STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

BROWN COUNTY,
Plaintiff,
v. Case No. 18-CV-640

BROWN COUNTY TAXPAYERS ASSOCIATION, et al.,
Defendants/Third-Party-Plaintiffs

v.

RICHARD CHANDLER, Secretary,
Wisconsin Department of Revenue,
Third-Party Defendant

DEFENDANTS/THIRD-PARTY-PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

If you give your daughter $10,000 on the condition that she use it to reduce her burdensome credit card debt, can she use it for anything she wants? Can she use the money to finance a vacation to Europe on the theory that she could have charged the trip on her credit card and her balance is "reduced" because she didn't have to borrow the money? What does it mean to "reduce" something? What does it mean to say that money has to be used for a specific purpose? These simple questions are at the heart of this case.

State law says that counties can collect a sales tax, but that the money from the tax can only be used for one thing. A county sales and use tax "may be imposed only for the purpose of directly reducing the property tax levy." Wis. Stat. § 77.70. To determine whether a sales and use tax is lawful then, the question is simply this: "Did the county's property tax levy decrease by the amount of sales and use tax raised?"

At issue in this case is the legality of Brown County's new sales and use tax ("County Sales Tax"), which became effective on January 1, 2018. Did Brown County use revenue from that tax to directly reduce its property tax levy? No. Instead, the County used that revenue to fund a dramatic increase in spending and still raised its property tax levy. The County Sales Tax is therefore unlawful and should be declared void.

STATEMENT OF FACTS

Defendant/Third-Party-Plaintiff Brown County Taxpayers Association ("BCTA") is an unincorporated nonprofit association. (Heidel Aff., ¶1.) BCTA's mission is to promote individual freedom and citizen responsibility; limited government which is fiscally responsible, transparent and accountable to the people; and economic policy that encourages free markets, promotes entrepreneurism, respects property rights, and expands opportunity for the people of Brown County to prosper and live free, productive lives. (*Id.*, ¶5, Ex. A.) BCTA has over 100 dues-paying members, including individuals, businesses, and organizations who purchase and use products and services in Brown County. Its members pay and will continue to pay the County Sales Tax. (*Id.*, ¶7.) BCTA's members also include individuals, businesses, and other organizations who sell taxable products and services in Brown County. (*Id.*, ¶8.) Those members have to collect and remit the County Sales Tax to the Wisconsin Department of Revenue ("DOR").

Defendant/Third-Party-Plaintiff Frank Bennett is an adult citizen of Wisconsin who lives in Brown County. He regularly purchases products and services in Brown County and pays and will continue to pay the County Sales Tax. (*Id.*, Bennett Aff., ¶¶2-5.) This brief will refer to the Defendants/Third-Party-Plaintiffs BCTA and Bennett collectively as "Taxpayers."

Plaintiff Brown County is a Wisconsin county and it enacted the County Sales Tax. (Compl., ¶1.) Third-Party Defendant Richard Chandler is the Secretary of the DOR. (3rd P. Compl., ¶7; 3rd P. Ans. ¶7.) DOR is the state agency responsible for levying, enforcing, and collecting county sales and use taxes. Wis. Stat. § 77.76. Defendant Chandler is sued in his official capacity. (3rd P. Compl. ¶7.)

Prior to January 1, 2018, Brown County did not have a county sales and use tax. (3rd P. Compl., ¶13; Ans. to Counterclaim, ¶13.) On May 17, 2017, the Brown County Board of Supervisors enacted an ordinance creating a 0.5% sales and use tax (the "Ordinance"), intended to go into effect on January 1, 2018. (Compl., ¶10, Ex. B.) According to the Ordinance, the $147,000,000 the County Sales Tax is expected to raise over its six-year duration is dedicated to be spent on the following new projects:

1) Expo Hall Project - $15,000,000
2) Infrastructure, Roads and Facilities Projects - $60,000,000
3) Jail and Mental Health Projects - $20,000,000
4) Library Project - $20,000,000
5) Maintenance at Resch Expo Center Project - $10,000,000
6) Medical Examiner and Public Safety Projects - $10,000,000
7) Museum Project - $1,000,000
8) Parks and Fairgrounds Project - $6,000,000
9) Stem Research Center Project - $5,000,000

(*Id.*, ¶12, Ex. B.)

In 2017, the Brown County Executive issued a 2018 budget proposal that was consistent with the newly-passed ordinance. (3rd P. Compl. ¶18, Ex. D; Ans. to Counterclaim, ¶18.) On November 1, 2017, the Brown County Board of Supervisors made minor amendments to the budget proposal (not relevant here) and adopted it as amended as the County's 2018 budget. On November 7, 2017, the Brown County Executive signed the 2018 budget with no vetoes. (3rd P. Compl., ¶19; Ans. to Counterclaim, ¶19.) The budget creates a special fund "to account for the

collection and use of .05% (sic) County sales tax imposed for capital improvements." (3rd P. Compl. Ex. D, p. 17; Ans. to Counterclaim, ¶18.) The budget estimates that the County Sales Tax will raise $22,458,333 in 2018 and calls for spending $17,895,065 of that revenue. (*Id.*, p. 329.) That money is budgeted to be spent on the following new projects:

1) Highway Projects - $9,264,687
2) Facility Building Upgrades - $250,000
3) Jail Projects: Sheriff Jail Pods - $1,071,258
4) Library Branch Expansion/Relocation - $1,000,000
5) Medical Examiner Facility - $528,120
6) Museum Permanent Exhibit - $500,000
7) Parks Improvements - $500,000
8) Brown County Research and Business Park: STEM Innovation Center - $4,200,000
9) Public Safety Communications Upgrades: 9-1-1 & TS SDC UPS Replacement - $581,000

(*Id.*, pp. 279-80.)

In 2017, Brown County's property tax levy was $86,661,972. (3rd P. Compl., ¶22; Ans. to Counterclaim, ¶22.) In 2018, Brown County's property tax levy was $90,676,735, an increase of $4,014,763 or about 5%. (3rd P. Compl., ¶23; Ans. to Counterclaim, ¶23.) Brown County's 2018 levy limit was $91,115,007. (3rd P. Compl., ¶22; Ans. to Counterclaim, ¶22.)

ARGUMENT

Under Wis. Stat. § 802.08(2), summary judgment "shall be rendered 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." *See also, e.g., SECURA Ins. v. Lyme St. Croix Forest Co., LLC*, 2018 WI 103, ¶15, 384 Wis. 2d 282, 918 N.W.2d 885 ("Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

The Taxpayers are entitled to summary judgment. The undisputed facts show that Brown County enacted the County Sales Tax and is using the proceeds from the tax to pay for $147,000,000 in new spending. Instead of reducing the property tax levy, the County raised it. Because state law requires that county sales and use tax proceeds must be used to "directly reduce the property tax levy," Wis. Stat. § 77.70, the County Sales Tax is unlawful.

I) BROWN COUNTY'S SALES TAX VIOLATES THE PLAIN LANGUAGE OF WIS. STAT. § 77.70

The pertinent portion of § 77.70 currently reads 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),[1] **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 and footnote added.)

A) The Plain Language of Wis. Stat. § 77.70 Requires County Sales Tax Revenues to Be Used Only to Directly Reduce the Property Tax Levy

"[S]tatutory interpretation begins with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*, ¶45. Dictionaries are an accepted source for the common, ordinary, and accepted meaning of a statutory term. *See Id.*, ¶¶41, 53-54. "[I]f the meaning of the statute is plain, [a court] ordinarily stops the inquiry." *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶15, 312 Wis. 2d 1, 754 N.W.2d 439 (citing *Kalal*, 2004 WI 58, ¶45).

[1] That exception is not at issue here, as it applies only to counties with an electronics and information technology manufacturing zone, which Brown County does not have.

The highlighted language is not difficult to understand. "Reducing" means "to diminish in size, amount, extent, or number." Webster's New Collegiate Dictionary, p. 320 (1981). "Direct"[2] means "stemming immediately from a source," "marked by the absence of an intervening agency, instrumentality, or influence." *Id.*, p. 320. "Directly reducing the property tax levy," then, means to diminish the amount of the levy in a manner stemming immediately from the source – the sales tax revenue – without any intervening steps. The revenue from the county sales tax must reduce the levy, not fund new spending. Step one – impose the sales tax. Step two – decrease the property tax levy by the amount of the sales tax revenue. Avoiding a hypothetical increase in the levy (or a credit-financed vacation to Europe) – is neither a "reduction" nor "direct."

Not only is directly reducing the levy a use for sales tax revenue, the statute establishes that it is the "only" permissible use. "Only" means "as a single fact or instance and nothing more or different," synonymous with "solely" and "exclusively". *Id.*, p. 795. Therefore, revenue from the sales tax can be used solely and exclusively to lower the property tax levy and nothing more or different.

If sales tax revenue can be used solely for that purpose and nothing else, by definition it cannot be used to fund increased spending by the county. New spending does not cause a levy reduction. At best, using sales tax revenue to fund new spending avoids a hypothetical increase in property taxes (which might have been used to pay for the new projects), but "avoiding an increase" is not a "reduction" much less a "direct" reduction. To claim otherwise – to say that using sales tax revenue for new spending because it could hypothetically have been paid for by

[2] "Directly" meaning "in a direct manner." Webster's New Collegiate Dictionary, p. 320 (1981).

property tax dollars – reads the limitation on the use of sales tax revenue out of the statute. It becomes no limitation at all.

The County might argue that requiring the county to first raise the levy before lowering it (perhaps immediately) with a sales tax creates a needless step and it would be more efficient to avoid it. But legislative limitations on local government authority are usually not designed with efficiency in mind – they are designed to protect the public. Requiring the county board to both be able to and to actually vote to raise the levy first requires discipline from the elected officials and prevents them from obscuring what is really going on from the public. If legislators have been unable (due, for example to applicable levy limits) or unwilling to raise property taxes, a sales tax only augments county revenue and that is not permitted.

In sum, Wisconsin Stat. § 77.70 is concisely written and easily understandable. The word "reduce" is in common use, and the legislature's use of "directly" and "only" as brisk modifiers eliminate any doubt as to the statute's scope and application.

B) The Legislative History of Wis. Stat. § 77.70 Supports the Plain Language of Wis. Stat. § 77.70

Though not necessary to an interpretation of Wis. Stat. § 77.70, the legislative history of the statute further confirms that the obvious meaning of the statute is the correct one. *See Sands v. Whitnall S.D.*, 2008 WI 89, ¶15, 312 Wis. 2d 1, 754 N.W.2d 439 ("[T]he court may also consult extrinsic sources 'to confirm or verify a plain-meaning interpretation.'" (quoting *Kalal*, 271 Wis. 2d 633, ¶45)). The actions of the Legislature in creating the statute, as well as the public comments of lawmakers and events of the mid-1980's, support the conclusion that county sales tax revenue must be applied exclusively to reduce the property tax levy.

Prior to 1985, counties could impose sales and use taxes, but the proceeds from such taxes had to be distributed to the cities, villages, and towns within the County. *See* Wis. Stat. §§

77.70 (1983), 77.76(4) (1983). However, no county had enacted a sales tax, Legislative Reference Bureau, *Wisconsin's County Sales and Use Taxes: A New Version of an Earlier Concept*, 86-IB-5, p. 2 (Oct. 1986) ("LRB Bulletin") (2nd Kamenick Aff., Ex. A), "presumably because none of the proceeds of the tax could be used by county government and because counties could not control how the net proceeds of such taxes would be used by other local units of government within the county." Op. Att'y Gen. 1-98 (Kamenick Aff., Ex. E, p. 1).

Property tax relief was a major topic of conversation during the 1985 state budget process.[3] Proposals were made to raise the state sales tax and earmark the money as direct credits on property tax bills.[4] Dane County and the City of Madison lobbied the legislature to allow counties to spend their county sales tax revenues themselves, so that when the counties had to take over municipal responsibilities for various social welfare programs (as required by a change in state law), they could raise funds with a sales tax while the municipalities at the same time lowered their own property tax levies.[5] Counties were also facing the potential of a loss of significant federal funds due to the Gramm-Rudman-Hollings Balanced Budget Act.[6]

Responding to that pressure, the Legislature changed § 77.76 to allow counties to use the proceeds from county sales taxes themselves. *See* 1985 Wis. Act 29, § 1500x. Later that year, the Legislature took up a technical bill to improve the administration of the tax and make it apply to certain purchases (like vehicles) made outside of the taxing county (a use tax). *See* 1985 Wis. Senate Bill 376 (Kamenick Aff., Ex. F). During the process, Senator Russ Feingold offered a successful amendment to add language requiring the sales tax to be used only "for property tax

[3] For example, farmers complained about property taxes and lobbied for succor. (Kamenick Aff. Ex. O.) Property tax relief was a "major feature" of Governor Earl's budget proposal. (Kamenick Aff. Ex. P.)
[4] Kamenick Aff. Exs. P & Q.
[5] *Id.*, Exs. R, S, & T.
[6] LRB Bulletin, pp. 8, 11, 15.

relief."[7] In the Assembly, the vaguer phrase "property tax relief" was replaced with the stricter "directly reducing the property tax levy."[8] That language was passed by the legislature and signed by the Governor. 1985 Wis. Act 41.

Publicly, Senator Feingold called the sales tax inequitable and said that if counties were going to use it, "we should ensure that the revenue it raises goes directly toward lowering property tax bills."[9] Governor Earl, after signing the bill into law, said that it was meant to be "a vehicle to hold down property-tax increases rather than a spur to added spending."[10] After the law was passed, Dane County (which had lobbied for it) considered enacting a sales tax. If Dane County had enacted a sales tax, it was estimated to "lower the county property tax levy by an estimated $6.5 million in 1986 and $13 million in 1987, the first full year on which revenues could be collected."[11] The County Board Chairman of Barron County, the first county to enact a sales tax, stated that the revenue "offsets the property tax. We're using it as direct relief to property tax."[12]

The public understood what the tax was for. In at least one instance, public pressure stymied efforts to enact sales taxes where the public felt that a sales tax was being proposed for the wrong purpose. For example, Fond du Lac voters in 1986 rejected a referendum calling for a sales tax that the Fond du Lac Chamber of Commerce had flagged as being misused to "slightly offset" an increase in property taxes instead of actually lowering taxes.[13]

---

[7] Kamenick Aff., ¶10, Exs. G, H, I & J.
[8] *Id.*, Exs. L & M.
[9] *Id.*, Ex. U.
[10] *Id.*, Ex. V.
[11] 2nd Kamenick Aff. Ex. B.
[12] LRB Bulletin, p. 6.
[13] *Id. at* 8.

C) The Practice of Counties Implementing Sales Taxes Supports the Plain Language of Wis. Stat. § 77.70

If the plain language and legislative history of Wis. Stat. § 77.70 did not make the answer obvious enough, the Court can look to the actual practice of counties implementing sales taxes – in particular those counties that implemented sales taxes shortly after the law was changed in 1985. *Cf. Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W.2d 408 (in interpreting constitutional provisions, courts will consider the "earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption"); Sutherland Statutory Construction § 49:1 (7th Ed.) ("Where an act's language is ambiguous, then, courts may find interpretive guidance in the way the statute was construed when it first became operative."). While the practice across the 66 counties that have a sales tax is not uniform, there are some clear conclusions that can be drawn from the record. In particular, the earliest counties to adopt a sales tax clearly understood what it was actually for.

Reviewing the language used in the 66 county sales tax ordinances across the state demonstrates a clear trend: the earliest counties to adopt a sales tax were the most likely to adopt language adhering to the statute's plain meaning. Only as years and decades passed and institutional memories lapsed did a few counties begin to stretch the rules.

The language used in those ordinances over the years tends to fall into one of four categories. First, half of the counties' ordinances simply quote the statutory language, stating that the revenue shall be used to directly reduce the property tax levy.[14]

Second, many counties chose to include additional language in their ordinances that further explicate the intent of that statutory restriction. Examples include:

[14] 2nd Kamenick Aff., Ex. C, pp. 1, 2, 5-6, 9, 10, 15, 16, 17, 20, 25, 34, 37, 40-42, 44-46, 47, 48, 52, 58-60, 61, 64, 65-69, 70, 71, 77, 78, 81, 82, 84-85, 86, 94, 95-96.

- "may not be used for any new or expanded county services" (6 similar counties)
- "shall be applied directly to the property tax bill as a property tax credit" (6 similar counties)
- "shall not be used in any manner whatsoever for any new or expanded County programs or services" (3 similar counties)[15]

Third, other counties ignore the statutory restriction and dedicate the sales tax revenue to broad categories of new spending, like capital projects.[16]

Finally, Brown County's approach – dedicating sales tax revenue to specific new projects – is rare. Only three[17] other counties earmark revenue for new projects listed in the sales tax ordinance itself.[18]

The clear trend among counties shows that the earliest counties to adopt a sales tax – those closest to the conditions that led to the statutory change – were much more likely to pass an ordinance in the first two categories, consistent with the Legislature's intent. In the first two years after § 77.70 was changed, a dozen counties[19] implemented a sales tax. None of them[20] expressly dedicated sales tax revenue for broad categories of spending or listed projects.

---

[15] *Id.*, Ex. C, pp. 18-19, 21, 22, 23, 24, 27-28, 29-30, 35, 36, 38, 49, 55, 62, 63, 83, 87.
[16] *Id.*, Ex. C, pp. 11-12, 13-14, 26, 31-32, 33, 39, 43, 50-51, 56-57, 72, 75-76, 79-80, 91-92.
[17] Some counties specify that sales tax revenue will pay for bonds for specific projects. Those are difficult to clearly assign to a category. (*See, e.g., id.*, Ex. C, pp. 3-4 (Barron), 73-74 (Rusk).) If the bonds had been issued and the property tax levy raised to pay them, using sales tax revenue to pay them instead would lower the levy (assuming the county did not increase spending to use the newly-available levy amounts). But if the bonds were taken out roughly simultaneously with the imposition of a sales tax and no raise in levy, then the county would be merely avoiding an increase by paying for those bonds with a sales tax, not actually decreasing the levy.
[18] Kenosha, Milwaukee, Waupaca. (*Id.*, Ex. C, p. 39, 53-54, 93.
[19] Barron, Buffalo, Dunn, Iowa, Jackson, Lincoln, Marathon, Oneida, Rusk, Sawyer, St. Croix, Walworth. (*Id.*, Ex. C, pp. 3-4, 9, 23, 34, 36, 48, 49, 58-60, 73-74, 77, 81, 87.)
[20] Excepting the two counties, Barron and Rusk, which dedicated the revenue to paying for specific bonds. *See supra*, n. 17. However, it seems highly likely that those were pre-existing obligations, as both of those counties' property tax levies actually decreased immediately after the imposition of a sales tax. (*Id.*, ¶¶6-9, Exs. D, E & F.)

Over the next decade, most counties[21] continued to quote the statute or include better language, although a few started to dedicate sales tax revenue to specific projects[22] or permit spending on new projects in broad categories[23].

It was only after 1998, when then-Attorney General James Doyle issued a formal opinion erroneously concluding that § 77.70 allowed spending on new projects (*see infra*, Section II), that counties started using a sales tax as an excuse to increase spending instead of decreasing the property tax levy more frequently. After that point, only two counties[24] used better language, while six counties[25] quoted the statute and nine[26] allowed for increased spending.

D) Brown County's Sales Tax Is Illegal Under a Plain Language Analysis

In the end, the question facing this Court is simple: "Did Brown County use the sales tax revenue to lower the property tax levy, or did they use it for something else?" The language of the ordinance itself answers that question: the money is being used to pay for a slew of new projects.

To harken back to the analogy that opened this brief, does paying for a vacation using money earmarked to reduce debt actually "reduce" the debt by not incurring additional debt? Can the wayward daughter really tell her father "I was going to go to Europe and put the vacation on my credit card anyway, so I'm actually reducing my credit card balance by not using

[21] Adams, Ashland, Bayfield, Burnett, Columbia, Crawford, Dane, Dodge, Door, Douglas, Forest, Iron, Jefferson, Juneau, Langlade, Marquette, Monroe, Ozaukee, Pepin, Pierce, Polk, Portage, Price, Richland, Shawano, Trempealeau, Vernon, Vilas, Waushara. (*Id.*, Ex. C, pp. 1, 2, 5-6, 10, 16, 17, 18-19, 20, 21, 22, 27-28, 35, 37, 38, 47, 52, 55, 61, 62, 63, 64, 65-69, 70, 71, 78, 83, 84-85, 86, 94.)
[22] Kenosha, Milwaukee, Waupaca. (*Id.*, Ex. C, pp. 39, 53-54, 93.)
[23] Chippewa, La Crosse, Oconto, Sauk, Washburn. (*Id.*, Ex. C, pp. 13-14, 43, 56-57, 75-76, 88-90.)
[24] Eau Claire, Grant. (*Id.*, Ex. C, pp. 24, 29-30.)
[25] Clark, Florence, Kewaunee, Lafayette, Taylor, Wood. (*Id.*, Ex. C, pp. 15, 25, 40-42, 44-46, 82, 95-96.)
[26] Brown, Calumet, Fond du Lac, Green, Green Lake, Marinette, Rock, Sheboygan, Washington. (*Id.*, Ex. C, pp. 7-8, 11-12, 26, 31-32, 33, 50-51, 72, 79-80, 91-92.) Fond du Lac's ordinance quotes directly from the Attorney General's opinion. (*Id.*, Ex. C, p. 26.)

my credit card"? The answer is obvious. Yet that is the exact logic Brown County uses here. It says that it doesn't have to actually reduce its levy, because it was going to put the $147,000,000 on its credit card.

But state law does not permit the sales tax to be spent in that manner. This sales tax violates the restriction in Wis. Stat. § 77.70 that sales tax revenue be used "only for the purpose of directly reducing the property tax levy." This restriction may or may not be a good policy, but that decision is one for the legislature, not Brown County or this court, to make.

II) THE ATTORNEY GENERAL'S 1998 OPINION CONTRADICTS THE PLAIN LANGUAGE OF WIS. STAT. § 77.70

The County relies on a formal opinion issued in 1998 by then-Attorney General James Doyle interpreting § 77.70 more broadly than the plain language of the statute permits. He concluded that preventing the property tax levy from *rising* due to new projects had the same legal effect as *reducing* it. Op. Att'y Gen. 1-98, 2-3. In other words, the sales tax ought to be available to facilitate or "spur" new spending. However, no court has ever adopted that interpretation, which contradicts the statute's plain language and it renders the legislature's restriction on the use of sales tax revenue illusory. It will always be possible to say that maybe or somehow property taxes could have been raised instead to pay for new projects actually funded by the sales tax.

Attorney General Doyle analyzed whether a county could budget its sales and use tax proceeds "as a revenue source used to offset the cost of individual items contained in the county budget." *Id.* at 2. Some counties were using this method to dedicate sales and use tax revenue to paying for <u>new</u> projects. He condoned this practice, concluding that there was no meaningful distinction between using sales and use taxes to pay for existing expenses (lowering the actual

property tax levy) and using such taxes to pay for new expenses (preventing the property tax levy from rising). *Id.* at 2-3.

The Attorney General's interpretation contradicts the plain language of the statute, which calls for a direct reduction, not the absence of an increase. *See Kalal*, 2004 WI 58, ¶¶44-45 ("Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. . . . [S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'") (quoting *Seider v. O'Connell*, 2000 WI 76, ¶31, 236 Wis. 2d 211, 612 N.W.2d 659). The Attorney General focused on what types of projects the sales and use tax revenue was being used to pay for, while the statute says the revenues may "only" be used to pay for property tax reduction. The question should not be what projects the sales and use tax revenue is being used to fund, but whether the property tax levy decreases by the amount of sales and use tax revenue collected.

The opinion distorts the meaning of "directly reducing the property tax levy" beyond recognition, because preventing an increase in the property tax levy is at best an <u>indirect</u> method of property tax relief. But the statute does not call merely for "relief" (whether direct or indirect). The legislature specifically rejected a version of the statute using that broader language, instead opting for more specific language requiring a direct reduction.

Not only does the opinion contradict the plain language of the statute, the Attorney General failed to consider any of the external indications of legislative intent discussed previously. He did not look at the drafting history of the bill. He did not look at public statements about the bill or the reasons for giving counties a workable sales tax in the first place. He thought it absurd that one county could use a sales tax to pay for an existing project already

funded by property taxes while another county could not use it to pay for a new project. But that is not an absurd limitation; it is integral to the limitation that the legislature chose to impose. A sleight of the hand that turns "avoiding an increase to fund new projects or programs" into a reduction reads this limitation out of the statute.

The Attorney General's opinion is not binding on courts and should be disregarded, because it contradicts the plain language of the statute and does not comport with the external indications of legislative intent.

III) BROWN COUNTY'S SALES TAX IS ILLEGAL EVEN UNDER THE ATTORNEY GENERAL'S ALTERNATIVE ANALYSIS

If this Court disagrees with the Taxpayers and concludes that the Attorney General's opinion is correct, it should still strike down the County Sales Tax. That opinion concludes that a sales tax can be used to pay for new spending, but only if that new spending could have been funded with a property tax. Because levy limits – enacted after the 1998 opinion was published – prevent counties from exceeding certain property tax levels, projects that would cause the levy to exceed that limit (if paid for with property taxes) cannot be paid for with a sales tax. Brown County's projects exceed what they could have paid for by raising their levy to their levy limit, so the sales tax is unlawful, even under the Attorney General's opinion.

A) The Effect of County Levy Limits on the Attorney General's Opinion

The Attorney General concluded that the term "directly" in the statute means that a sales and use tax cannot be used to pay for anything that the property tax levy could not be raised to pay for. Op. Att'y Gen. 1-98, 3. Specifically, he said that:

> 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. Although any revenue source frees up other funds to be used for other budgetary purposes, the budgeting of sales and use tax proceeds to

> defray the cost of items which cannot be funded by a countywide property tax constitutes indirect rather than direct property tax relief.

Id. (emphasis added).

The Attorney General's opinion (and the amendment of § 77.70) occurred before the enactment of levy limits. Levy limits prohibit how much counties may raise their property taxes, sharply limiting what a county can spend on new projects with a property tax increase or, by the Attorney General's logic, with a sales and use tax.

Counties were not subject to levy limits until 2006. *See* 2005 Wis. Act 25. Under Wis. Stat. § 66.0602(2), "political subdivisions" (including counties, § 66.0602(1)(c)) may not increase their levies "in any year by a percentage that exceeds the political subdivision's valuation factor." A "valuation factor" "means a percentage equal to the greater of either the percentage change in the political subdivision's January 1 equalized value due to new construction less improvements removed between the previous year and the current one or zero percent." § 66.0602(1)(d). Effectively, a county's levy is fixed at its current level, and can only be raised if the county experiences a net positive growth in property values due to new construction. A county cannot exceed this levy limit, unless it gets approval by referendum of the voters or other exceptions apply. § 66.0602(4).

The Attorney General's opinion did not, and could not, take into account the effect of levy limits on § 77.70. Because 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. It can only raise its levy by an amount proportional to the net growth in new construction in the county. If the cost of proposed projects exceeds the allowable levy increase, the county could not raise its levy to pay for those projects. Because a county could not raise its property tax levy to pay for those

projects, implementing a sales and use tax to pay for those projects **would not avoid a property tax increase that would otherwise occur.** A simple syllogism demonstrates this logic:

Major premise:	A county can only use a sales and use tax to pay for projects the county could levy a property tax to fund.
Minor premise:	A county cannot levy a property tax to fund projects in excess of its levy limit.
Conclusion:	A county cannot use a sales and use tax to pay for projects in excess of its levy limit.

B) Brown County Did Not Have Room Under Its Levy Limit to Pay for Its New Projects

Even under Attorney General Doyle's interpretation, the County Sales Tax still violates § 77.70, because Brown County could not have raised its property tax levy to pay for all of the new spending being funded by the County Sales Tax.

Brown County proposes to fund $147,000,000 in new projects over seven years with the County Sales Tax, including almost $18,000,000 in new spending in 2018 alone. Brown County's allowable levy limit increase in 2018 was $4,453,035. Brown County therefore could not have raised its levy to pay for the $18,000,000 in new projects. Brown County is not using the County Sales Tax "only for the purpose of directly reducing the property tax levy and only in [its] entirety." *See* Wis. Stat. § 77.70. Instead, Brown County is using the County Sales Tax to evade its levy limits, increasing its overall tax revenue by over 25% in 2018. Even under the Attorney General's interpretation, the County Sales Tax violates Wis. Stat. § 77.70.

C) Brown County Could Not Have Borrowed to Pay for Its New Projects

Finally, Brown County argues that the property tax levy limit does not matter because the county could have borrowed to pay for the $147,000,000 in new projects, and counties can raise their levies to pay for debt service without regard to the levy limit. Brown County is saying that

it could have borrowed for all this new spending and could have raised its property taxes to pay back the bonds and therefore it can pay for the same spending with a sales tax.

But Brown County did not borrow for the new spending, which would have required clearing a variety of procedural hurdles and which would have been subject to a variety of limitations and restrictions that were evaded here.

Although, under Wis. Stat. § 66.0602(3)(d)2., counties can exceed their levy limits to pay for new debt service subject to state constitutional limits on total indebtedness, state law imposes a variety of extraordinary procedural requirements for borrowing, *see generally* Wis. Stat. § 67.045 ("Debt issuance conditions."); § 67.05 ("Bond issues; procedure."); § 67.06 ("Form and contents of bonds."); § 67.08 ("Execution and negotiation."); § 67.09 ("Registration of municipal obligations."). To be able to borrow, Brown County would probably have had to get permission from a public referendum or pass a resolution authorizing the borrowing by at least a three-fourths majority. § 67.045(1)(a), (b).

When it passed its sales tax ordinance, Brown County had not completed any of the prerequisites for issuing debt. This Court cannot assume Brown County could have met those prerequisites even if it had tried. If it could not have met the prerequisites, it could not have borrowed, and it could not have exceeded its levy limit to pay for the projects, so it cannot be said that the sales tax was used to avoid a certain increase in the property tax levy.

To conclude otherwise would render the various restrictions on incurring debt meaningless. The careful procedures the legislature imposed could be evaded by enacting a sales tax. It would undermine the constitutional cap on debt established by Article XI, sec. 3(2) of the Wisconsin Constitution and allow the county to use its borrowing capacity to justify a sales tax, and raise revenue without having that revenue charged against the debt limit.

Using sales tax revenue to avoid a hypothetical property tax hike that might have occurred (had Brown County attempted to borrow money and had it been able to successfully navigate the process for doing so) is hardly a direct property tax reduction. It is, instead, a Rube Goldberg interpretation of the law. First, assume that the County would have borrowed to pay for these projects had it not passed a sales tax. Second, assume that the County could and would have met the prerequisites to borrow for the projects. Third, assume that paying for debt service on borrowing is just as good as paying for the projects directly. Finally, assume that avoiding an increase actually counts as a reduction. This circuitous and uncertain route is not "reducing" anything, much less "directly reducing the property tax levy."

Permitting Brown County to justify adopting a sales tax because it says it could have and would have borrowed the money would render the limit of a sales tax to direct property tax reduction meaningless. Brown County has a debt limit of roughly one billion dollars and a current unused capacity of about $925 million. (Kamenick Aff., Ex. C, p. 318.) The debt service on its unused capacity far exceeds the yield of a .5 % sales tax; it could therefore always justify the adoption of a sales tax to spend more money. This is contrary to both the statutory language and legislative intent.

Accepting this argument would write the exception out of the statute, thwarting the legislature's desire to allow a county sales tax for the sole purpose of directly reducing property taxes. Such a result runs directly contrary to the legislature's intent.

CONCLUSION

This brief has discussed legislative history, county practice, and an attorney general opinion. But at the end of the day this is a case that can easily be resolved by resort to the text of

the operative statute alone. The text plainly requires a county to use revenue from its sales tax to directly reduce its property tax levy, not pay for new projects.

Ironically, when Brown County enacted its first sales tax in 1985, it understood what that text meant. Brown County was among the first counties to enact a sales tax (although it was repealed before it went into effect). LRB Bulletin, pp. 5, 7. When it passed that sales tax, Brown County "earmarked the revenue for a credit on individual property tax bills." *Id.* at 7. The Brown County Executive, in a letter to the Brown County Board, referred to the sales tax being used as a "Real Estate Tax Credit." *Id.* at 14.

Thirty years ago, Brown County knew what to do with a sales tax. It is unfortunate that it has lost that institutional memory. This Court should apply the unambiguous text of Wis. Stat. § 77.70, grant the Taxpayers' Motion for Summary Judgment, and declare Brown County's Sales and Use Tax Ordinance null and void.

Dated this 21st day of December, 2018.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Defendants/Third-Party Plaintiffs

Electronically Signed by Thomas C. Kamenick
Richard M. Esenberg, WI Bar No. 1005622
414-727-6367; rick@will-law.org
Thomas C. Kamenick, WI Bar No. 1063682
414-727-6368; tom@will-law.org
Anthony F. LoCoco, WI Bar No. 1101773
414-727-7419; alococo@will-law.org
1139 East Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385