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 SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

## PROCEDURAL POSTURE

In January 2018, the now Third-Party Plaintiffs and Defendants, Brown County Taxpayers Association and Frank Bennett (collectively "Defendants") filed suit against Brown County in *Brown County Taxpayers Association v. Brown County* (Brown County Case No. 2018-CV-0013), and sought a declaratory judgment that the Brown County Ordinance authorizing the implementation of a sales and use tax was invalid and further asked the court to enjoin Brown County and the Department of Revenue from collecting the tax. Judge Atkinson dismissed that action without prejudice on March 1, 2018, finding that the Defendants' suit was

improper because they failed to provide notice under Wis. Stat. § 893.80 prior to filing suit. The Defendants then served a Notice of Claim on Brown County on March 1, 2018, seeking essentially the same relief that they sought in the failed lawsuit. Brown County disallowed the claim on or about May 22, 2018 and, as such, a controversy now exists between the parties to this action.

In light of Defendants' Notice of Claim and an imminent legal challenge to the Ordinance, Brown County filed this action pursuant to Wis. Stat. § 806.04 seeking, primarily, a declaratory judgment that Chapter 9 of the Brown County Code of Ordinances (the "Ordinance"), adopted on May 17, 2017, which authorized the imposition of a sales and use tax (the "Sales Tax") is valid in its current form. The Defendants counterclaim and allege the Ordinance authorizing the tax is unlawful and void as a matter of law.

There are no issues of material fact in relation to the parties' dispute surrounding the appropriate interpretation of Wis. Stat. § 77.70. As a result, this case is ripe for resolution.

## INTRODUCTION

The Defendants claim Wisconsin law mandates a county that authorizes the collection of a sales and use tax must annually offset all proceeds from the tax, dollar-for-dollar, from the property tax levy established by the county board pursuant to the statutory budget process. There is simply no legal basis for this Court to ignore the plain language of a statute supported by years of consistent application by the Attorney General, the Department of Revenue and Wisconsin counties.

Section 77.70 of the Wisconsin Statutes authorizes Wisconsin counties to impose a sales and use tax. Pursuant to this statute, there are three (3) conditions associated with a county's imposition of the tax. First, a county must adopt an ordinance authorizing the tax. Second, the

tax must be imposed at the rate of 0.5 percent. Finally, the tax may be imposed only for the purpose of directly reducing the property tax levy. Brown County satisfied all three (3) of these conditions in the text of the Ordinance and, therefore, the Ordinance must be declared a valid exercise of the statutory authority by Brown County under Wis. Stat. § 77.70.

Defendants' primary argument, both in this matter and the previous case, is that Wis. Stat. § 77.70 mandates that a county offset, dollar-for-dollar, anticipated sales and use tax proceeds from its property tax levy. Defendants' position ignores the plain meaning of Wis. Stat. § 77.70 and otherwise contradicts established interpretive guidance from the Wisconsin Attorney General and the Department of Revenue. As discussed in detail below, Defendants are asking this Court to wholly re-shape Wis. Stat. § 77.70 with reckless disregard for the consequences to Brown County, Brown County taxpayers and, for that matter, the 65 other Wisconsin counties that have authorized the imposition of a sales and use tax.

Beyond the clear deficiencies in Defendants' legal arguments, it is difficult to understand how Defendants' position promotes any semblance of sound public policy. Brown County authorized the Sales Tax to pay for what its duly-elected representatives on the County Board determined were necessary capital projects – roads, facilities, infrastructure, a jail, parks, etc. If the proceeds from the Sales Tax were not available, the projects would need to be funded from the proceeds of borrowing. Borrowing money costs money. If Brown County was forced to borrow, property taxpayers would be forced to pay the extra costs associated with the borrowing, in this case $13,627,943.36 in interest during the lifetime of the Ordinance. It cannot be disputed that Brown County acted in a fiscally-prudent fashion by choosing the "pay in cash" method of financing capital projects.

As set forth in detail below, without regard to whether this matter is viewed through the lens of the well-established rules of statutory construction or through common sense notions of appropriate stewardship of limited taxpayer resources, Defendants' claim lacks merit. Brown County seeks a declaratory judgment that its authorization of the Sales Tax was valid and its appropriation of the proceeds of the tax to pay for the capital projects enumerated in the Ordinance is lawful.

## FACTS

### 1. Wis. Stat. § 77.70[1]

In 1985, the Wisconsin Legislature enacted Wis. Stat. § 77.70 which authorized counties to enact a sales and use tax and established the conditions precedent a county must satisfy in order to impose the tax.

Section 77.70 provides as follows:

> 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.[2]

(Emphasis added).

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.
[2] While the text of the statute has been amended since its adoption in 1985, the terms relevant to the parties' dispute here (and emphasized in the offset quote) have remained unchanged.

Currently, 66 of Wisconsin's 72 counties have imposed a sales and use tax pursuant to Wis. Stat. § 77.70.[3]

**2. Wisconsin County Budget Process**

Pursuant to Wis. Stat. § 65.90(2), Wisconsin counties are required to adopt an annual budget.[4] As required by Wis. Stat. § 65.90(3)(b), the budget contains expenditures in such categories as general government, public works, public safety, conservation and development, capital outlay, and debt service. The county budget is also required to delineate all anticipated revenue sources to support budgeted expenditures. One of the revenue sources that counties rely upon to support their expense budgets is the local property tax levy. A county budget will also typically show the property tax rate for a county, which is the actual levy under Wis. Stat. § 66.0602 divided by the value of taxable property (i.e., equalized value) in the county, exclusive of any tax incremental district value increment. see Wis. Stat. § 70.57(1m).

**3. Wisconsin County Property Tax Levy and Levy Limits**

Once operating expenses are determined and other revenue sources are accounted for, the county board sets the property tax levy ("Operating Levy"). Section 66.0602 imposes a cap on allowable annual increases to a county's Operating Levy, which is expressed as a percentage. In essence this cap restricts the percentage increase in the Operating Levy to the percentage increase in the county's net new construction, as established by the Department of Revenue (the "Levy Limit"), subject to a number of special exclusions related to certain revenues received by the county.[5] Wis. Stat. § 66.0602(2).

[3] https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx#txrate3
[4] Certain counties exercise budgetary authority under Wis. Stat. § 59.60. Brown County does not.
[5] https://www.revenue.wi.gov/Pages/EQU/nnc.aspx

Perhaps recognizing there are circumstances where capital needs must be addressed outside the constraints of the Levy Limit,[6] Wis. Stat. § 66.0602(3)(d)(2) excludes general obligation debt[7] from the Levy Limit if that debt is issued on or after July 1, 2005, for the purpose of funding capital projects. The total of all increases to a county's aggregate annual general obligation debt service payments year-over-year (the "Debt Levy") is excluded from the Levy Limit calculation.[8]

Thus, a Wisconsin county's total property tax levy ("Tax Levy") can be expressed, in very simplified terms, as the sum of the Operating Levy (which together with state aid and other revenue sources comprises the revenues necessary to support county government operations) and the Debt Levy (the tax revenues necessary to pay debt service on county borrowing). As indicated above, only the Operating Levy is subject to the Levy Limit. Wis. Stat. § 66.0602(3)(d)(2).

**4. Brown County's Imposition Of A Sales and Use Tax Effective January 1, 2018.**

Like most counties operating on limited budgets, Brown County has deferred maintenance and infrastructure challenges in an era of diminishing state aid and property tax revenues. In early 2017, Brown County's Board of Supervisors explored the possibility of issuing debt to support its capital needs.[9] Brown County's May 17, 2017 Ordinance enacting the

[6] Capital projects can be funded through various means, including (i) funds that have accumulated over time due to revenues exceeding expenditures (i.e., fund balance), (ii) funds appropriated from the Operating Levy, (iii) proceeds from the issuance of general obligation debt, and (iv) other sources of revenue, including sales and use taxes. (Klingsporn Aff., ¶ 6).

[7] General obligation debt is any debt guaranteed by the full faith and credit of a county.

[8] However, the total amount of general obligation debt outstanding is subject to different statutory limits (i.e., shall not exceed 5% of equalized value). Wis. Stat. § 67.03.

[9] Wisconsin local governments utilize a variety of instruments to issue debt to finance any "project undertaken for a public purpose" Wis. Stat. § 6704(2)(a). The authorized debt instruments include, but are not limited to, promissory notes and bonds. *see generally* Wis. Stat. § 67.12 and § 67.16. In both circumstances, if promissory notes or bonds are issued, the municipality must appropriate funds to support the repayment of these debts. Wis. Stat. § 67.12(ee) and § 67.16(2)(b).

Sales Tax was done for the purpose of funding capital projects which would otherwise have been funded through the issuance of additional debt obligations (Klingsporn Aff., ¶ 7).

According to the Ordinance, the 0.5% Sales Tax is in effect for a period of 72 months, starting January 1, 2018. *(Id.)* The Ordinance also put strict constraints on how revenues from the sales and use tax are to be used. Section 9.02 of the Ordinance states:

> **9.02 Purpose**. This Ordinance enacts a temporary 72 month, 0.5 percent Brown County sales and use tax, revenues for which: 1) **Shall not be utilized** to fund any operating expenses other than lease payments associated with the below mentioned specific capital projects; and 2) **Shall be utilized only to reduce the property tax levy by funding the below listed specific capital projects,** as well as funding said specific capital projects' associated costs as deemed appropriate by Brown County administration, in the below listed estimated amounts:
>
> (1) Expo Hall Project - $15,000,000.00;
>
> (2) Infrastructure, Roads and Facilities Projects - $60,000,000.00;
>
> (3) Jail and Mental Health Projects - $20,000,000.00;
>
> (4) Library Project - $20,000,000.00;
>
> (5) Maintenance at Resch Expo Center Project - $10,000,000.00;
>
> (6) Medical Examiner and Public Safety Projects - $10,000,000.00;
>
> (7) Museum Project - $1,000,000.00;
>
> (8) Parks and Fairgrounds Project - $6,000,000.00; and
>
> (9) Stem Research Center Project - $5,000,000.00.
>
> (Complaint, Ex. B) (emphasis added).

The Ordinance expressly states the Sales Tax was imposed for the purpose of directly reducing the property tax levy. It also states that sales tax revenues (a) cannot be used to fund any operating expense other than lease expenses with these projects; and (b) must be used to

"reduce the property tax levy" by funding the delineated nine capital projects. (Complaint, Ex. B).

To illustrate compliance with Wis. Stat. § 77.70, the Brown County Board of Supervisors also imposed a mill rate[10] freeze for the time period when the sales and use tax is in effect.

> **9.03 MILL RATE FREEZE.** While this temporary sales and use tax Ordinance is in effect, the Brown County Mill Rate shall not exceed the 2018 Brown County Mill Rate. If the Brown County Mill Rate does exceed the 2018 Brown County Mill Rate during the 72 months that this temporary 0.5 percent Brown County sales and use tax is in effect, then this sales and use tax shall sunset on December 31 of the year the Brown County Mill Rate exceeds the 2018 Brown County Mill Rate.

The Ordinance is set to automatically expire six (6) years after January 1, 2018 – the date the Sales Tax was implemented.

> **9.04 EFFECTIVE COMMENCEMENT AND SUNSET DATES**. Subject to the following contingencies being met on or before August 15, 2017, this Ordinance shall take effect on January 1, 2018, and shall sunset 72 months thereafter, unless during said 72 month period any general obligation debt, excluding refunding bonds, is issued by Brown County in which case this Ordinance shall sunset on December 31 of the year any general obligation debt, excluding refunding bonds, is issued:

(Complaint, Ex. B).

According to the Ordinance, two actions would cut short the 72 month sales and use tax to December 31 in a given year:

a. Brown County's mill rate exceeding the 2018 Brown County Mill Rate; or

b. The issuance of general obligation debt for anything other than a refinancing.

[10] The Mill Rate is a "figure representing the amount per $1,000 of the assessed value of property, which is used to calculate the amount of property tax." *Milewski v. Town of Dover*, et al., 377 Wis. 2d 38, 899, N.W.2d 303 (2017) n. 18 (citations omitted).

(*Id*). The Ordinance provides sales tax collections to commence on January 1, 2018. (Ordinance, Section 2). In 2018, the Brown County Finance Department estimated that Sales Tax revenues would be $23,011,160. (Klingsporn Aff., ¶ 9).

**5. Brown County's 2018 Budget Process**

Brown County's Finance Department is responsible for implementing Brown County's annual budgeting process and verifying adherence to statutory levy constraints. (Klingsporn Aff., ¶ 10). Prior to enacting its budget, Brown County engages in a lengthy, overlapping multi-step budgeting process. That process includes the following activities, in order of action:

a. Working with Information Technology, Human Resources, and insurance brokers to ensure all county health, dental, workers compensation, and unemployment compensation plans are appropriately funded;

b. Working with the County's liability brokers and consultants to ensure all insurance coverages are in place; and

c. Working with all departments on their proposed budgets, which include increases in employee compensation as appropriate and necessary, other outlays necessary to support program needs, and anticipated capital project needs.

(Klingsporn Aff., ¶ 11).

The budget process begins in January of each year and includes an eight month strategic planning process culminating with final budget adoption in October or November. (Klingsporn Aff., ¶ 12). During the first six months of this process, the Finance Department works closely with each of the 31 different Brown County departments to set their respective budgets. In total, budgetary activity is tracked through 75 different funds. (Klingsporn Aff., ¶ 13). In August, the Finance Department compiles the final departmental budgets and determines the amount of allowed levy increase due to net new construction. All of this information, and more, is then

compiled into a proposed Annual Budget. (Klingsporn Aff., ¶ 14). In September, the County Executive submits the proposed budget to the County Board for hearings, deliberation, possible amendment and final adoption. (Klingsporn Aff., ¶ 15). The estimated Sales Tax proceeds were accounted for in formulating Brown County's 2018 and 2019 Annual Budgets. (Klingsporn Aff., ¶ 16, Exs. D and E).[11]

## LEGAL STANDARD

Under Wis. Stat. § 802.08(2), summary judgment is to be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Further, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," so long as there is no disputed fact that is material to the claim or defense made. *Baumeister v. Automated Products, Inc.*, 277 Wis. 2d 21, 690 N.W.2d 1, (quoting *City of Elkhorn v. 211 Centralia Corp*., 275 Wis. 2d 584, 685 N.W.2d 874); see also *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

Summary judgment is appropriate here because there is no dispute of material fact and the parties' dispute centers around the legal question surrounding the appropriate interpretation of Wis. Stat. § 77.70.

[11] The 2018 Annual Budget estimated sales and use tax proceeds to be $22,458,333 (Klingsporn Aff., Ex. D., p. 329). The 2019 Annual Budget estimated sales and use tax proceeds to be $24,500,000 (Klingsporn Aff., Ex. E., p. 262).

## STANDARDS FOR STATUTORY INTERPRETATION

### I. Statutes Are To Be Given Their Common, Ordinary, and Accepted Meaning.

In *State ex rel. Kalal v. Circuit Court of Dane County*, 271 Wis. 2d 633, 681 N.W.2d 110 (2004) the Wisconsin Supreme Court enunciated what has come to be recognized as the authoritative standard for statutory interpretation.

> Accordingly, we now conclude that the general framework for statutory interpretation in Wisconsin requires some clarification. It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

*Id.* at 662-63, (emphasis added);[12] see also *Fond Du Lac Cty. v. Town of Rosendale,* 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App., 1989)(stating "[o]ne of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning."); see also *Heritage Farms, Inc. v. Markel Ins. Co.,* 316 Wis. 2d 47, 762 N.W.2d 652 (2009).

A court's focus on the plain meaning interpretive process, as enunciated in *Kalal,* is not new. In *Connecticut Nat'l Bank v. Germain*, the United States Supreme Court stated very clearly:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

[12] The *Kalal* Court saw the need to clarify its prior decisions, because as it noted, they resulted in Wisconsin's statutory interpretation case law evolving "in something of a combination fashion, generating some analytical confusion." *Id*. at 661.

503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992); *see also Hartford Underwriters Ins. v. Union Planters Bank,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000).

Accepting that statutes cannot be read in a vacuum, the *Kalal* Court explained that proper statutory interpretation according to its plain meaning requires examination of the statute in context:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. **Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.** "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute."

*Id*. at 663. (citations omitted)(emphasis added). Indeed, "[a] statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes- this is, from its context or the structure of the statute as a coherent whole." *Kalal* at 665.

Thus, the language of Wis. Stat. § 77.70 is to be interpreted in the manner in which it is used as a whole and also with consideration of surrounding or closely-related statutes.

The *Kalal* court's interpretive methodology was reaffirmed in *Bank Mutual v. S.J. Boyer Const. Inc.*, 326 Wis. 2d 521, 785 N.W.2d 462 (2010). The *Bank Mutual* court again emphasized the importance of context in ascertaining the plain meaning of a statute.

> We do not read the text of a statute in isolation, but look at the overall context in which it is used. **When looking at the context,**

> **we read the text 'as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results.'** Thus, the scope, context, and purpose of a statute are relevant to a plain-meaning interpretation 'as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself. If the plain language is clear and unambiguous, we apply the plain words of the statute and ordinarily proceed no further.

*Id*. at 534-535. (emphasis added)(citations omitted).

In summary, and as the *Bank Mutual* court stated, 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) reasonably, to avoid absurd or unreasonable results. *Id*. at 534.

Under the *Kalal* methodology, as further explained in *Bank Mutual*, there is no need for the Court to review any material other than the text of Wis. Stat. § 77.70 and the text of similar and surrounding statutes. In so doing, the Legislature's intent, as expressed in the plain meaning of Wis. Stat. § 77.70, is clear.

## ARGUMENT

### A. The Plain Language Of Wis. Stat. § 77.70 Supports The Ordinance.

The crux of the parties' dispute centers around thirty (30) words in Wis. Stat. § 77.70.

> 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.**

(emphasis added).

Defendants allege the above emphasized language "requires a county to use all of the proceeds from a sales and use tax *exclusively* to reduce the amount of money it collects in property taxes (the property tax levy)" and that "the Sales Tax is not being used *only to directly* reduce its property tax levy" (Counterclaim, ¶ 27-28)(emphasis). The language Defendants use to describe the statute's alleged mandate is found nowhere in the statute itself. In fact, the word "[E]xclusively" does not appear anywhere in the statute. As a result, Defendants' claim is misplaced and should be dismissed.

**1. The Word "Exclusively" Is Not In Wis. Stat. § 77.70.**

As indicated above, Defendants improperly insert the word "exclusively" into the statute and in doing so, attempt to change its meaning. Section 77.70 does not provide that the sales and use tax proceeds should be used "exclusively" for any specific purpose. Rather, the statute dictates that the "county sales and use tax may be **imposed only for the purpose** of directly reducing the property tax levy and only in their entirety." (emphasis added). The act of imposing the tax, which is the only act mentioned in the statute, happens once – when a county board adopts the ordinance authorizing the imposition of a tax.

It is clear that Wis. Stat. § 77.70 is an enabling statute which *allows* a county to impose a sales and use tax. *Liberty Grove Town Bd. v. Door County Bd. of Supervisors*, 284 Wis. 2d 814, 702 N.W.2d 33 (2005)[13]; see also *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, n. 5, 85 L. Ed 2d 24 (1985) (stating that "[f]irst, it is true that § 66.076(1) permits certain municipalities, including towns to operate sewage systems. The provision is simply a general

[13] In *Liberty Grove*, the Court of Appeals held that Wis. Stat. § 59.54(4) was an enabling statute which permitted Door County to have exclusive rights to name roads. Relevant to this matter is the *Liberty Grove* court's recognition that "[t]he plain language of this statute gives counties discretionary authority to establish a rural naming or numbering system when the purpose of the system is to aid in fire protection, emergency services and civil defense. The statute also gives counties discretion to give each road a name or number and to cooperate with towns to implement the system." *Id*. at 822.

enabling statute, however, not a mandatory prescription.") Section 77.70 contains absolutely no direction on *how* sales and use tax proceeds are to be used. Indeed, the Legislature has placed limitations on a county's spending authority in a completely different statutory section. *see generally* Wis. Stat. § 66.0602. Quite simply, the only conditions the Legislature placed on a county's right to impose a sales and use tax is that it must be imposed (by Ordinance) for the purpose of directly reducing the Levy (as evidenced by the Brown County Board's actions imposing the tax) and that if imposed, it must be imposed at a rate of 0.5%.

**2. Defendants Read the Phrase in Wis. Stat. § 77.70 "Only To Directly Reduce" Out Of Context.**

The Defendants next insert the phrase "only to directly reduce" into the statute by alleging that "[t]he Sales Tax is not being used 'only to directly reduce' its property tax levy." (Counterclaim, ¶ 28) In doing so, the Defendants again create a false directive when the statute does not contain such. Again, the only directive within Wis. Stat. § 77.70 is that any sales and use tax "may be imposed **only for the purpose of** directly reducing the property tax levy…." (Emphasis added.) The plain language of the statute simply means that (a) Brown County may impose a sales and use tax and (b) when it acts to impose the tax, it may do so only for the purpose of "directly reducing the property tax levy." As set forth above, the statute is an enabling statute – not a spending constraint. Defendants' attempt to flip the statute's clearly-intended purpose by inserting phrases and conflating terms within the statute is misplaced.

**B. An Analysis of Surrounding or Closely Related Statutes Supports Brown County's Interpretation of Wis. Stat. § 77.70.**

Finally, Defendants misinterpret the statutory phrase "and only in their entirety" when they allege that the statute "requires a county to use all of the proceeds" to reduce the property tax levy. (Counterclaim, ¶ 27). Under the plain language of the statute, the phrase "only in their

entirety" means that the only sales and use tax rate which can be charged, if the tax is adopted, is a 0.5% tax rate. That tax rate is explicitly stated in the earlier phrase "the rate of the tax imposed under this section is 0.5 percent of the sales price or purchase price" within Wis. Stat. § 77.70.

If the Legislature intended to establish a dollar-for-dollar reduction, as Defendants contend, it would have used words such as "offset," "deduct," "subtract," or "retire" to specify that all sales and use tax revenues must be subtracted from the property tax levy. Indeed, the Legislature did just this in two other tax statutes within Chapter 77 - Wis. Stat. § 77.705 and § 77.706.

Both of these statutes contain the same clause "only in their entirety" as Wis. Stat. § 77.70 but go further than Wis. Stat. § 77.70 by mandating how revenues from those taxes *shall* be "exclusively" used.

Wis. Stat. § 77.705, commonly known as the Miller Park Stadium tax, states:

> A local professional baseball park district created under subch. III of ch. 229, by resolution under s. 229.68(1), may impose a sales tax and a use tax under this subchapter at a rate of no more than 0.1 percent of the sales price or purchase price. **Those taxes may be imposed only in their entirety.** The resolution shall be effective on the first January 1, April 1, July 1, or October 1 that begins at least 120 days after the adoption of the resolution. Any monies transferred from the appropriation account under s. 20.5666(1)(gd) to the appropriation account under sec. 20.835(4)(gb) shall be used exclusively to retire the district's debt. Any monies received under s. 341.14(6r)(b)13.b. and credited to the appropriation account under s. 20.835(4)(gb) **shall be used exclusively to retire the district's debt.**

(emphasis added).

Wis. Stat. § 77.706, commonly known as the Lambeau Field Tax, states:

> A local professional football stadium district created under subch. IV of ch. 229, by resolution under s. 229.824(15), may impose a sales tax and a use tax under this subchapter at a rate of 0.5 percent of the sales price or purchase price. **Those taxes may be imposed**

> **only in their entirety.** The imposition of the taxes under this section shall be effective on the first January 1, April 1, July 1, or October 1 that begins at least 120 days after the certification of the approval of the resolution by the electors in the district's jurisdiction under s. 229.824(15). Any moneys transferred from the appropriation account under s. 20.566(1)(ge) to the appropriation account under s. 20.835(4)(ge) **shall be used exclusively to retire the district's debt.**

(emphasis added).

Much like Wis. Stat. § 77.70, the phrase "in their entirety" in these two statutes refers to the amount of the authorized sales and use tax (0.5%), not *how* the sales and use tax revenues are required to be spent. Furthermore, and unlike Wis. Stat. § 77.70, the more recently adopted Sections 77.705 and 77.706 went one step further and explicitly directed that any revenues from the Miller Park and Lambeau tax "**shall** be used exclusively to retire the district's debt." (emphasis added) Section 77.70 does not contain the exclusive "shall" directive in terms of how tax proceeds are spent and Defendants should not be allowed to add it in now.

### C. Levy Limits, Under Wis. Stat. § 66.0602(6), Do Not Require A Dollar-For-Dollar Reduction To The Property Tax Levy As A Result Of Sales And Use Tax Revenues.

In their counterclaim, Defendants suggest that the levy limits play an important role in the court's analysis. (Counterclaim, ¶ 38). Their levy limit argument is a red herring and has no bearing on Brown County's appropriation of sales and use tax revenues. In fact, the absence of any statutory directive mandating an offset actually supports Brown County's position.

Section 66.0602 addresses local levy limits for villages, towns, cities, and counties. Wis. Stat. § 66.0602(1)(au)-(c). It provides how much an Operating Levy can be increased on a yearly basis, the exclusion of the Debt Levy from the Levy Limit calculation, and negative adjustments to the total Tax Levy. Wis. Stat. § 66.0602(2), (2m), and 3(d)(2). Notably, Wis. Stat. § 66.0602(2m) requires certain negative adjustments to the Tax Levy if a county's debt

service is less than it was in the prior year or on the amount of revenues received to pay for "covered service[s]" funded in 2013 and as defined in Wis. Stat. § 66.0602(2m)(b). Despite explicitly requiring a negative adjustment for certain specific revenue streams, the Legislature did not require a negative adjustment to the Operating Levy based on sales and use tax revenues. If the Legislature intended to provide for such a negative adjustment based on sales and use tax revenues, as Defendants allege, it would have explicitly provided for the adjustment, just as it had done for retired debt service and "covered services."

Section 77.70 has been in effect since 1985, long before the 2006 enactment of levy limits. Yet, despite presumptively knowing of the existence of Wis. Stat. § 77.70 at the time Wis. Stat. § 66.0602 was enacted, the Legislature took no action to provide a statutory negative adjustment to the levy limit for sales and use tax revenues in 2006. The absence of such action by the Legislature is critical to the interpretation of Wis. Stat. § 77.70 and indicates that the Legislature, despite having the knowledge and the ability to do so (and having done so in two other statutes), declined to require a dollar-for-dollar reduction in the property tax levy for sales and use tax revenues.

### D. The 1998 Attorney General Opinion Reaches The Correct Conclusion And Is Entitled To Deference As A Matter Of Law.

Defendants contend the Attorney General's 1998 Opinion "contradicts the plain language of the statute" and his reasoning no longer applies because of the subsequent 2006 creation of levy limits. (Counterclaim, ¶¶ 33-38, Ex. G). The timing associated with the statute's enactment, the Attorney General's Opinion, and the Legislature's subsequent acceptance of the Attorney General's Opinion belies the Defendants' position.

After reviewing the plain meaning of the statute, the Attorney General opined there is nothing prescriptive in Wis. Stat. § 77.70 concerning how sales and use tax revenues must be spent.

> Counties, 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. The countywide property tax levy is usually shown as a single line revenue source in the budget. The net proceeds of the sales and use tax are also a revenue item. **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 total property tax before determining the net property tax that must be levied.** That budgeting method directly reduces the amount of the countywide property tax which must paid by each taxpayer.

(Counterclaim, Ex. G)(emphasis added).

Thus, according to the Attorney General, a county's budget will reflect the impact of sales and use tax revenues by a direct subtraction from the property tax levy, which would be otherwise necessary to support the budget. Such an analysis fits with Wis. Stat. § 77.70's phrase, "for the purpose of directly reducing the property tax levy."

The Attorney General interpreted Wis. Stat. § 77.70 by analyzing the word "directly." He interpreted "directly" to mean that budgetary items which could be funded through a countywide property tax could also be funded through sales and use tax. 1998 Wis. Op. Att'y Gen. 2, 2 (1998). As a result, the Attorney General concluded "that funds received from a county sales and use tax under section 77.70 may be budgeted by the county board 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 Attorney General issued this opinion eight (8) years before the enactment of Wis. Stat. § 66.0602's levy limits in 2006. Yet despite having presumptive knowledge of this opinion, the Legislature did not take any steps to codify a dollar-for-dollar reduction to the property tax levy based upon sales and use tax revenues.

Importantly, the Attorney General's opinion is "persuasive" and "regarded as presumptively correct." *Schill v. Wisconsin Rapids School District,* 327 Wis. 2d 572, 786 N.W.2d 177 (2010).

> **A well-reasoned attorney general's opinion interpreting a statute is, according to the court's rules of statutory interpretation, of persuasive value**. Furthermore, a statutory interpretation by the attorney general "is accorded even greater weight, and **is regarded as presumptively correct,** when the legislature later amends the statute but makes no changes in response to the attorney general's opinion."

*Id.* at 626-27. (emphasis added); see also *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School Dist.,* 364 Wis. 2d 429, 438, 867 N.W.2d 825 (Ct. App., 2015)(stating "[O]pinions of the attorney general are not binding as precedent, but they may be persuasive as to the meaning of statutes . . . Thus, the interpretation advanced by the attorney general is of particular importance here."); *State v. Beaver Dam Area Dev. Corp.,* 312 Wis. 2d 84, 752 N.W.2d 295 (2008).

Given the persuasive value of the Attorney General's Opinion and the Legislature's subsequent inaction to create a dollar-for-dollar deduction for sales and use tax revenue when it codified Wis. Stat. § 66.0602, the only reasonable conclusion is that the Legislature did not intend for that outcome.

### E. The Department of Revenue's Interpretation Is Particularly Important.

Under Wis. Stat. § 66.0602(6), the Department of Revenue is charged by the Legislature with enforcing levy limits.[14] To fulfill its statutory obligation, the Wisconsin Department of Revenue requires every county to file a Levy Limit Worksheet for each fiscal year, outlining how the Tax Levy is reached. Section D of the 2018 Levy Limit Worksheet, titled "Adjustments to Allowable Levy Limit" identifies certain sums separated by category (Lines A-O) that are to be added or subtracted from the allowable levy to perform the statutory levy limit calculation. (Klingsporn Aff.,¶ 18). For example, Line E in Section D of the 2018 Levy Limit Worksheet excludes all sums paid for debt service from the levy limit calculation. In other words, if a county borrows money for a capital project, the principal and interest payments that the county pays on the loan are excluded from the definition of revenues subject to the levy limit. (Klingsporn Aff.,¶ 19). There is nothing in Section D "Adjustments to Allowable Levy Limit" in the Levy Limit Worksheet that identifies proceeds of a sales and use tax as being deducted from the allowable levy. None of the fifteen (15) items on Section D remotely relate to such a calculation. (Klingsporn Aff., ¶ 20). In summary, the Department of Revenue has consistently interpreted Wis. Stat. § 77.70 as <u>not</u> mandating a dollar-for-dollar offset of sales tax revenues from the property tax levy.

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[14] Wis. Stat. § 66.0602(6) states:
PENALTIES. Except as provided in sub. (6m), if the department of revenue determines that a political subdivision has a penalized excess in any year, the department of revenue shall do all of the following:
(a) Reduce the amount of county and municipal aid payments to the political subdivision under s. 79.035 in the following year by an amount equal to the amount of the penalized excess.
(b) Ensure that the amount of any reductions in county and municipal aid payments under par. (a) lapses to the general fund.
(c) Ensure that the amount of the penalized excess is not included in determining the limit described under sub. (2) for the political subdivision for the following year.
(d) Ensure that, if a political subdivision's penalized excess exceeds the amount of aid payment that may be reduced under par. (a), the excess amount is subtracted from the aid payments under par. (a) in the following years until the total amount of penalized excess is subtracted from the aid payments.

For the last thirty-three (33) years, Wis. Stat. § 77.70 has been consistently interpreted by counties across Wisconsin, the Department of Revenue, and the Attorney General. For the last twenty (20) years, the Legislature did not act to change Wis. Stat. § 77.70 despite knowing of the Attorney General's opinion and the adoption of two other similar statutes which required a specific use of tax revenues. For the last twelve (12) years, the DOR, the agency charged with the responsibility for enforcing the statutory levy limits imposed on counties throughout the state, has not required a dollar-for-dollar reduction. These long-standing interpretations are not only entitled to deference, they are absolutely correct as a matter of law.

### F. Wis. Stat. § 77.70 Should Be Interpreted To Avoid Absurd or Unreasonable Results

In addition to reading statutes to give them their common and ordinary meaning, while considering surrounding and closely related statutes, the Wisconsin Supreme Court has also held that courts must read statutes "reasonably, to avoid absurd or unreasonable results." *Bank Mutual* at 535. If Defendants' tortured interpretation mandating a dollar-for-dollar offset were to be accepted, Brown County taxpayers will be negatively affected for decades to come. In other words, Defendants' proffered interpretation leads to an absurd result.

In support of their dollar-for-dollar reduction argument, Defendants argue the *estimated* 2018 Sales Tax revenues of $22,458,333 should be subtracted from the county board-approved 2018 levy. (Counterclaim, ¶ 28).[15] The 2018 levy limits were set in the fall of 2017, long before Brown County could determine with any accuracy how much Sales Tax it would actually collect by December of 2018. (Klingsporn Aff., ¶ 21). While Brown County can estimate Sales Tax

[15] Exhibit F to the Counter-claim is not the final draft of the 2017 Levy Limit Worksheet for the 2018 Levy Limit. (Klingsporn Aff, ¶ 40). Instead, the final 2018 Allowable Levy Limit was $ 87,584,261, as set forth in the 2017 Levy Limit Worksheet for the 2018 Allowable Levy, and which was filed with the Department of Revenue. (Klingsporn Aff, ¶ 41, Ex. B). The 2018 Levy Limit Worksheet for the 2019 Allowable Levy, which was filed with the Department of Revenue, sets a finalized Allowable Levy of $88,346,048. (Klingsporn Aff, ¶ 42, Ex. C).

revenues for a fiscal year, it cannot precisely determine an exact amount for budgeting purposes because revenues depend on consumer spending. (Klingsporn Aff., ¶ 22).[16] [17]

In 2018, sales and use tax revenues are estimated to be $23,011,160. (Klingsporn Aff., ¶ 9) As of December 19, 2018, Brown County already received eleven payments from DOR representing Sales Tax revenues in the total amount of $20,598,082. (Klingsporn Aff., ¶ 24). Brown County's 2019 Annual Budget was adopted on October 31, 2018. (Klingsporn Aff., ¶ 25). If the Sales Tax is held to be invalid, Brown County's 2019 Annual budget would need to be amended because the revenue categories have changed. However, there is no legal mechanism for Brown County to amend its property tax levy for 2019. (Klingsporn Aff., ¶ 26).

The County is required by law to directly reduce the general property tax levy for every dollar of debt service retired each year. (Klingsporn Aff., ¶ 28). If Brown County was forced to borrow, property taxpayers would be forced to pay the extra costs associated with borrowing, in this case $13,627,943.36 in interest over the time of the Ordinance. (Klingsporn Aff., ¶ 29). Such borrowing would also result in property taxpayers incurring approximately $47,000,000 in interest over the twenty (20) year life of the debt service. (Klingsporn Aff., ¶ 30).

The Sales Tax will result in direct property tax savings every year from 2019 through 2023. (Klingsporn Aff., ¶ 31). If the Sales Tax remains in place, taxes on a property assessed at $163,200 (the median value of a home in Brown County) would decrease by $140.20 between 2018 and 2023. (Klingsporn Aff., ¶ 32). However, if there was no Sales Tax, the issuance of general obligation debt would result in taxes on that same median property increasing by

[16] These revenues to Brown County will benefit Brown County taxpayers by lowering the property tax rate, reducing interest expenses on financing projects, and having non-County residents assist with financing through purchases subject to the sales and use tax. (Klingsporn Aff., ¶ 8).

[17] However, it would not be impossible under the two similar statutes, Wis. Stat. § 77.705 and § 77.706, which require that monies received be used exclusively to retire the debt.

$356.48 between 2018 and 2023. (Klingsporn Aff., ¶ 33)[18] The difference is a savings of $496.68 for the typical Brown County homeowner of a median property as a direct result of the Sales Tax. (Klingsporn Aff., ¶ 34). If the sales tax is invalidated, the County will need to borrow money to make up the shortfall. (Klingsporn Aff., ¶ 35). Brown County property taxpayers would then suffer the consequences.

Brown County's 2019 budget and property tax levy are set and the 2019 Budget has been approved. (Klingsporn Aff., ¶ 36) If the Sales Tax is repealed, Brown County would be unable to fund its already established operating budget, which includes compensation increases to employees as necessary and appropriate, while simultaneously decreasing its budget by nearly $24,500,000 the amount of 2019's estimated Sales Tax revenues. (Klingsporn Aff., ¶ 37). Furthermore, there is a significant risk that Brown County's credit rating will be negatively affected if the County is unable to use sales and use tax revenues to satisfy its capital obligations. (Klingsporn Aff., ¶ 38).

If Defendants prevail, Brown County (and other Wisconsin counties) will be forced into a guessing game of how to handle reconciling actual sales and use tax receipts to estimates in light of the (now) mandatory offset. There is simply no statutory or regulatory guidance as to how these calculations should be made. Such a result will lead to chaos among Wisconsin counties as they have to invent new rules to deal with such a ruling.

To attempt to strong arm a county into a position where it cannot fund capital projects, where it may not be able to cover its 2019 county budget and will require it to take on approximately $147,000,000 in additional borrowing is an absurd and unreasonable result and inconsistent with the plain language of Wis. Stat. § 77.70.

[18] The County is required by law to directly reduce the general property tax levy by every dollar of debt service retired each year. (Klingsporn Aff., ¶ 28).

## CONCLUSION

Since 1985, the Legislature and the Executive branch have consistently interpreted Wis. Stat. § 77.70 as an enabling statute, not a prescriptive statute. The Defendants' attempt to insert phrases and their ill-conceived version of legislative intent into Wis. Stat. § 77.70 ignores the statute's plain language.

Quite simply, Wis. Stat. § 77.70 enables Wisconsin counties to impose a sales and use tax but does not require a dollar-for-dollar reduction to the property tax levy. When comparing Wis. Stat. § 77.70 to Wis. Stat. § 77.705 and § 77.706, both of which require the use of revenues to retire debt, it is clear that the Legislature did not intend Wis. Stat. § 77.70 to have the same result. As further evidence of the intent behind Wis. Stat. § 77.70, Wis. Stat. § 66.0602 does not require that a county negatively adjust its property tax levy based on sales and use tax revenues. Twenty years ago, the Attorney General confirmed as much, and despite having knowledge of his Opinion and over three decades to change Wis. Stat § 77.70, the Legislature has chosen not to do so.

From a practical perspective, there is nothing to suggest that the Legislature intended to encourage counties to borrow more. Such an intention, should it exist, would be antithetical to any semblance of rational fiscal management

For all of the above reasons, Brown County respectfully requests the Court grant its motion for summary judgment and declare that the Ordinance and 2018 Budget are valid, enforceable, and may continue in full force and effect.

Dated at Milwaukee, Wisconsin, this 21st day of December, 2018.

By: Electronically signed by Andrew T. Phillips

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