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 OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Brown County's task in this case is daunting: it needs to convince this Court that imposing a sales and use tax for the purpose of funding a slate of new spending projects is the same as imposing a sales and use tax "*only* for the purpose of *directly reducing* the property tax levy." Wis. Stat. § 77.70 (emphases added). To avoid having to fall back on an argument that this court should not enforce the law because it doesn't let the County spend as much as it wants, they must argue that when the legislature said not to use this new sales tax as a vehicle for new spending, it meant precisely the opposite.

So the County tries a little bit of everything in its initial summary judgment brief: a novel and strained interpretation of Wis. Stat. § 77.70; a request that the Court extend "[d]eference" (Dkt #48, P. Br. 18) to a second, completely different interpretation of the statute set forth in a flawed Attorney General opinion; citation to a Department of Revenue worksheet, which doesn't

establish what the County says it does; and finally the presentation of a parade of horribles that it says will result should the Court apply Wis. Stat. § 77.70 as written.

But Wis. Stat. § 77.70 is too clearly written and too easily understandable to circumvent. Spending money on a new "Stem Research Center Project," to take one example, simply does not constitute "directly reducing the property tax levy." (*See* Compl. ¶12, Ex. B.) This Court should rule that Brown County's sales and use tax is void because it violates the plain text of Wis. Stat. § 77.70.

ARGUMENT

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

Wis. Stat. § 77.70 authorizes the imposition of a county sales and use tax, but provides that, subject to an exception not applicable here, "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.) In its own initial summary judgment brief, BCTA showed how the language of the statute, bolstered by the statute's legislative history and county practice, mandates a ruling that counties use sales and use tax proceeds to actually reduce the property tax levy, not for additional spending projects a county says it would have paid for with additional property taxes. (Dkt #49, D. Br. 5-12.) Brown County attempts to counter this interpretation of § 77.70 with four text-based arguments of its own, each without merit.

A) A County Need Not Impose a Sales and Use Tax, but if It Does, the Tax Must Be Imposed Only for the Purpose of Directly Reducing the Property Tax Levy

Much of Brown County's textual analysis focuses *not* on an argument that it is actually using its sales and use tax proceeds to directly reduce the property tax levy, but that it need not do so in the first place because § 77.70 is "an enabling statute, not a prescriptive statute." (Dkt

#48, P. Br. 25.) In Brown County's view, a law that says a sales and use tax can be imposed only to reduce taxes somehow "contains absolutely no direction on how sales and use tax proceeds are to be used." (*Id.* at 14-15.) But § 77.70 is both an enabling and a prescriptive statute. It *enables* the imposition of a sales and use tax, but it also *prescribes* the purpose for which it may be imposed. The tax must directly *reduce* the property tax and not avoid some hypothetical unadopted (and, as we have seen, otherwise impermissible) increase. In restricting the purpose for which the tax may be imposed, the law also restricts the County's spending.

Seeking to muddle this patently clearly instruction, the County says that because "[t]he act of imposing the tax . . . is the only act mentioned in the statute" – as opposed to the act of spending the proceeds – the County complied with § 77.70's command when it enacted its ordinance, "as evidenced by the Brown County Board's actions imposing the tax." (*Id.* at 15.) It divorces the act of imposing the tax from spending the proceeds of the tax as if a county can pass the tax for one purpose with a wink and a nod and then use the proceeds for any other purpose it desires. This imaginative parsing of the individual words of a phrase at the expense of its whole meaning, violates two basic principles of statutory construction.

First, words "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (per Story, J.) (discussing the federal Constitution), *quoted in* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 356 (2012). That is, words should be given a "fair" meaning, not a "hyperliteral" one. Scalia & Garner, *supra*, at 356 (emphasis removed); *see also State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results.").

For example, the late Justice Antonin Scalia's treatise on statutory interpretation discusses a classic case analyzed by the famed jurists William Blackstone and Samuel von Pufendorf in which a law prohibited persons from "laying hands" on a priest. Scalia & Garner, *supra*, at 356. Blackstone, Pufendorf, and Scalia all agree that the statute prohibits kicking a priest (though no hands are involved), even though a hyperliteral reading would permit that conduct. *Id.* at 356-57. Similarly, a recent Wisconsin Supreme Court case involved a law forbidding cities from passing "ordinances" or "resolutions" regulating firearms. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶3, 373 Wis. 2d 543, 892 N.W.2d 233. The City of Madison argued that this left it free to pass "rules" regulating firearms. *Id.* at ¶46. The Supreme Court rejected the argument out of hand, explaining that adopting the City's argument would lead to "law-making as comedy" – a "gotcha" game where parties are always trying to stay one step ahead of the legislature's efforts to cover every possible circumstance. *Id.* The point is that while courts should not add words to or subtract words from a statute, words should not be given an unnaturally restrictive meaning.

In this case, the verb "impose" is a synonym for "levy," as in to "levy a tax." *See* Webster's New Collegiate Dictionary 571 (1981). When the legislature specified the purpose of the "impos[ition]" of a sales and use tax, it was speaking about the imposition of a tax generally, meaning the entire process of enacting a tax, collecting tax proceeds, and spending those proceeds, not the specific, limited act of enacting a tax into law by ordinance. This is the natural interpretation of the words used in § 77.70 and how any layman would understand the statute. Brown County's reading, according to which the purpose explicitly mandated by the legislature in § 77.70 need be fulfilled only at the moment "a county board adopts the ordinance authorizing the imposition of a tax" (Dkt #48, P. Br. 14) is unnatural and amounts to little more than

wordplay. *See Wisconsin Carry*, 373 Wis. 2d 543, ¶¶19-20 ("We are not merely arbiters of word choice. . . . It is, instead, the 'plain *meaning*' of a statute we must apply."). Thus, in assessing compliance with the statute, a Court must ask whether the sales and use tax has been imposed to reduce property taxes and not to spend more money. Contrary to the County's assertion, reading the language to say that the sales and use tax can be used to augment a County's property tax levy – even to exceed the otherwise applicable levy limit – can be a "direct reduction" wrenches the statutory language from its context.

Brown County's interpretation violates a second canon of construction, namely the rule that "[s]tatutory interpretations that render provisions meaningless should be avoided." *Belding v. Demoulin*, 2014 WI 8, ¶17, 352 Wis. 2d 359, 843 N.W.2d 373. What is achieved by forcing a County to *enact* a sales and use tax for the purpose of directly reducing the property tax levy if it may then turn around and spend the proceeds however it wants? Brown County seems to imply that the statute is satisfied if county lawmakers simply hold the proper intention in their hearts when they vote on enacting the ordinance, but such a requirement produces no practical effect. It would render that condition on sales and use taxes meaningless and superfluous.

After all, what would it mean to limit a sales and use tax to directly reducing property taxes if a county can instead use it to pay for new spending which *might* have increased the property tax levy? Is the tired canard, repeated by so many politicians, of calling a smaller-than-wanted increase a "cut" really a valid legal argument? Such maneuvering would render the sales and use tax's limitation meaningless.

B) The Word "Exclusively" Does Not Appear in Wis. Stat. § 77.70, but the Word "Only" Does

Brown County claims that BCTA "insert[s] the word 'exclusively' into the statute" in an "attempt to change its meaning" (Dkt. #48, P. Br. 14) when BCTA argues in its Counterclaim

and Third Party Complaint that § 77.70 "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)." (3rd P. Compl., ¶27 (emphasis added)).

We have no idea what this is supposed to mean. Using "exclusively" to describe the statute's effect does not change its meaning, because "exclusively" and "only" are synonyms. *See, e.g.*, Merriam-Webster Online Thesaurus, https://www.merriam-webster.com/thesaurus/exclusively (last visited January 21, 2019) (listing as synonyms for the word "exclusively" "alone, just, *only*, purely, simply, solely" (emphasis added)). Brown County does not suggest that the statute would mean something else if it said that the tax may be "imposed exclusively for the purpose of directly reducing the property tax levy." Whatever disagreement there may be about the meaning of the purpose specified in § 77.70, there can be no dispute that under the statute a county sales and use tax may be imposed "only," or "exclusively," (or "alone," or "just," or "purely," or "simply," or "solely") for that purpose.

C) Brown County Is Attacking a Straw Man when It Discusses the Phrase "Only in their Entirety"

In addition to specifying that county sales and use taxes be imposed only for the purpose of directly reducing the property tax levy, Wisconsin Stat. § 77.70 requires that such taxes be imposed "only in their entirety." Brown County explains that that phrase "means that the only sales and use tax rate which can be charged, if the tax is adopted, is a 0.5% tax rate" and accuses BCTA of misinterpreting it when BCTA argues that "all" of a County sales and use tax proceeds must be directed toward reducing the property tax levy. (Dkt. #48, P. Br. 15-16 (citing 3rd P. Compl., ¶27.)

BCTA does not contest Brown County's interpretation of "only in their entirety," which is why BCTA does not separately discuss or analyze the phrase in its initial pleadings or Brief in

Support of Summary Judgment. The requirement that all sales and use tax revenues go toward reducing the property tax levy stems from § 77.70's requirement that such taxes be imposed "*only* for the purpose of directly reducing the property tax levy." (Emphasis added.)[1] If some of the tax is used for directly reducing the property tax levy, and some of it is used to increase spending, then the tax has not been used "only" for the correct purpose.

D) That the Legislature Could Have Accomplished the Same Goals Using Different Language Does Not Alter § 77.70's Meaning

The balance of Brown County's textual argument rests on Brown County's claim that the legislature could have more clearly communicated its desire that sales and use taxes be imposed only for the purpose of directly reducing the property tax levy. Brown County cites Wis. Stats. §§ 77.705 and 77.706, statutes authorizing certain sports-related special districts to impose sales and use taxes; unlike Wis. Stat. § 77.70, these statutes explicitly discuss how revenues received should be spent. But this proves little, for two reasons.

First, a requirement that the tax be imposed only to directly reduce property tax is a limitation on spending. Period. As explained above, reading it in any other way renders it illusory. Second, even if it were true that § 77.70 could be better-drafted, "the same could be said of many (even most) statutes," which is why courts do not "expect[] (let alone demand[]) perfection in drafting." *Torres v. Lynch*, ___ U.S. ___, 136 S. Ct. 1619, 1633 (2016). It will almost always be possible to envision, with the benefit of hindsight, a "better" or more explicit version of a statute using different language. Brown County is correct that the Legislature could have used words like "offset," "deduct," "subtract," or "retire." (Dkt #48, P. Br. 16.) It could

[1] Brown County also notes that Wis. Stat. § 77.70 "does not contain the exclusive 'shall' directive in terms of how tax proceeds are spent" (Dkt #48, P. Br. 17), perhaps a reference to the statute's use of the word "may." But the permissive "may" in § 77.70 pertains to the imposition of the tax, which is indeed non-mandatory. The purpose for which the tax must be imposed, if it is imposed at all, *is* mandatory, as evidenced by the statute's use of the word "only."

have repeated its injunction six ways from Sunday to foreclose interpretive jiggery-pokery (although that still may not have stopped Brown County from arguing another interpretation). Instead it chose to use a single, patently clear word – reduce – because nothing more is needed. Wis. Stat. § 77.70's requirements are clear, and that is enough. *See Id.* at 1634 ("The question, then, is not: Could Congress have indicated (or even did Congress elsewhere indicate) in more crystalline fashion [the rule of law sought]? The question is instead, and more simply: Is that the right and fair reading of the statute before us?").

In any event, in comparing Wis. Stats. §§ 77.705 and 77.706 with § 77.70, the County is comparing apples and oranges. There are likely good reasons the legislature drafted §§ 77.705 and 77.706 differently than it did § 77.70. Unlike § 77.70, which authorizes a county sales and use tax only to reduce the property tax levy, §§ 77.705 and 77.706 authorize special district sales and use taxes to fund additional – and very particular – expenses: those associated with sports stadiums. These special district taxes also automatically sunset after certain conditions are met, most significantly the retirement or payment of bonds issued to help pay those expenses. *See* Wis. Stat. 77.707. The legislature and the special districts have an interest in assuring investors that their bonds will be repaid by specifically delineating the path of the sales and use tax revenue stream.

A county sales and use tax, on the other hand, does not necessarily sunset and is not imposed to fund one narrow and unique type of government expenditure. A county has a great deal of discretion to choose <u>what</u> to spend sales and use tax revenues on, so long as it results in lowering the property tax levy by an equivalent amount. As the Attorney General opinion noted, counties can do that by using the revenue to fund services and projects that were <u>already</u> being

funded by property taxes. Op. Att'y Gen 1-98, 2. The Legislature therefore had no need to delineate the types of things sales and use tax revenue could be used to fund.

Where reasons for different drafting approaches exist, the Supreme Court has rejected arguments to draw conclusions from those differences. *See, e.g.*, *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40 (2008) (section of Bankruptcy Code imposed temporal requirement even though it did not contain temporal language present in other sections of the Code; unlike with respect to the section under consideration, the temporal language appearing elsewhere in the Code was "indispensable to the operative meaning of the provisions in which they appear"); *Scarborough v. United States*, 431 U.S. 563, 570-71 (1977) (in deciding whether criminal gun possession statute contained a requirement that the gun "have a contemporaneous connection with commerce at the time of the offense," fact that separate criminal gun possession statute explicitly imposed such a requirement "help[ed] [the Court] not at all" because the first statute was "enacted hastily with little discussion and no hearings" while the second was "a carefully constructed package of gun control legislation"). In sum, Brown County's references to analogous statutes, while not wholly irrelevant, is not particularly probative with respect to the meaning of § 77.70.[2]

II) NEITHER THE ATTORNEY GENERAL'S 1998 OPINION NOR A DEPARTMENT OF REVENUE LEVY LIMIT WORKSHEET OVERCOME THE TEXT OF WIS. STAT. § 77.70

Brown County next suggests that the 1998 Attorney General Opinion on county sales and use taxes and a Department of Revenue levy limit worksheet require a ruling in its favor. But the County's reliance on the Attorney General Opinion is erroneous and self-defeating, while its

[2] Brown County also suggests that the phrasing of one other statute, Wis. Stat. § 66.0602, supports its argument that there are no restrictions on its use of sales and use tax revenues. Wisconsin Stat. § 66.0602 pertains to levy limits. For purposes of clarity, that argument is addressed below.

citation to the worksheet rests on a misunderstanding of the difference between a levy and a levy limit.

A) The 1998 Attorney General Opinion Is Wrong, and any Presumption that It Is Correct Has Been Rebutted

As discussed by Brown County, in 1998 the Attorney General opined that counties could use sales and use tax revenues to pay for new spending projects that could have been funded through property taxes. Though relying on the Attorney General's 1998 opinion, Brown County does not spend much time explicating it. Instead, the County quotes a portion of the opinion and then suggests that the opinion should be "regarded as presumptively correct" because the Legislature has amended Wis. Stat. § 77.70 since the issuance of the Attorney General's opinion but without clarifying the disputed language. (Dkt #48, P. Br. 20 (quoting *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177)).

Assuming the validity of the proposition of law from *Schill*,[3] any presumption of correctness has been rebutted. In its own summary judgment brief, BCTA explained why the Attorney General opinion conflicts with the clear directives of § 77.70. (*See* Dkt #49, D. Br. 13-15.) Wisconsin Stat. § 77.70 calls for a direct reduction in the property tax levy, not the absence of an increase. The Attorney General opinion therefore reads the word "directly" out of the statute, instead promoting an *indirect* method of reducing the property tax levy. The opinion also renders the legislature's restriction on the use of sales tax revenue illusory, because it will

[3] In the event of review by the Wisconsin Supreme Court, BCTA wishes to preserve an argument that this proposition of law is erroneous and should be overruled. There could be countless reasons besides agreement with the Attorney General that the Legislature might act on a statute yet not modify it in response to an Attorney General opinion. For example, the Legislature might not be able to reach agreement on a change; the Legislature might not be aware of or have considered the Attorney General opinion; or a lack of controversy over the interpretation might make amendment a low priority, *see* Op. Att'y Gen 1-98, 2 ("I am aware of no litigation concerning the meaning of the quoted restriction on the use of county sales and use tax revenues since the passage of 1985 Wisconsin Act 41."). In any event, laws are to be given meaning expressed by those who enacted them and not the unexpressed intent of a later legislature that did not.

always be possible to say that somehow property taxes *could* have been raised to pay for new projects actually funded by the sales tax.

BCTA will not repeat its entire analysis of the Attorney General opinion here, but two additional points are especially relevant to this Court's consideration. First, Brown County's reliance on the Attorney General's opinion is self-defeating because it is inconsistent with Brown County's central argument. Brown County argues that "the Attorney General opined there is nothing prescriptive in Wis. Stat. § 77.70 concerning how sales and use tax revenues must be spent" (Dkt #48, P. Br. 19), but that is demonstrably false. Then-Attorney General Doyle characterized the language in § 77.70 as a "*restriction* on the use of county sales and use tax revenues." Op. Att'y Gen 1-98, 2 (emphasis added). At best, the Attorney General's analysis presents an alternate argument for the County; the Court cannot simultaneously conclude that § 77.70 says nothing about how revenues are to be spent but also that spending sales and use tax revenues on new spending is permissible because this satisfies the requirement of a direct reduction of the property tax levy. That alternate argument is, for the reasons we have expressed, incorrect, but it belies the ones that Brown County makes here.

Second, as set forth in BCTA's initial brief (Dkt #49, D. Br. 15-19), should this Court conclude that the Attorney General's opinion is correct, Brown County's sales tax is still invalid. Under the opinion, a county can only use a sales and use tax to pay for projects the county could have levied a property tax to fund. Yet 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 because levy limits would have prevented it from doing so. 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, yet its allowable levy limit increase in 2018 due to net new construction

was only $1,360,312. (Klingsporn Aff., Ex. B, 1, lines 6 & 7.) The County simply does not have enough flexibility in the amount it is authorized to levy in property taxes to have covered the costs of its many expensive projects. Brown County does not have an answer to the argument that it could not have funded its projects via property taxes in light of its levy limit, because no answer is available.[4] Thus, even a presumption of correctness does not help the County.

B) Brown County Confuses a Levy with a Levy Limit

The Department of Revenue maintains a worksheet used to assist counties in calculating their levy limits. (Klingsporn Aff. Ex. B.) Brown County argues that if BCTA were interpreting the statute correctly, the worksheet would contain a line requiring counties to deduct sales and use tax proceeds from the levy limit (and it doesn't). (Dkt #48, P. Br. 21.) But Brown County is eliding a county's property tax levy with the county's levy limit. The levy *limit* specifies the percentage by which a county may increase its levy (not including funds levied to pay for debt service) in a particular year; it is not the same as the levy itself. *See* Wis. Stat. § 66.0602(2). But § 77.70 requires a reduction in the levy itself.

This makes a difference for purposes of this case. If a county decided to enact a sales and use tax for the purpose of directly reducing its property tax levy, it would apply its sales and use tax revenues to its planned levy during the budgeting process. This has nothing to do with the calculation used to determine how much a county would be *allowed* to levy in a particular year, which is the subject of the Department of Revenue worksheet. That depends on items like the previous year's levy, debt service, net new construction, and other adjustments. *See* Wis. Stat. §

[4] That it might have borrowed the money and repaid it from property tax revenues is no answer. (*See* Dkt #49, D. Br. 17-19.)

66.0602(1)-(2). The Department of Revenue's levy limit worksheet – a practical document and not a legal analysis – has nothing to say about the interpretation of Wis. Stat. § 77.70.[5]

But even if the Department of Revenue Worksheet did speak to the legal question at issue, this court would owe absolutely no deference to that interpretation, contrary to what Brown County argues in its initial brief. (*See* Dkt #48, P. Br. 22 (explaining that various putative interpretations of § 77.70, including the putative interpretation by the Department of Revenue, are "entitled to deference").) In 2018 the Wisconsin Supreme Court "ended [its] practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion); *Id.* at ¶135 (Ziegler, J., concurring) (agreeing, but on non-constitutional grounds); *Id.* at ¶159 (Gableman, J., concurring) (same). Additionally, the worksheet contains no legal analysis of § 77.70, so the bare fact that the Department of Revenue had taken a different view than BCTA would not mean much.[6]

Brown County similarly misinterprets the levy limit statute when it states that "Wis. Stat. § 66.0602(2m) requires certain negative adjustments to the *Tax Levy* [under certain circumstances]" and that "[i]f the Legislature intended to provide for . . . a negative adjustment [to the Operating Levy] based on sales and use tax revenues, as Defendants allege, it would have explicitly provided for the adjustment." (Dkt #48, P. Br. 18 (emphasis added).) But Wis. Stat. § 66.0602(2m) discusses reductions to the levy *limit*, not to the levy itself. *E.g.*, Wis. Stat. §

[5] And the Department of revenue takes no position on the merits of this legal question. *See* Third Party Defendant's Response Brief at 1.

[6] Besides referencing materials authored by the Attorney General and the Department of Revenue, Brown County states that "[f]or the last thirty-three (33) years, Wis. Stat. § 77.70 has been consistently interpreted by counties across Wisconsin." (Dkt #48, P. Br. 22.) The County does not cite anything in the record for this surprising statement. In its initial brief, BCTA provided a detailed analysis of county practice. (Dkt #49, D. Br. 10-12.) BCTA's research shows that county practice is, in fact, far from consistent. However, the clear trend is that the earliest counties to adopt a sales tax were the likeliest to pass ordinances faithful to the purpose specified in § 77.70, suggesting that those most likely to have knowledge of § 77.70's meaning construed it the way BCTA does.

66.0602(2m)(a) ("the political subdivision shall reduce its *levy limit*") (emphasis added). Once again, the County is confusing the two. That the Legislature used slightly different language in different statutes aimed at accomplishing different things is not enough to overcome § 77.70's text.

III) THIS COURT SHOULD REJECT BROWN COUNTY'S POLICY ARGUMENTS

Finally, Brown County advances a wide variety of policy-based arguments that its sales tax is valid because ruling otherwise would lead to negative effects. It presents these arguments with reference to the rule of law that statutes must be interpreted "reasonably, to avoid absurd or unreasonable results." (Dkt #48, P. Br. 22 (quoting *Bank Mut. v. S.J. Boyer Const., Inc.*, 2010 WI 74, ¶24, 326 Wis. 2d 521, 785 N.W.2d 462).) As will be shown below, however, none of the effects Brown County cites fits this definition. Brown County's objections are to its inability to use sales and use tax revenue to raise taxes beyond those permitted by the applicable levy limit. That is not an argument about how the statute is to be read; it's an argument about whether the statute should exist. That is a question for the legislature and not the courts.

A) The County Misapplies the Absurd or Unreasonable Results Canon of Construction

The absurd or unreasonable results canon of construction is an aid to determining the meaning of a statute. *See, e.g., HSBC Realty Credit Corp. v. City of Glendale*, 2007 WI 94, ¶¶19-20, 303 Wis. 2d 1, 735 N.W.2d 77 (referring to the principle as a "canon[] of statutory construction"); *State v. Grunke*, 2008 WI 82, ¶31, 311 Wis. 2d 439, 752 N.W.2d 769 ("An absurd result follows when an interpretation would render the relevant statute contextually inconsistent or would be contrary to the clearly stated purpose of the statute.") (Footnotes omitted.) It is not a license for a court to engage in a "subjective" analysis of whether the practical outcome of a case would be difficult for a particular litigant. *See Anderson v. Aul*, 2015

WI 19, ¶113, 361 Wis. 2d 63, 862 N.W.2d 304 (it was inappropriate for the lead opinion to consider, among other things, harm that might occur to the plaintiffs as a result of the court's holding).[7] "While courts interpret statutes 'to avoid absurd or unreasonable results,' it is not the role of the court to weigh the 'consequences of alternative interpretations.'" *Id.* at ¶114 (citation omitted) (quoting *Kalal*, 271 Wis. 2d 633, ¶46).

A significant number of the negative effects cited by Brown County stem solely from the County's decision to break the law by spending its sales and use tax revenue to fund new spending projects rather than to directly reduce its property tax levy. For instance, Brown County says that if its sales tax is struck down, it will no longer be able to fund its current budget and will need to borrow to cover the gap. It suggests it may not be able to provide compensation increases to employees and that its credit rating may be negatively affected.

If Brown County had not so dramatically raised its spending in 2018, these would not be problems. If BCTA is correct about the meaning of the statute, each of these effects could have been avoided had Brown County spent its sales and use tax revenues appropriately. Notably, Brown County's argument would excuse any illegal government tax being used to fund government expenditures, because removing that illegal revenue will leave the governmental entity with tough decisions about how to address the shortfall. Adopting Brown County's argument would mean incentivizing lawless behavior: so long as a governmental entity can make it sufficiently difficult to extricate itself from its own illegal conduct by the time a court is able to review that conduct, the entity will be permitted to continue its activity.

Brown County's complaints of potential budgeting difficulties are a transparent and inappropriate attempt to frighten the Court into ruling in its favor. Brown County's concerns can

[7] The opinion cited in *Anderson* in this brief is the opinion of the Court, despite the fact that it is a concurrence. *See Anderson v. Aul*, 2015 WI 19, ¶106 n.1, 361 Wis. 2d 63, 862 N.W.2d 304.

be addressed, if necessary, in the remedy phase of this litigation. But whether Brown County's credit rating might be affected by a ruling that it improperly spent tax proceeds has nothing to do with the meaning of the statute at issue or the legality of Brown County's actions. "It's too hard to stop breaking the law" is no excuse.

B) Interpreting Wis. Stat. § 77.70 as Written Does Not Lead to Absurd or Unreasonable Results

The remainder of the negative consequences Brown County discusses in its brief are either illusory or not absurd or unreasonable.

1) Brown County would not "have to" borrow

Brown County repeatedly argues that it would be forced to borrow to fund its capital projects in the absence of sales and use tax revenue and contends that "encourag[ing] counties to borrow more" is not "sound public policy" or "rational fiscal management." (Dkt #48, P. Br. 3, 25.) First, taking $147,000,000 illegally from taxpayers is not sound public policy or rational fiscal management.

Second, BCTA strongly contests Brown County's assumption that a lack of sales tax revenue automatically leads to borrowing. As BCTA explained in its initial brief, borrowing requires clearing a variety of procedural hurdles and is subject to a variety of limitations and restrictions that were evaded by using an illegal sales and use tax here. (*See* Dkt #49, D. Br. 18.) For example, 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. Wis. Stat. § 67.045(1)(a), (b). Brown County asked this Court to assume that it could have met all of the prerequisites even if it had tried. Making that assumption in order to allow the County to evade the limitations of §77.70 would read the limitation out of the statute. For good reason the legislature has prescribed that borrowing such substantial amounts means

facing the voters and explaining why the borrowing is necessary (a much more difficult task than making a self-serving and unexplained claim to that effect in an affidavit). This Court cannot assume Brown County would have had the political will to incur this debt.[8]

Third, borrowing is far from the only option Brown County would have to address the sudden drop in revenue. Under Wis. Stat. § 66.0602(4)(a), Brown County may raise its levy limit to pay for the spending directly by drafting a resolution submitted to the voters for approval. Brown County could use its contingency fund, if it has one, under Wis. Stat. § 65.90(5)(b). Brown County could also eliminate the new spending from its budget, or – if it decides that that spending should have priority – cut spending elsewhere. It could fund its transportation spending with a wheel tax under Wis. Stat. § 341.35. Brown County quietly admits it is able to amend its budget (Dkt #48, P. Br. 23), but ignores all these other possibilities and repeats *ad nauseam* that it will "have to" borrow money if its sales and use tax is struck down. But under Wis. Stat. § 65.90(5)(a), a county may make changes to both the tax levy and the amounts of appropriations and their purposes with a two-thirds vote.

Even if borrowing were the only option, for some of the reasons just discussed, the Legislature may have had a very good reason to favor borrowing over taxation as a means of funding county spending projects: political accountability. A sales and use tax is imposed not only on Brown County residents, but on visitors to the county who have no representation in Brown County government. Borrowing or raising the county levy limit, on the other hand, imposes costs directly on Brown County taxpayers and in many cases needs to be approved directly by Brown County voters. Wis. Stat. § 67.045(1)(a), (b); Wis. Stat. § 66.0602(4). Brown

[8] For all these reasons, the assertion by Bradley S. Klingsporn in his affidavit that it is his "understanding and belief" that the County's spending projects "would otherwise have been funded through the issuance of additional debt obligations" (Aff. of Bradley S. Klingsporn 2) is purely speculative, not based on personal knowledge, wholly unfounded, and entitled to no weight.

County is free to argue that the Legislature made the wrong trade-off when it drafted § 77.70, but it was undoubtedly the Legislature's prerogative to make that choice. *See, e.g., Borgnis v. Falk Co.*, 147 Wis. 327, 351, 133 N.W. 209 (1911) ("When acting within constitutional limitations, the Legislature settles and declares the public policy of a state, and not the court."). Additionally, BCTA explained in its initial brief all of the evidence suggesting that the Legislature intended that counties not use this new tax as an excuse to increase spending. (Dkt #49, D. Br. 7-9.) The legislature's promotion of political accountability and its decision to limit new county spending is hardly an absurd or unreasonable result.

2) Estimating tax receipts is not absurd or unreasonable

The County next argues that complying with § 77.70 will be difficult because it can only estimate how much sales tax revenue it will collect in each coming year. (Dkt #48, P. Br. 22, 24.)[9] The County ignores that virtually all revenue numbers in a budget are estimates. Sometimes people don't pay their property taxes. Sometimes people are naughtier or nicer than expected and fines and forfeitures revenue needs an adjustment. The County deals with these variations as a matter of course – for example, compare the County's own 2017 budgeted numbers (Klingsporn Aff., Ex. D, p. 27) with its 2017 actual numbers (Klingsporn Aff., Ex. E, p. 18), showing that "Intergov Revenue" was $3 million less than anticipated but "Public Charges" was almost $2 million more. Requiring a governmental entity to budget with estimates is neither absurd nor unreasonable.

[9] To reduce that uncertainty, Brown County could also choose to collect the sales and use tax one year and apply those revenues to reducing the following year's tax levy.

CONCLUSION

This Court should apply the unambiguous text of Wis. Stat. § 77.70, grant BCTA's Motion for Summary Judgment, and declare Brown County's Sales and Use Tax Ordinance null and void.

Dated this 21st day of January, 2019.

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