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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT III
APPEAL CASE NO. 2020AP940

BROWN COUNTY,
Plaintiff-Respondent,
v.

BROWN COUNTY TAXPAYERS
ASSOCIATION and

FRANK BENNETT,
Defendants-Third-Party Plaintiffs-Appellants,
v.

PETER BARCA, SECRETARY,
WISCONSIN DEPARTMENT OF REVENUE,
Third-Party Defendant-Respondent.

Appeal from the Circuit Court for Brown County
Case No. 18-CV-640
The Honorable John P. Zakowski Presiding

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS' BRIEF AND APPENDIX

Richard M. Esenberg, WI Bar No. 1005622
Anthony F. LoCoco, WI Bar No. 1101773
Lucas T. Vebber, WI Bar No. 1067543
WISCONSIN INSTITUTE FOR LAW & LIBERTY
330 East Kilbourn Ave., Suite 725
Milwaukee, WI 53202-3141
414-727-9455; FAX: 414-727-6385
Attorneys for Defendants-Third-Party Plaintiffs-Appellants

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STATEMENT OF THE ISSUE PRESENTED

Issue: Whether Plaintiff-Respondent Brown County's sales and use tax, which commits over one hundred million dollars of tax revenue to new spending, violates Wis. Stat. §77.70, which mandates that "county sales and use taxes may be imposed *only* for the purpose of *directly reducing* the property tax levy." (Emphases added.)

Circuit Court Decision: The Circuit Court concluded that the County had directly reduced its property tax levy by preventing a hypothetical increase in the levy to pay for the new spending and that, therefore, the County's sales and use tax does not violate Wis. Stat. §77.70. (R.103:28.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be useful to clarify any questions that the Court may have due to the complexity of some of the arguments and the fact that this is a case of first impression.

The opinion in this case should be published as it will enunciate a new rule of law and decide a case of substantial and continuing public interest.

STATEMENT OF THE CASE

By statute, Wisconsin counties are authorized to adopt a sales and use tax in the amount of 0.5 percent of the sales or purchase price. Wis. Stat. §77.70. The Legislature's directive that these taxes "may be imposed *only* for the purpose of *directly reducing* the property tax levy," *id.* (emphases added), is the crux of this case.

In 2017 Brown County enacted a sales and use tax under §77.70 ("the County Sales Tax"). But instead of applying the funds (over one hundred million dollars) to directly reducing the property tax levy as required, Brown County is unquestionably using it to pay for new spending.

The Circuit Court concluded that Wis. Stat. §77.70 does not impose any restrictions on the use of sales tax revenue and that, even if it does, Brown County is using the sales tax to pay for new spending that *could* have been funded through increased property taxes; that there exists a "decrease" in a theoretical "increase" in property taxes; and that therefore the sales taxes have been used to directly reduce property taxes.

Defendants-Third-Party Plaintiffs-Appellants Brown County Taxpayers Association and Brown County taxpayer Frank Bennett (collectively, "BCTA") will show that §77.70 does indeed restrict the use of

sales tax revenue and that the County's new tax here did not directly reduce the property tax levy for Brown County taxpayers. Moreover, even under the County's argument (as adopted by the Circuit Court), the new tax, at best, might have resulted in an *indirect* and *hypothetical* reduction of the property tax levy but the undisputed facts show that in reality the County's new tax did not result in a property tax reduction at all. In 2017, Brown County's property tax levy was $86,661,972 and in 2018 (after the tax) it was $90,676,735, an actual increase of $4,014,763 or about 5%.

Consequently, at issue before this Court is a single legal question of first impression in the courts of Wisconsin: where a county pays for new capital projects by imposing a sales tax, has it "directly reduc[ed] the property tax levy" within the meaning of Wis. Stat. §77.70? The Circuit Court answered that question in the affirmative. This Court should reverse.

Factual Background

On May 17, 2017, the Brown County Board of Supervisors enacted an ordinance creating a 0.5% sales and use tax (the "Ordinance"), scheduled to go into effect on January 1, 2018. (R.1:5; 3.) According to the Ordinance, the $147,000,000 that 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

(R.3:1.)

In 2017, the Brown County Executive issued a 2018 budget proposal that was consistent with the newly-passed ordinance. (R.9:13, 34-39; *see* R.15:3.) 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 Brown County's 2018 budget. (*See* R.9:14; 15:3; 59:95-167.) On November 7, 2017, the Brown County Executive signed the 2018 budget with no vetoes. (R.9:14; 15:3.) The budget created a special fund "to account for the collection and use of .05% [sic] County sales tax imposed for capital improvements." (R.58:90.) The budget estimated that the County Sales Tax would raise $22,458,333 in 2018 and called for spending $17,895,065 of that revenue. (R.59:39.) That money was 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

(R.60:179-80.)

In 2017, Brown County's property tax levy was $86,661,972. (R.9:14; 15:3.) In 2018, Brown County's property tax levy was increased to $90,676,735, an increase of $4,014,763 or about 5%. (*Id*.) Moreover, as explained in detail below, Brown County did not have room in its statutory levy limit to increase its property tax levy to pay for all of the $17,895,065 of new spending proposed for 2018.

Procedural Background

On January 2, 2018, BCTA sued Brown County in Brown County Circuit Court seeking a declaration that the Ordinance violated Wis. Stat. §77.70. (R.115:2.) The Circuit Court, the Honorable William M. Atkinson presiding, dismissed that case without prejudice on March 1, 2018 due to BCTA's failure to file a notice of claim under Wis. Stat. §893.80. (*Id*.)

BCTA thereupon promptly served Brown County with said notice of claim dated March 1, 2018. (R.4.) Brown County disallowed the claim on or about May 22, 2018, but instead of waiting for BCTA to sue it again, Brown County filed the present lawsuit against BCTA in Brown County Circuit Court on May 23, 2018 seeking a declaration as to the validity of the Ordinance. (R.1; 5.) BCTA counterclaimed and filed a third-party complaint against the Secretary of the Department of Revenue ("DOR"), whom BCTA viewed as a necessary or permissive party. (R.9; *id.* at 11-12.) Following briefing on cross-motions for summary judgment by Brown County and BCTA, (*see* R.38-80, 87-97), the Circuit Court, the Honorable John P. Zakowski presiding, held oral argument on August 29, 2019. (R.127.)

On March 24, 2020, the Circuit Court issued its decision and order granting Brown County's motion for summary judgment, denying BCTA's motion for summary judgment, and upholding the validity of Brown County's ordinance. (R.103.)

On March 31, 2020, BCTA filed a motion for reconsideration or clarification of the Circuit Court's decision and order objecting to the Circuit Court's incorrect statements in its decision to the effect that BCTA "did not avail [itself] of the opportunities to dialog with [its] elected officials and

present [its] argument to them" before filing a lawsuit and that the courts were "not the proper venue for [BCTA] to have started [its] campaign." (R.103:23, 31-32; R.107.) The Circuit Court denied the motion but clarified that, although its observations about the failure of BCTA to raise the issue as a political question were incorrect, they were in fact irrelevant to the legal question before it. (R.115:4.)

Judgment was entered on May 18, 2020, (R.120), and BCTA filed its notice of appeal on May 20, 2020, (R.122).

STANDARD OF REVIEW

Whether a circuit court correctly granted summary judgment is a question of law reviewed de novo, as are issues of statutory interpretation. *See, e.g.*, *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶9, 315 Wis.2d 350, 760 N.W.2d 156.

ARGUMENT

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, Brown 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. THE COUNTY SALES TAX VIOLATES THE PLAIN LANGUAGE OF WIS. STAT. §77.70

The pertinent portion of §77.70 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 added.) One would think that the italicized language above is self-explanatory. Counties may impose sales and use taxes, but must use the proceeds to directly reduce their property tax levies—no other purpose is authorized. To determine whether a county 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?

The answer in this case is no. Instead, the County used the revenue to fund a dramatic increase in spending and *still raised* its property tax levy by about $4,000,000. These actions run contrary to the plain language of Wis.

[1] That exception is not at issue here.

Stat. §77.70, which is supported by the legislative history of the statute and the early practice of Wisconsin's counties. The County Sales Tax is unlawful and should be declared void.[2]

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

The methodology used to interpret statutes in Wisconsin is well-established. "[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 (*Seider v. O'Connell*, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). "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. Because none of the words at issue are technical or specially-defined, resort must be had to the common, ordinary, and accepted meaning of the words used in Wis. Stat. §77.70. Dictionaries are an accepted source for this type of meaning. *See id.*, ¶¶41, 53-54. "[I]f the meaning of

[2] The parties agree that the phrase "only in their entirety" as used in Wis. Stat. § 77.70 is a directive that if a sales tax is imposed, it must be imposed in the amount of 0.5% and not some lesser percentage.

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.

The pertinent language—"the county sales and use taxes may be [1] *imposed* only for the [2] *purpose* of [3] *directly* [4] *reducing* the property tax levy" (emphases added)—is not difficult to understand.

"Impose" means "to establish or apply as compulsory : LEVY." Webster's New Collegiate Dictionary 571 (1981) (illustrating with the example "[impose] a tax").[3]

"Purpose" means "something set up as an object or end to be attained." *Id.* at 930. "Direct"[4] means "from point to point without deviation," "by the shortest way," "from the source without interruption or diversion," and "without an intervening agency or step." *Id.* at 320.

"Reduce" means "to diminish in size, amount, extent, or number." *Id.* at 962 (illustrating with the example "[reduce] taxes).

Thus when the Legislature commands in §77.70 that a county sales and use tax "may be imposed only for the purpose of directly reducing the

[3] As discussed below, the relevant version of Wis. Stat. § 77.70 was enacted in the 1980s, so BCTA has cited a dictionary from that decade. *See Landis v. Physicians Ins. Co. of Wisconsin*, 2001 WI 86, ¶36, 245 Wis. 2d 1, 628 N.W.2d 893.
[4] "Directly" means "in a direct manner." *Directly*, Webster's New Collegiate Dictionary 320 (1981).

property tax levy" it is mandating two things: (i) a county may apply the tax only to attain the object of diminishing the amount of the property tax levy; and (ii) this diminishment must occur by the shortest route possible from the source—that is, from the collection of the sales tax revenue—without any intervening steps. Step one: impose the sales tax. Step two: decrease the property tax levy by the amount of the proceeds.

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

In sum, Wisconsin Stat. §77.70 is concisely written and easily understandable. The words "impose," "purpose," and "reduce" are 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

Although it is not necessary to consult it here, the legislative history of the statute further confirms that the obvious meaning of the statute is the

correct one. *See Sands*, 312 Wis. 2d 1, ¶15 ("[T]he court may also consult extrinsic sources 'to confirm or verify a plain-meaning interpretation.'" (quoting *Kalal*, 271 Wis. 2d 633, ¶51)).

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, (R.41:9), "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." (R.59:168-69.)

In 1985, the Legislature changed § 77.76 to allow counties to use the proceeds from county sales taxes themselves. *See* 1985 Wis. Act 29, § 1500x. Property tax relief was a major topic of debate during that year's state budget process; for example, proposals were made to raise the state sales tax and earmark the money as direct credits on property tax bills. (*See* R.59:183-85.) Later in the year, the Legislature took up a mostly technical bill to improve the administration of the county sales tax. (*See* R.59:175.) During the process, Senator Russ Feingold offered a successful amendment to add

language requiring the sales tax to be used only "for the purpose of property tax relief." (*Id.* at 176-79.) 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." (*Id.* at 189.) In the Assembly, the vaguer phrase "property tax relief" was replaced with the even stricter "directly reducing the property tax levy." (*Id.* at 180-81.) That language was passed by the Legislature and signed by the Governor. 1985 Wis. Act 41.

Thus, the history of the enactment of Wis. Stat. §77.70—a focus on driving down property tax bills accompanied by a revealing tightening of the relevant language from tax "relief" to "direct[]" tax "reduc[tion]"—confirms the meaning of the statute: counties may adopt sales and use taxes, but may only do so to directly reduce the property tax levy.

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

Although, again, it should not be necessary here, this Court can also look to the actual practice of counties implementing sales taxes shortly after the law was changed in 1985. "Where an act's language is ambiguous . . . courts may find interpretive guidance in the way the statute was construed when it first became operative." 2B Sutherland Statutory Construction §

49:1 (7th ed.); *cf. Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W.2d 408 (applying this rule to constitutional provisions). 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 consistent with the clear import of Wis. Stat. §77.70.

In the first two years after §77.70 was changed, a dozen counties implemented a sales tax. (R.41:27-28, 33, 47, 58, 60; R.42:12, 13, 22-24, 37-38, 41, 45, 51.) None of them expressly dedicated sales tax revenue for broad categories of spending or new projects.

Anecdotal evidence from the period further confirms that counties initially understood the sales tax law this way. For example, shortly after the sales tax law was passed, Dane County considered enacting a sales tax. (R.41:24.) 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." (*Id.*) Similarly, 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." (*Id.* at 12-13.) Indeed,

ironically for purposes of the present litigation, Brown County itself was among the first of the counties to enact a sales tax, in 1985 (it was repealed before it went into effect), and the County "earmarked the revenue for a credit on individual property tax bills." (*Id.* at 12, 14.) The then-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 21.)

Over the next decade, the vast majority of counties either quoted the statute in their ordinances or included even more restrictive language in ordinances adopting a sales tax. (R.41:25, 26, 29-30, 34, 40, 41, 42-43, 44, 45, 46, 51-52, 59; R.42:1, 2, 11, 16, 19, 25, 26, 27, 28, 29-33, 34, 35, 42, 47, 48-49, 50, 58 (29 counties).) However, a handful started to dedicate sales tax revenue to specific projects, (R.42:3, 17-18, 57 (three counties)), or to permit spending on new projects in broad categories, (R.41:37-38; 42:7, 20-21, 39-40, 52-54 (five counties).)

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 more noticeably started using the sales taxes as an excuse to increase spending instead of decreasing the property tax levy. After that point, while two

counties used language even more restrictive than present in the statute (R.41:48, 53-54) and six counties quoted the statute (R.41:39, 49; 42:4-6, 8-10, 46, 59-60), nine allowed for increased spending, (R.41:31-32, 35-36, 50, 55-56, 57, 14-15, 36, 43-44, 55-56).[5]

Like legislative history, county practice is of course not determinative here since no amount of practice can override the terms of a statute. But to the extent this Court is inclined to examine county practice to assist it in interpreting what the relevant words mean, practice shows that the earliest counties to adopt a sales tax clearly understood what it was actually for. Only as years and decades passed and institutional memories lapsed did some counties begin to break the rules, spurred on by an ill-conceived (*see* Section II.B., *infra*) 1998 attorney general's opinion on the meaning of Wis. Stat. §77.70.

D. The County 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 directly lower its property tax levy, or did the

[5] 66 of the 68 counties with a sales tax are catalogued here. Two counties, Outagamie and Menominee, enacted sales tax ordinances that did not become effective until 2020. *See* Wisconsin Department of Revenue, *Sales Tax Rate Chart* (Apr. 20, 2020), https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx. Those ordinances are not a part of the record and thus not a part of this analysis.

County use it for something else? The language of the County's ordinance itself answers that question: the money is being used to pay for a slew of new projects, not to directly reduce the property tax levy, the *only* purpose authorized by Wis. Stat. §77.70.

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. As will now be discussed, to claim otherwise—to say that using sales tax revenue for new spending is permissible because it could hypothetically have been paid for by property tax dollars—reads the limitation on the use of sales tax revenue out of the statute. It becomes no limitation at all.

II. THE COUNTY'S ARGUMENTS, AS ADOPTED IN THE CIRCUIT COURT'S DECISION, THAT THE COUNTY SALES TAX DID NOT VIOLATE THE PLAIN LANGUAGE OF WIS. STAT. §77.70 ARE FLAWED AND RESULTED IN ERROR

Because the language of Wis. Stat. §77.70, its legislative history, and county practice all work against what the County has done, Brown County took a "kitchen sink" approach in front of the Circuit Court, offering a variety of alternate arguments. The Circuit Court agreed with some, but not all of the County's arguments, but each fails.

A. The County and the Circuit Court Are Wrong about the Proper Interpretation of Wis. Stat. §77.70

The County and the Circuit Court get at least three things wrong with respect to the interpretation of §77.70.

1. Whether Wis. Stat. §77.70 Is an "Enabling Statute" is Beside the Point as the Restriction on the Imposition of a County Sales and Use Tax is Mandatory

Brown County argued, and the Circuit Court agreed (R.103:20) that §77.70 is, in Brown County's lexicon, an "enabling statute"—one that grants authority and discretion as to whether to use that authority—as opposed to a "prescriptive" statute—one that mandates that Brown County do something. But this distinction does not exist in any Wisconsin case law and the Circuit Court cites no case law to say that "enabling statutes" cannot contain conditions, modifiers or prescriptions. A person or an entity can be authorized to do something by a statute but also required to do it in a certain way and within certain limitations. In fact, in *Liberty Grove Town Bd. v. Door County Bd. of Supervisors*, the central case the County cited for this supposed distinction, the Court of Appeals confirmed that "a county's statutory authority is *limited to that provided in the enabling statute*." 2005 WI App 166, ¶16, 284 Wis. 2d 814, 702 N.W.2d 33 (emphasis added); *see also Nw. Properties v. Outagamie Cty.*, 223 Wis. 2d 483, 487-88, 589

N.W.2d 683 (Ct. App. 1998) ("A municipality's authority in enacting an ordinance is limited by its enabling statute. When an ordinance fails to comply with the empowering statute, it is invalid." (citation omitted)). That is, *every* enabling statute is, in some sense, a prescriptive statute. This is so because "counties are creatures of the Legislature and their powers must be exercised within the scope of authority ceded to them by the state." *Dane Cty., Through Dane Cty. Dep't of Soc. Servs. v. Wisconsin Dep't of Health & Soc. Servs*., 79 Wis. 2d 323, 329, 255 N.W.2d 539 (1977).

Given the lack of authority for the proposition that enabling statutes may not contain prescriptions, it is hard to know how to address an argument that a statute which says that county sales taxes "may be imposed only for the purpose of directly reducing the property tax levy" somehow "contains absolutely no direction on *how* sales and use tax proceeds are to be used." (R.38:15.) The basic answer is that §77.70 is both an enabling and a prescriptive statute. It *enables* the imposition of a sales and use tax without requiring that a county adopt it, but it also *prescribes* the purpose for which it may be imposed, if it is imposed.

2. Wisconsin Stat. §77.70 Should Not Be Read Hyperliterally or to Have No Meaning.

The County made one significant statutory interpretation argument in the Circuit Court that was not accepted by the Circuit Court, or at least not addressed in the Circuit Court's decision. Brown County tried to bolster its contention that §77.70 somehow contains no real restriction by playing on the words "impose[]" and "purpose." In Brown County's view, §77.70 only mandates a particular "purpose" with respect to the *imposition* of the tax, not how the sales tax revenues are spent. Brown County seems to imply (it never makes itself clear on this point) that the statute is satisfied if county lawmakers simply hold the proper intention in their hearts when they vote on enacting the ordinance. (R.38:15.) But 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 Kalal*, 271 Wis. 2d 633, ¶46 ("[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, *supra*, at 571. When the Legislature specifies the purpose of the "impos[ition]" of a sales and use tax, it is 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 mechanically 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 precise moment "a county board adopts the ordinance authorizing the imposition of a tax," (R.38:14), 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.").

Brown County's interpretation also 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? Nothing. Such a requirement produces no practical effect.

Brown County's arguments in this vein similarly appear to build on one sense of the word "purpose," which is "INTENTION," Webster's, *supra*, at 930, as if the Legislature meant only to control the thoughts of County officials and not their actions. But that meaning is inapplicable in the lawmaking context. "It is the *law* that governs, not the intent of the lawgiver . . . Men may intend what they will; but it is only the laws that they enact which bind us." *Kalal*, 271 Wis. 2d 633, ¶52 (quoting Antonin Scalia, *A Matter of Interpretation*, at 17 (Princeton University Press, 1997)) (alteration in original). In the lawmaking context, purpose is relevant only insofar as it is "ascertainable from the text and structure of the statute itself." *Id.* at ¶¶48, 52. Counties enact a law for a particular purpose, such as directly reducing the property tax levy, by adopting an ordinance that accomplishes that effect. An alternate reading renders that condition on sales and use taxes meaningless and superfluous.

3. The Restrictions in Other Statutes Are Not Relevant to the Interpretation of §77.70.

The Circuit Court agreed with the County's argument that the language in the later-enacted Wis. Stat. §§77.705 (the Miller Park Stadium Tax) and 77.706 (the Lambeau Field Tax) aids in the interpretation of the language in §77.70. Specifically, the Circuit Court concluded that because those statutes direct that certain appropriated moneys[6] associated with the Miller Park Stadium Tax and the Lambeau Field Tax shall be used or spent in a certain way, the absence of similar provisions in §77.70 means that the Legislature did not place any restrictions on the use of county sales tax funds. This was error for three reasons.

First, and most importantly, the Circuit Court was wrong to conclude that because §77.70 is more broadly worded, it does not include a limitation similar to the one present in §§77.705-.706. This is nonsense. A general ban on any racial discrimination in university admissions, for example, is more broadly worded than a ban on awarding scholarships based on race. But the greater includes the lesser. In the same way, a broad requirement that the tax be imposed only for the purpose of directly reducing property tax is still a

[6] Although the County did not develop its argument on this point, Wis. Stat. §77.705-.706 do not appear to be the statutes directing the use of stadium sales tax revenue. *See* §§229.685; 229.825. However, the arguments pertaining to §77.705-.706 apply in the same way to the pertinent sections of ch. 229.

limitation on spending or use of revenues. Period. Reading it in any other way, as discussed both above and in the sections that follow, renders it illusory.

Second, the canon Brown County cites—namely, that courts should assign meaning to the failure to include in a statute a provision that appears in a similar statute, *see, e.g.*, *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶22, 316 Wis. 2d 47, 762 N.W.2d 652—does not apply where there are reasons for the difference. *See, e.g.*, *Scarborough v. United States*, 431 U.S. 563, 570-71 (1977) (canon inapplicable 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"); *Heritage Farms*, 316 Wis. 2d 47, ¶23 (canon inapplicable because first statute was "drafted from the perspective of who may bring an action," whereas second was "drafted from the perspective of who is the tortfeasor").

The Circuit Court compared two different types of taxes enacted at different times by different Legislatures for different purposes. Unlike county sales taxes, which were authorized to drive down property tax levies used to fund all kinds of government expenses, special district sales tax revenue may only be used to pay for a specific and unique type of

governmental expense, namely those associated with sports stadiums. Further, and unlike county sales taxes, special district sales taxes automatically sunset after certain conditions are met, most significantly the retirement or payment of bonds issued to help pay those expenses; the Legislature and special districts thus have a special interest in assuring investors that their bonds will be repaid by specifically delineating the path of the sales and use tax revenue stream. *See* Wis. Stat. 77.707.

Or perhaps the stadium tax bill drafters simply thought their language added clarity as compared to that chosen by the bill drafters in the 1980s but did not want to go to the time and expense of updating § 77.70, a statute not related to their project. In fact, before the statutory changes at issue here were adopted, Wis. Stat. §77.70 originally required that a sales tax ordinance "stat[e] its purpose." §77.70 (1983). The Legislature that created the modern county sales tax likely concluded the most efficient way to amend the statute to accomplish direct property tax reduction was to simply clarify the only permissible purpose going forward rather than rewrite the statute from scratch.

Any one of these reasons, or all of them, easily explain the difference in terminology and explain why that difference makes no difference to this

case. Both types of taxes have limitations on the use of the revenues, even though the limitations are different.

Third, even if it were true that §77.70 could have been worded more clearly, the question in matters of statutory interpretation is never "[c]ould [the Legislature] have indicated (or even did [the Legislature] elsewhere indicate) in more crystalline fashion" its wishes. *Torres v. Lynch*, ___ U.S. ___, 136 S. Ct. 1619, 1634 (2016). That a statute might have been drafted "with more precision . . . could be said of many (even most) statutes." *Id.* at 1633. "The question is instead, and more simply: Is that the right and fair reading of the statute before" the court? *Id.* at 1634. This is especially true in this case, where §77.70 was enacted well before the stadium taxes. If the Legislature years later finds a clearer way to express itself as to a subject, has the meaning of the earlier statute changed? Of course not—the inquiry remains the same: the most reasonable reading of the words in the statute. For reasons already set forth, the most reasonable reading of §77.70 is that it restricts the use of county sales tax revenue.[7]

[7] The Circuit Court cited Wis. Stat. §66.0602, the statute setting levy limits, as another example of what it saw as a more clearly-drafted statute. The same reasoning applies to that statute. First, any added specificity does not affect the reasonable meaning of §77.70. Second, there are good reasons that §66.0602 required additional specificity: it sets a mathematical formula for calculating levy *limits* to the exact dollar under pain of statutorily-prescribed penalty, *see* §66.0602(6), whereas counties have more discretion in

B. The Attorney General's 1998 Opinion Contradicts the Plain Language of Wis. Stat. §77.70, and Any Presumption that It Is Correct Has Been Rebutted

The Circuit Court also relied heavily on a 1998 formal opinion by then-Attorney General Jim Doyle (the "AG"), wherein the AG concluded that preventing the property tax levy from *rising* due to new spending had the same legal effect as *reducing* it. (R.59:169-70). But this interpretation ignores the words "directly" and "reduce," rendering the Legislature's restriction on the use of sales tax revenue illusory. It will almost 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.

1. The Attorney General's Opinion

In a formal opinion dated May 5, 1998, the AG set forth his view of the meaning of Wis. Stat. §77.70. He began by acknowledging one proper use of sales tax funds:

> 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.

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budgeting, including in the setting of their *levies* and the use of their sales tax funds. Third, the statute was enacted 21 years after §77.70, and the Legislature may well have updated its approach in this separate context.

(R.59:169.) This conclusion is mostly correct, although it fails to distinguish between the property tax levy that pre-existed the creation of the sales and use tax and the property tax levy after the creation of the sales and use tax.

For example in this case, the property tax levy which pre-existed the sales tax was the 2017 levy in the amount of $86,661,972. (R.9:14; 15:3.) The County's 2018 budget estimated that the County Sales Tax would raise $22,458,333 that year and called for spending $17,895,065 of that revenue. (R.59:39.) If that latter number was shown as a substraction from the pre-existing levy of $86,661,972, and the resulting levy for 2018 was then $68,766,907, then the full amount of the sales and use tax would have been used to reduce the levy as required by §77.70. But that was not what Brown County did.

Instead, in 2018, Brown County proposed raising its spending by at least approximately $22,000,000[8] which would have raised its levy by about the same amount (to about $108,000,000). Brown County then reduced that "new" levy by $17,895,065 (the year's sales tax revenue) resulting in its 2018 property tax levy of $90,676,735. Brown County contends that this was a

[8] That is, about 18 million in capital expenses to be funded by the sales tax (R.59:39), plus approximately 4 million in additional expenses (represented in the County's proposed financial summary, (R.58:98)).

reduction of the levy (because it decreased the hypothetical increase), when, in fact, it was an increase of $4,014,763 or about 5% from the levy that pre-existed the sales and use tax. (R.9:14; R.15:3.) Moreover, as explained in detail below, Brown County did not even have room in its statutory levy limit to increase its property tax levy to pay for the $17,895,065 of new spending proposed for 2018 and thus effectively evaded it. In sum, Brown County's sales and use tax did not even result in property tax *relief* for Brown County taxpayers to say nothing of direct reduction of the property tax levy.

Unfortunately the AG opinion goes on to agree that sales and use tax proceeds may be used to defray the cost of new projects (as Brown County did), essentially concluding that reducing a hypothetical increase is a reduction of the property tax levy. In response to the argument that this rendered the word "directly" superfluous, the AG explained that the word retained meaning because some projects (for example, public library services in some districts) could not be funded through property taxes at all and thus could not be funded through sales tax revenue. Funding these projects with sales tax revenue would "free[] up other funds" but this would constitute "indirect . . . property tax relief." (R.59:170.)

The AG believed that it would be "unreasonable" to construe the statute to require that the proceeds of the sales and use tax be used to actually reduce the property tax levy (as opposed to offsetting the hypothetical increased costs of new spending) because some counties which had already started projects (and thus had factored the costs into their levy) could use sales tax revenue to pay for them while a similarly-situated county which had not yet started the project could not, despite the absence of any "county-by-county limiting language in the statute." (*Id.* at 169-70.)

The Circuit Court was persuaded by this interpretation, but for the reasons stated below it cannot be correct.

2. The Attorney General's 1998 Opinion Contradicts the Plain Language of Wis. Stat. §77.70

The main problem with the AG's interpretation is that it flatly contradicts the language of §77.70, which calls for a direct reduction, not the absence of an increase. *See Kalal*, 271 Wis.2d 633, ¶¶44-45.

Avoiding a hypothetical increase in the property tax levy by using sales tax revenue on projects that might have been funded through an increase in the levy is neither a "reduction" nor "direct." It is not a reduction because the property tax levy has not actually diminished in amount—instead, it has

not increased, and these are not equivalent. For example, if two parents give their daughter $10,000 on the condition that she use it to reduce her burdensome credit card debt, and she instead uses the money to finance a vacation to Europe, we do not say that she reduced her credit card debt thereby. Just so here: Brown County has not reduced the property taxes it requires its citizens to pay by imposing a *second* tax and then using it to pay for a wish list of new capital projects.

And even if the absence of an increase might be characterized as a reduction, it is not "direct" because it did not occur via the shortest way—application of the sales tax revenue to the property tax levy—instead, Brown County was required to engage in the intervening step of funding new spending items with the revenue, which, in turn, supposedly lowered the property tax levy. To claim otherwise—to say that using sales tax revenue for new spending directly reduces the property tax levy because it could hypothetically have been paid for by property tax dollars—reads the limitation on the use of sales tax revenue out of the statute. Almost anything fits into this category. In this respect the AG was correct to address the

surplusage canon but wrongly concluded that his interpretation complied with it.[9]

At best, then, preventing a hypothetical increase in the property tax levy is an *indirect* method of property tax *relief*. But that's not good enough. The statute does not merely call for "relief" (whether direct or indirect). In fact, as discussed above, the Legislature *specifically* rejected a version of the statute using that broader language, instead opting for more specific language requiring a direct reduction. Regrettably, the Attorney General failed to consider any of the external indications of legislative intent discussed previously.

Instead, he focused on what types of projects the sales and use tax revenue was being used to pay for. The AG found it unreasonable in light of the statutory language 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 unreasonable limitation; it is integral to the taxing authority the Legislature chose to grant counties.

[9] The AG decided "directly" retained meaning with reference to projects not even fundable by the property tax levy. But even assuming that paying for those projects could be viewed as "indirectly" reducing the property tax levy (which is not at all clear) that is simply an additional layer of indirectness as compared to paying for capital projects with sales taxes, which also at best only indirectly reduce the property tax levy.

While forcing counties to first raise the property tax levy before lowering it with a sales tax may seem inefficient, 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.

The AG thus also erred in concluding that the two types of counties he cites—the county using the sales tax to pay for a preexisting project already funded by the property tax levy and the county that wishes to use the sales tax to pay for a new project—are being treated differently. Both types must first obtain non-sales tax funding for the project before funding it with sales tax revenue. The first type in the AG's hypothetical has merely already done so while the second must do so in the future.

Even putting all of these flaws in the AG's opinion aside, while the AG cites the need to avoid "absurd or unreasonable results" he misapplies the rule. That canon is an aid to determining the meaning of a statute enacted

by the Legislature. *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"). It is not a blank check for executive branch actors to engage in a freewheeling analysis of whether they think that the Legislature's policy choices make sense. *See, e.g.*, *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.); *Anderson v. Aul*, 2015 WI 19, ¶113, 361 Wis. 2d 63, 862 N.W.2d 304 (Ziegler, J., concurring on behalf of the Court) (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). *Grunke* cites textual or contextual inconsistency as the hallmarks of absurd or unreasonable results; we do not expect the legislature to contradict itself. But the AG identifies no such problem. Instead, his conclusion rests on his own supposition that treating putatively like counties alike (in fact, for reasons already explained, they are not) is a more important value then transparency, accountability, and procedural safeguards. That was not his decision to make.

In any event, the AG's opinion is not binding on courts, *see, e.g.*, *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295, and should be disregarded. It contradicts the plain language of the statute, does not comport with confirmatory extrinsic sources, and misapplies multiple canons of construction. To the extent the Circuit Court found it persuasive, it erred.

3. Any Presumption that the Attorney General's Opinion Is Correct Has Been Rebutted

The Circuit Court below relied on Wisconsin case law for the conclusion that the Attorney General's opinion is entitled to a presumption of correctness. (R.103:27 (quoting *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶126, 327 Wis. 2d 572, 786 N.W.2d 177 (lead opinion).) As an initial matter, as it did below (R.64:10 n.3), BCTA notes that in the event of review by the Wisconsin Supreme Court it will argue that this proposition of law is erroneous and should be overruled. Regardless, assuming the validity of the proposition that AG opinions can ever be entitled to a presumption of correctness, that presumption is of course not irrebuttable in a court of law. For the reasons set forth in the prior section, the AG's reasoning is seriously deficient and contrary to the unambiguous terms of §77.70. Consequently,

any presumption of correctness is rebutted and this Court need not and should not follow the opinion.

C. The County Sales Tax Is Illegal Even Under the Attorney General's Alternative Analysis

If this Court disagrees with BCTA and concludes that the AG'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 it could have paid for by raising its levy to its levy limit, so the sales tax is unlawful, even under the AG's opinion.

1. The Effect of County Levy Limits on the Attorney General's Opinion

As noted, although the 1998 AG opinion approved of using sales tax revenue to pay for new projects, even the AG agreed that

> [s]ales 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.

(R.59:170 (emphases added).)

The Attorney General's opinion (and the amendment of §77.70) occurred *before the enactment of levy limits* in 2006. *See* 2005 Wis. Act 25. Levy limits now 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 AG's logic, with a sales and use tax.

Under Wis. Stat. §66.0602(2), "political subdivision[s]" (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 assumes that counties can raise property taxes at will, and thus 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.*

2. Brown County Did Not Have Room under its Levy Limit to Pay for its New Projects

Even under the AG'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. (R.3:1; 59:39.) Yet in 2017, Brown County's property tax levy was $86,661,972 (R.9:14; 15:3) and in 2018, Brown

County's levy limit was $87,584,261,[10] a difference of only about one million dollars. (R.46:1.) This means the County could not have raised its levy to pay for the $18,000,000 in new projects. Brown County is therefore not using the County Sales Tax "only for the purpose of directly reducing the property tax levy." *See* Wis. Stat. §77.70. Instead, it is using the County Sales Tax to evade its levy limits, increasing its overall tax revenue by over 20% in 2018.

Even the Circuit Court recognized the force of this logic:

> The Court, throughout the process of rendering a decision on this case, has found this Taxpayer argument the most compelling. How can the County claim "only" to be "directly reducing" its property tax levy with sales and use tax revenue, when it is increasing spending beyond what it could without the sales and use tax revenue? Phrased another way, if the County is generating $145,000,000.00-plus in sales and use tax revenue over 72 months, then why are property taxes not being reduced by $145,000,000.00-plus over those 72 months?

(R.103:28.) This is a good question but one the Circuit Court inexplicably decided to avoid answering. Nor does the Circuit Court answer the specific question for 2018—how can the County increase spending by $18,000,000 in one year, when it only has room for $1,000,000 under its levy limit, and

[10] Or $$91,115,007. Brown County initially stated that the latter number was correct (R.9:18; 15:5) but then stated the former was the actual number (R.38:22 n.15). BCTA does not know why they are different or which is correct. Nothing here turns on the difference.

still contend that it is somehow reducing the property tax levy? This Court should fix these errors. Even if the Court finds the AG's interpretation persuasive, it should still conclude that the County Sales Tax violates Wis. Stat. §77.70.

3. Brown County Did Not Borrow to Pay for its New Projects

Brown County argued below, and the Circuit Court appears to have agreed, that the property tax levy limit also 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.

We are now quite far afield from direct property tax reduction. For starters, 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, the County would likely 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).

By passing its sales tax ordinance, Brown County neatly avoided all of the legal requirements for borrowing the money. 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, §3(2) of the Wisconsin Constitution and allow Brown County to use its borrowing capacity to justify

a sales tax, and to 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 utterly meaningless.

D. The Court Is Not Interfering with the Discretion of the County Board Because the Board Has No Discretion in this Matter

As part of it reasoning, the Circuit Court expressed concern that adopting BCTA's interpretation would lead to the "unreasonable result" of the court "usurp[ing] the decisions of the County's elected officials." (R.103:22.) But this is circular reasoning and obviously depends solely on whether the Circuit Court was correct to conclude that §77.70 leaves "ample discretion" (*id.*) to counties in choosing how to spend their funds. As BCTA has shown, no such discretion is afforded.

The discretionary decision available to the County Board was whether or not to adopt a sales and use tax. Nothing that BCTA asked the Circuit Court to do or asks this Court to do interferes with that discretionary decision. How the money must be spent, however, has been decided by the Legislature—it must be spent to directly reduce the property tax levy.

E. Brown County's Mill Rate Freeze is a Red Herring and Any Reduction in Brown County's Property Tax Levy that Is Occurring Does Not Arise by Direct Operation of the County Sales Tax

At various times Brown County suggests—likely as a failsafe should this Court agree with BCTA's interpretation—that its math shows that the County Sales Tax is directly reducing its property tax levy anyway. These conclusory statements, which revealingly are never actually accompanied by a clear, step-by-step explanation of how the reduction is being accomplished,

are based on a hope that the Court's eyes will glaze if asked to scrutinize the County's calculations. But the statements do not withstand scrutiny.

Brown County first implies that it is using *some* of its sales and use tax revenue to pay down existing debt. (R.65:16.) Even were that true, it would not satisfy the statute, because the County would not be using the sales and use tax "only" to directly reduce the levy. Some of the tax revenue would still be used for other purposes, namely capital projects.

But *it is not true* that Brown County is using sales and use tax proceeds to pay existing debt. This is easily provable. The Sales Tax Ordinance states that "revenues . . . *Shall not be utilized* to fund any operating expenses other than lease payments associated with the below mentioned specific capital projects." (R.3:1.) Nor does Brown County's 2018 budget show sales and use tax revenue being spent on debt service; rather, it shows it being spent on $17,895,065 of projects from the ordinance (R.50:82), with a remaining balance of $4,574,118 unspent in a special fund, (R.51:26). Brown County's own minutes show not that the revenue is paying for debt service, but rather that paying for new capital projects with the revenue would avoid borrowing for those projects, keeping the total debt down as well as allowing the existing debt to be paid off faster. (R.68:2.) BCTA has already addressed

how deciding that these actions meet §77.70 require assuming that the County would have chosen to borrow and would have met the prerequisites for doing so, assuming that paying for debt service on *borrowing* is just as good as paying for the projects *directly*, and assuming that avoiding an increase counts as a reduction. Thus any reduction in the property tax levy that occurs is not a direct result of the sales tax; the same reduction would obtain if the County chose not to fund the capital projects it lists at all.

Brown County similarly argues that enacting into its ordinance a mill rate freeze somehow indicates compliance with §77.70. (*See* R.3:1.) It does not. Assuming the mill rate were somehow interchangeable with the property tax levy, a freeze is obviously not the same as a reduction, much less a direct reduction. And it is not interchangeable: the mill rate is a function of a county's property tax levy and the equalized value of taxable property. *See Milewski v. Town of Dover*, 2017 WI 79, ¶47 & n.18, 377 Wis. 2d 38, 899 N.W.2d 303 (lead opinion). So what Brown County is saying is that it has promised to limit its levy increases to a level that does not raise the mill rate. This is simply a variation of its earlier arguments. Slowing the increase of the property tax levy is not the same as a direct reduction of the property tax levy; a mill rate freeze, or even a decrease, does not necessarily

mean the levy decreased. And even to the extent the mill rate is frozen or decreasing due to a *decrease* in the property tax levy, that decrease is not due to sales tax revenues but instead from payments on debt service, which could occur with or without the County Sales Tax.

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

Brown County's final collection of arguments all boil down to a warning that bad things will happen if this Court rules in favor of BCTA. The County couches some of these arguments in the "absurd or unreasonable results" canon, but as explained that canon is not used for open-ended analyses into whether the Legislature's policy decisions are good ideas or not. And the Circuit Court rejected these arguments out of hand, properly stating that it was not interested in "hyperbolic arguments of chaos ensuing if the court decides one way or another" but instead intended to "find the correct legal, not political, decision." (R.103:18.)

For example, Brown County suggests that BCTA's interpretation will not be administrable due in part to a lack of DOR guidance. It is not clear upon what the County is basing this fear. The AG itself explained how counties can apply its revenue to decrease the property tax levy. (R.59:169.) Further, in a particular budget the County can either apply last year's sales

tax revenue to next year's levy or it can apply an estimate of next year's sales tax revenue to next year's levy (the same kind of estimates municipalities make in any number of budgetary areas).

In fact, although the many variables affecting the county budgeting process make proving that a dollar-for-dollar reduction has occurred in a particular year difficult, BCTA provided strong evidence below that such reductions have already occurred in counties across the state. For example, Ashland County imposed its sales and use tax in 1988. *Sales Tax Rate Chart*, *supra* n.5. It collected $258,496.05 in sales tax revenue that year. Department of Revenue, *County Sales Tax Distributions*, https://www.revenue.wi.gov/Pages/RA/CountySalesTaxDistributions.aspx (last visited July 6, 2020) (use top and drop-down menus). And it reduced its property tax levy by a little more at the same time—$259,106. (R.75:1.)[11] Langlade County also enacted its sales and use tax in 1988, collecting $279,308.29 in sales tax revenue that year and reducing its property tax levy by $282,938 the next year. Lafayette County imposed a sales and use tax in 2001, collecting $247,123.80 in revenue and reducing its levy by $292,050.

[11] Citations for the following two examples are to the same sources and follow the same pattern; for the sake of simplicity they have been omitted.

The next year it collected $465,956.42 and reduced its levy by $487,337. These facts suggest that Brown County's speculative administrability fears are misplaced.

Indeed, DOR, while not taking a side in the legal dispute, has noted: (1) all counties are already required to submit a PC-400 form, which contains a line item titled "County sales tax credit" and which reduces the county property tax levy on the form (*see* R.91); and (2) if the Circuit Court "were to enjoin collection of the sales and use tax, [DOR] would need at least 30 to 60 days to implement the change" (R.62:9)—*i.e.*, it could implement the change. Finally, and importantly, the question of remedy is not before this Court: that question can be decided on remand, if need be. The only question at hand is the legal meaning of §77.70.

Separately, Brown County notes that a ruling in BCTA's favor would lead to all sorts of bad outcomes for it. It advances this argument despite the fact that "it is not the role of the court to weigh the 'consequences of alternatives interpretations.'" *Anderson*, 361 Wis. 2d 63, ¶114 (Ziegler, J., concurring on behalf of the Court). A significant number of the negative effects cited by the 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. Adopting the County's argument would mean incentivizing unlawful 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. The County's concerns can be addressed, if necessary, in the remedy phase of this litigation. But whether the 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.

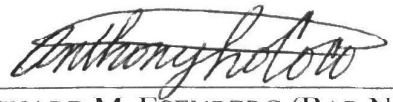
CONCLUSION

For the foregoing reasons, BCTA respectfully requests that this Court reverse the decision of the Circuit Court and remand for further proceedings.

Dated this 3rd day of August, 2020.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY



RICHARD M. ESENBERG (BAR NO. 1005622)
ANTHONY LOCOCO (BAR NO. 1101773)
LUCAS T. VEBBER (BAR NO. 1067543)
Wisconsin Institute for Law & Liberty

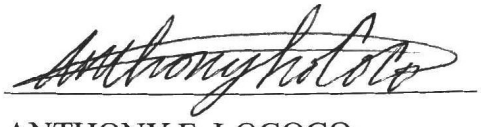
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
(414) 727-9455; rick@will-law.org
FAX: (414)727-6385

Attorneys for Defendants-Third-Party Plaintiffs-Appellants

CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on August 3, 2020. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 3rd day of August, 2020.

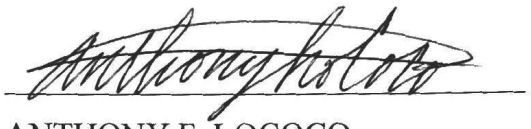


ANTHONY F. LOCOCO

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,980 words.

Dated this 3rd day of August, 2020.



ANTHONY F. LOCOCO

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of August, 2020.

ANTHONY F. LOCOCO

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX CERTIFICATION

Pursuant to Wis. Stat. § 809.19(2)(b), I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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ANTHONY E. LOCOCO