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, REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff, Brown County, ("Brown County" or "County") submits this reply brief in support of its motion for summary judgment asserting that the plain language of Wis. Stat. § 77.70 does not require a dollar-for-dollar reduction to the existing or pre-existing property tax levy for sales and use tax revenues, as claimed by the Defendants.

INTRODUCTION

Notwithstanding over 100 pages of briefing, Defendants still have not provided the Court with what they call the "simple" mathematical formula relating to the calculation of the "mandatory" dollar-for-dollar offset of sales and use tax revenues from the county property tax levy, which they contend Wis. Stat. § 77.70 requires yet is found nowhere in the text of any statute or administrative rule. Instead, Defendants read words into the statute, illogically read prescriptive

mandates into the statute, and then conclude "this is the natural interpretation of the words used in Wis. Stat. § 77.70 and how any layman would understand the statute." (Def's Response Br., p. 4)

There is simply no requirement in Wis. Stat. § 77.70 for the dollar-for-dollar reduction Defendants seek to impose on Brown County and its property taxpayers. Counties across Wisconsin have budgeted for, and applied, sales tax revenues in different ways to "directly reduce the property tax levy" for over 30 years. Moreover, both the Attorney General and the Department of Revenue have applied the statute consistent with the County's interpretation. There is simply no basis for the Court to accept the Defendants' invitation to read an unwritten requirement into the law, completely disrupt the well-established interpretation and practice of 65 other counties and at least two state agencies, and create a new law.

ARGUMENT[1]

I. The Ordinance Does Not Violate the Plain Language of Wis. Stat. § 77.70.

The plain meaning of Wis. Stat. § 77.70 is clear. There is nothing in the statute requiring the mandatory offset (even though other statutes surrounding Wis. Stat. § 77.70 clearly contain such language) and there is not one single indication in any statute anywhere indicating the Legislature intended such a result. Yet, Defendants suggest that the mandatory offset arises by implication. Defendants' argument is misplaced.

Defendants' citation to *Martins v. Hunter's Lessee,* 14 U.S. 304 (1816), in support of their tortured plain meaning argument is particularly instructive. In *Martins,* the Supreme Court, in construing the U.S. Constitution, stated that "this instrument, like every other grant, is to have reasonable construction" and that " . . . words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted *or enlarged*." 14 U.S. at 326 (emphasis added). Similarly,

[1] 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.

when discussing the task of interpreting statutes, the Supreme Court in *Barnhart v. Thomas* stated " . . . when a statute speaks clearly to the issue at hand we 'must give effect to the unambiguously expressed intent of Congress' but when the statute is 'silent or ambiguous' we must defer to a reasonable construction by the agency charged with its implementation." 540 U.S. 20, 26 (2003). Defendants have clearly searched high and low, but the fact remains that there is simply no precedent, either 200 years old or less than 20 years old, which supports the proposition that a mandate as drastic as that requested by Defendants here can simply be read into a statute.

Defendants' arguments concerning the scope of the Legislature's actual direction to counties in Wis. Stat. § 77.70 are similarly misplaced. Defendants argue that when the Legislature authorized the imposition of a tax in Wis. Stat. § 77.70, it was also "speaking about the imposition of a tax generally, meaning the entire process of enacting a tax, collecting tax proceeds, and spending those proceeds" and "not the specific, limited act of enacting a tax into law by ordinance." (Defendants' Response Br., p. 4). Therefore, according to Defendants, Wis. Stat. § 77.70 contains a dollar-for-dollar reduction requirement *even though there is absolutely no language even discussing how the supposed reduction is intended to be calculated, applied or achieved.*

While Defendants concede Wis. Stat. § 77.70 is an enabling statute, they argue it is also a "prescriptive statute" which "prescribes the purpose for which [the sales and use tax] may be imposed." Brown County agrees there is a purpose behind Wis. Stat. § 77.70 – to "directly reduce the property tax levy." Indeed, the word "purpose" is contained in the statute. But a "purpose" statement, examples of which are quite common throughout Wisconsin's statutes, do not equate to a mandatory spending prescription. The U.S. Supreme Court has consistently held that enabling statutes are undoubtedly different than prescriptive statutes.[2] In this case, Wis. Stat. § 77.70 does

[2] In *Town of Hallie v. City of Eau Claire*, the U.S. Supreme Court held that former Wis. Stat. § 66.076(1) was "simply a general enabling statute" which permitted certain municipalities, including towns, to operate sewage systems and not a

not call for a dollar-for-dollar reduction, but merely enables a county to enact an ordinance for the purpose of directly reducing the property tax levy.[3] Brown County's Ordinance matches the elements of Section 77.70. It spells out the purpose of the sales and use tax, keeps the property tax mill rate flat and prohibits new borrowing by the County during the Ordinance's pendency, and as evidenced by the affidavits already filed, directly reduces Brown County's property tax levy over the next six years.

Brown County has shown that the sales and use tax revenues generated as a result of the Ordinance are being used to "directly reduce the property tax levy".[4] (12/21/18 Klingsporn Aff., ¶ 8). While the tax is in effect, the mill rate will not increase, county debt will be paid down, and the result is a savings of $496.68 for the median Brown County property owner between 2018-2023. (12/21/18 Klingsporn Aff., ¶ 34). Moreover, at the May 8, 2018 Brown County Executive Committee Meeting, at the point where the proposed imposition of the tax was discussed, County Executive Streckenbach stated "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 the debt is roughly $14 million dollars and Streckenbach explained that his plan would lower this cost by not bonding anymore." (12/21/18 Chintamaneni Aff., Ex. B, p. 2).

---

mandatory prescription. 471 U.S. 34, 105 S. Ct. 1713, ft. 5, (1985) see also *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168 (1998) (holding that 20 U.S.C. § 954(d)(1) was an enabling statute which vested "substantial discretion" in the NEA to award grants).

[3] The mere fact that "impose" is a synonym for "levy" in Websters' Dictionary does not mean that 77.70's 79 relevant words authorizing the adoption and imposition of a sales and use tax covered the entire process of enacting a tax, including collection and spending. Wis. Stat. §§ 77.705 and 77.706 are examples of situations when the Legislature has chosen to mandate exactly *how* tax proceeds are to be used because the statutory language directs the collection and use of those tax proceeds.

[4] Contrary to the Defendants' suggestion, the County is not saying that the Ordinance is a mechanism to augment the property tax levy- it is a substitution. The County will not be borrowing and collecting sales and use tax revenues at the same time; in fact, the County is prohibited from borrowing during the pendency of the Ordinance.

Defendants have not submitted any evidence to refute Mr. Klingsporn's affidavit or Mr. Streckenbach's prior public comments that there will be a direct reduction in Brown County's property tax levy solely as a result of the sales and use tax. Thus, at this final stage in the briefing, it remains undisputed that the *direct result* of the Ordinance will be an overall decrease in the property tax levy in the years to come.[5]

According to Defendants, a reduction in levy reliance for capital projects and paying down debt to reduce the debt levy is not enough. Instead, Defendants' entire argument is that Wis. Stat. § 77.70 insists upon a dollar-for-dollar reduction and that sales and use tax proceeds must be used "exclusively" to reduce the amount of money Brown County collects in property taxes. (Third Party Complaint, ¶ 27). But Section 77.70 is not a "use" statute, nor is the word "use" contained anywhere within the Section. Unlike Sections 77.705 and 77.706, the plain language of Wis. Stat. § 77.70 has no directive on *how* the funds must exactly be used, only that the purpose for imposing the tax must be to reduce the property tax levy.[6]

Under the second prong of the *Kalal* analysis relating to how a statute must be interpreted consistent with "similar and surrounding statutes," the language in Sections 77.705 and 77.706 are critical to this court's interpretation of Section 77.70. In comparison to the specific language in Sections 77.705 and 77.706 prescribing that revenues obtained under these Sections must be "used exclusively" to retire specified debt, Section 77.70 does not contain such language. As discussed in Brown County's brief in support of summary judgment ("Initial Brief"), Section 77.70 is an enabling statute which allows a county to enact a sales and use tax Ordinance but does not require

[5] see *Tews v. NHI*, LLC, 330 Wis. 2d 389, 430, 793 N.W.2d 860 (2010)(stating " . . . Evidentiary matters in affidavits are deemed uncontroverted when competing evidentiary facts are not set forth in counteraffidavits . . . Counteraffidavits are required from the plaintiff only if the defense has established by its affidavits those facts required to defeat the claim asserted by the plaintiff . . . If the adverse party does not so respond, summary judgment, if appropriate, *shall* be entered against such party.")

[6] Defendants concede that "only in their entirety" relates to the statutorily-imposed rate of an authorized sales and use tax, *i.e.,* 0.5%. Thus, Brown County will not address that issue further.

that sales and use tax revenues be used exclusively or specifically for any purpose. If, in fact, the Wisconsin Legislature wanted to require the same reduction Sections 77.705 and 77.706 explicitly require, it would have included that language in Section 77.70. But despite having knowledge of these two statutes (and, for that matter, the Attorney General's Opinion) the Legislature never amended Section 77.70 to expressly require the dollar-for-dollar reduction Defendants argue exists here. This Court should not do the work reserved for the Wisconsin Legislature.

II. The Attorney General's Opinion And The DOR Worksheet Are Consistent With The Clear Language Of Wis. Stat. § 77.70.

The Attorney General's Opinion and the DOR Levy Limit Worksheet are also consistent with the plain language of Wis. Stat. § 77.70 because they do not require the dollar-for-dollar reduction. Since 1998, the Attorney General's Opinion has been the definitive guidance for Section 77.70 because the opinion clearly and concisely explains how "directly reducing" works in the context of Section 77.70. By funding other projects which could be funded by the overall property tax levy, the sales and use tax acts as a substitute for the debt levy. There is no "alternate argument" (as Defendants contend) within that Opinion. It provides the appropriate statutory interpretation by the state authority empowered to provide guidance, and, as stated in the Initial Brief, is "presumptively correct."

Beyond disagreement with the Attorney General's guidance, Defendants have also chosen to ignore the fact there are significant penalties built into the law if a county exceeds what the Legislature has determined to be the appropriate limit for a county property tax. See Wis. Stat. § 66.0602(2m)(a)-b) generally. DOR is the state agency charged with the responsibility for determining a county's compliance with the strict levy limits. If a county exceeds the levy limit, the DOR is required by law to offset, dollar-for-dollar, state aid otherwise owed to the county. Sec. 66.0602(6)(a).

The DOR Levy Limit Worksheet demonstrates how it requires certain negative adjustments to a county's operating levy in various circumstances. Contrary to Defendants' characterization, the Levy Limit Worksheet is not simply a "practical document;" it is the definitive statement about a county's levy authority and the amount of state aid, if any, that will be reduced as a result of DOR's calculations. (12/21/18 Klingsporn Aff., ¶ 17). Incredulously, Defendants argue that Brown County is confused by the distinction between a levy and a levy limit. Based upon their arguments, it is the Defendants who misunderstand how levy limits work. As Brown County's Initial Brief illustrates, levy limits apply only to the operating levy. (Brown County's Br. In Opposition, p. 2). The debt levy is exempt from levy limits. Wis. Stat. § 66.0602(3)(d)(2).

Without any reference to the only statute that speaks to the calculation of reductions from a county's levy limit, Defendants argue Section 77.70 requires a reduction in the operating levy. As set forth above and at length in previous briefs, any reductions (*i.e.*, negative adjustments) to a county's operating levy are expressly set forth in Section 66.0602. A negative adjustment for sales and use tax revenues is found nowhere in that statute. Section 66.0602(6)(a) does not even mention, much less mandate, a reduction or a negative adjustment to a county's property tax levy for sales and use tax revenues.

III. Summary Judgment Should Be Granted In Favor of Brown County Based On The Final Prong of Statutory Interpretation, To Avoid Absurd and Unreasonable Results.

Defendants characterize the County's action in adopting the Ordinance as an "illegal" activity and argue that the County's behavior in this regard is "lawless." Defendants argue this Court should not condone such activity. But Defendants' inflammatory accusations are grounded in neither fact nor law. There is nothing illegal or lawless about how the County enacted the Ordinance. And there is nothing wrong with the County telling the story, in its Initial Brief, of precisely how a Brown County property taxpayer would be significantly adversely affected if

Defendants convince the Court to ignore what 65 other counties, the Attorney General and DOR have found to be clear.

There is no denying that if Defendants prevail, it would create significant burdens for the County and its property taxpayers. But beyond the impacts on Brown County alone, Defendants completely ignore the adverse impact of such a newly-formed and ill-defined mandate on the other 65 counties that have authorized a sales and use tax. There is no statute indicating how an offset is to be calculated. There is no statute authorizing a state agency to establish the calculation through administrative rule. There is no statute directing DOR to reduce a county's levy limit by any calculated estimate of sales and use tax proceeds. All 65 counties with a sales and use tax would be forced into making the rules up as they proceed and DOR would be forced to adjudicate those rules utilizing a nonexistent standard drawn from a nonexistent statute. This is simply not how the law works.

Finally, the DOR's admission that it needs time to flush out a remedy if Defendants prevail is significant. In its brief, the DOR specifically requested further briefing "on the proper remedy if the Court rules the tax in its current form violates Wis. Stat. § 77.70." (DOR Response Br. p. 11). What DOR's request demonstrates is even it, the very agency tasked with ensuring compliance with Wis. Stat. § 77.70, does not know how to implement the dollar-for-dollar reduction which Defendants contend exist in the plain language of Wis. Stat. § 77.70. The Legislature gave no such specific direction because it never intended a dollar-for-dollar reduction.

CONCLUSION

At the conclusion of the parties' briefing on cross-motions for summary judgment, it should be abundantly clear that the County has faithfully and fully complied with the letter of Wis. Stat. § 77.70. The Defendants have utterly failed to demonstrate how the plain language within Wis. Stat.

§ 77.70 requires a mandatory dollar-for-dollar reduction of the property tax levy based upon actual or estimated sales and use tax proceeds. Brown County has established that Section 77.70 has no directive on *how* the funds must exactly be used, only that the imposition of the tax be undertaken for the purpose of reducing the property tax levy. To that extent, the undisputed affidavit of Brown County's Finance Director, Bradley Klingsporn, establishes the Ordinance will reduce the property tax levy. Coupled with the Attorney General's Opinion and DOR's admission that it does not know how to implement a dollar-for-dollar reduction, it is unmistakable that neither the Legislature nor the agency tasked with enforcing Wis. Stat. § 77.70 requires a dollar-for-dollar reduction. For these reasons, Brown County is entitled to summary judgment as a matter of law.

Dated at Milwaukee, Wisconsin, this 11th day of February, 2019.

By: Electronically signed by Andrew T. Phillips
Andrew T. Phillips, SBN 1022232
Steven L. Nelson, SBN 1009779
Smitha Chintamaneni, SBN 1047047

Attorneys for Plaintiff, Brown County

MAILING ADDRESS:
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
PH: (414) 287-1570 (ATP)
(414) 287-1463 (SLN)
(414) 287-1515 (SC)
FAX: (414) 276-6281
Email: aphillips@vonbriesen.com
snelson@vonbriesen.com

32648670_3.DOCX