs. A & B. Altering the longstanding interpretation of Wis. Stat. ¶ 77.70 would upend the settled law and introduce uncertainty to the most important county function – budget setting.

II. A Change in the Law Would Be Catastrophic To County Budgeting Across Wisconsin.

As noted above, every county that has enacted a sales and use tax since 2000 has implemented it in conformity with the Attorney General's Opinion – by budgeting funds received from a county sales and use tax to reduce the amount of the countywide property tax levy or to defray the cost of any budget item which can be funded by a property tax levy.

The sales and use tax has been a significant source of revenue for the counties to reduce reliance on the property tax levy. For instance, in 2017 Milwaukee County generated over $74,000,000 of revenue from its sales and use tax - an amount equal to 25% of its levy. *See* Affidavit of Knapp, Exs. A & B. Dane County generated over $57,000,000 – an amount equal to 30% of its levy. *Id.* A dollar-for-dollar reduction in the levies would force counties to choose between cutting essential services or forgoing necessary capital improvement projects.

And, it is not just the larger counties that would be significantly impacted. In 2017, Pepin County (with a population of just 7,469 people) generated $535,543 from its sales and use tax. That figure represents 12.8% of its levy for the same year. *Id.* A dollar-for-dollar reduction of the levies based on sales and tax use revenue would be catastrophic.

This is where BCTPA's hypothetical breaks down. The counties are not wayward children, mired in debt who are jetting off to Europe on Daddy's money. The reality is much different. The counties are governmental entities comprised of duly-elected representatives, regulated by Wisconsin law, charged with ensuring their citizens are safe, well protected, have county resources at hand, and opportunities for economic growth. This Court should not adopt an unprecedented reading of Wis. Stat. § 77.70 that forces the Counties to choose between these important priorities.

III. A Sales and Use Tax Ordinance Under Wis. Stat. § 77.70 Provides Tax Relief to County Residents.

BCTPA misunderstands how sales and use taxes actually generate revenue. A consistent theme in their brief is that the sales and use taxes are just another way for counties to tax their residents. This is an incomplete and incorrect view of sales and use taxes. Because sales and use taxes apply to goods and services, and not real estate, they generate revenue from non-residents who shop, eat, vacation, enjoy various entertainment venues or stop for gas in a county. In other words, a sales and use tax spreads the tax burden to all of the people that use the infrastructure that the tax supports. As the tax base is broadened to include non-residents, county property taxpayers receive tax relief.

In 2017, dollars spent by non-residents ("Direct Visitor Spending" in the terminology of the tourism industry) accounted for $12.7 billion dollars of spending in the 72 counties. *See* Affidavit of Knapp, Ex. D. In turn, this spending generated $1.5 billion dollars in state and local taxes, a portion of which was county sales and use taxes. *Id.* In fact, by some estimates tourists or visitors spend 58.3% of their dollars on items (food and beverage, lodging, entertainment and general retail) that are subject to Wisconsin sales and use taxes. Affidavit of Olson, Ex A.

The impact of this visitor spending yields significant savings to the counties' residents. For instance, Florence County experienced $5.7 million in Direct Visitor Spending in 2017. Florence County adopted a sales and use tax in 2006. While, this new revenue source did not lead to a dollar-for-dollar reduction in the total county property tax levy, it did reduce the tax burden on Florence County taxpayers. In 2006, Florence County's Mill Rate was $7.02/$1,000. However, the Mill Rate immediately dropped to $6.27 the next year and $5.98 the following year. Indeed,

the Florence County Mill Rate has not exceeded $6.87[1] in any year since the adoption of the sales and use tax. See Affidavit of Knapp, Exs. C & D.

This trend is not uncommon. Green County saw a similar reduction in its Mill Rate after the adoption of a sales and use tax in 2003. Within 3 years, the Mill Rate had dropped by $0.98 and it remained below the 2003 level for seven years. *Id.* Trempealeau County also saw an immediate reduction in the Mill Rate following the adoption of a sales and use tax in 2010. The County's Mill Rate stayed below the 2010 rate for 6 years. *Id.*

All of these examples serve as evidence that sales and use taxes necessarily provide tax relief to county property owners by broadening the tax base to include non-residents. Moreover, it is quite common for these new tax dollars to have a direct downward impact on the mill rate. The decrease in the mill rate yields immediate and tangible tax savings to county residents.

CONCLUSION

The law has been settled. Wisconsin counties have ordered their budgets and capital projects in reliance on Wis. Stat. § 77.70 and the Attorney General's Opinion. A change brought about by litigation, as opposed to legislation, would be devastating to the counties and their residents. BCTPA has proffered a novel interpretation of Wis. Stat. § 77.70, that is unknown to the statute's history. It is directly at odds with the Attorney General's Opinion - an opinion the Legislature has left undisturbed for 20 years despite almost constant legislative activity on the subject of county tax levies. Any change in the operation of Wis. Stat. § 77.70 should come from the Legislature, not a single trial court reviewing a case that is ostensibly a challenge to a single

[1] Indeed, $6.87 is the peak Mill Rate since the adoption of the sales and use tax. In no other year since the 2006 adoption of the sales and use tax has the Florence County Mill Rate exceeded $6.64 and it averaged $6.40 in the years following the adoption of the sales and use tax. This represents real tax savings to Florence County residents.

ordinance adopted by a single county. The potential impacts on public funding, public services and public policy across Wisconsin warrant restraint in this case.

Dated this 23rd day of January, 2019.

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