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WISCONSIN COURT OF APPEALS
DISTRICT III

APPEAL 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,
the Honorable John P. Zakowski, Circuit Court Judge,
Presiding
Circuit Court Case No: 18-CV-640

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT BROWN COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUE

Issue: Whether the presumptively valid Brown County sales and use tax ordinance ("Ordinance") complies with Wis. Stat. §77.70's enabling language that a county may impose a sales and use tax "only for the purpose of directly reducing the property tax levy," when the revenues derived from the Ordinance's sales and use tax—consistent with the guidance of an Attorney General Opinion—are used to pay for capital projects that otherwise would be funded by a countywide property tax.

Circuit Court Decision: Yes. The circuit court concluded the Ordinance complies with Wis. Stat. §77.70 because the sales and use tax revenues are being used to fund capital projects that Brown County otherwise would have funded by issuing debt. (R. 103; A.App. 101-32.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent Brown County believes the parties' Briefs adequately address the facts, arguments, and issue but welcomes the opportunity to present oral argument if the Court believes it would be helpful to its understanding of this case.

The Court's opinion should be published because the issue is one of first impression and has state-wide importance.

STATEMENT OF THE CASE

Brown County Taxpayers Association and Frank Bennett (collectively "BCTPA") contend the Ordinance is invalid because it does not comply with Wis. Stat. §77.70. BCTPA is wrong. Where, as here, a sales and use tax ordinance prevents an increase in the county's property tax levy over the life of the sales and use tax, the ordinance complies with §77.70.

BCTPA's interpretation of §77.70—*i.e.*, proceeds from a sales and use tax must be offset, dollar-for-dollar, from the property tax levy—is contrary to the legislature's intent because it imposes a limit on county authority the statute's plain meaning does not reflect:

- Had the legislature intended §77.70 to require a dollar-for-dollar offset, the legislature would have used the term "offset" in the statute.

- Had the legislature intended §77.70 to require a dollar-for-dollar offset, it would have put in the statute—or in another statute enforcing §77.70—instructions on how counties are to apply and calculate such an offset.

But the legislature has not done so, even 22 years after the Wisconsin Attorney General ("AG") interpreted §77.70 ***not*** to mandate a dollar-for-dollar offset, and even after 64 other Wisconsin counties have enacted sales and use tax

ordinances that do ***not*** provide for such an offset. Thus, for decades, the legislature has not attempted to "correct" any misinterpretation of §77.70 by the AG, the Department of Revenue ("DOR"), or 64 Wisconsin counties. Instead, the legislature's implied acceptance of the AG's Opinion and the practice of 64 counties constitutes an implied rejection of BCTPA's interpretation of §77.70 and also shows the legislature ***has not even accounted for the possibility §77.70 could require an offset***. By definition, an interpretation of a statute—such as BCTPA's interpretation here—that the legislature has not contemplated is an interpretation that is contrary to the legislature's intent and one that diverges from the statute's plain meaning.

This is a declaratory judgment action in which the sole issue—the validity of the presumptively valid Ordinance—is one of statutory interpretation. Specifically, the crux of this case is the interpretation of the following words in §77.70: "Any county desiring to impose county sales and use taxes under this subchapter may do so by the adoption of an ordinance, stating its purpose and referring to this subchapter. . . . [T]he county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy[.]"

On cross-motions for summary judgment, the circuit court correctly concluded the Ordinance is valid as compliant with §77.70. (R. 103; A.App. 101-32.) Section 77.70 contains enabling language that permits counties to enact by ordinance a sales and use tax. If counties choose to enact a sales and use tax via ordinance, the ordinance complies with §77.70 if the sales and use tax revenues are used to pay for capital projects that otherwise could be funded by a countywide property tax, thereby preventing a property tax increase. This is the interpretation of §77.70 the AG applied and is the interpretation the circuit court adopted when it granted summary judgment to Brown County. (*Id.*; A.App. 144-47.)

The presumptive validity of the Ordinance not only is reflected in its conformity with the plain meaning of §77.70, the AG Opinion, and the practice of dozens of Wisconsin counties, but also is reflected in Brown County's thorough and deliberate budget process. (R. 103, pp. 29-30.) Had the County not funded its needed capital improvements through a sales and use tax, it would have funded them through issuing debt. (R. 44, ¶7.) To pay off the debt, the County would have had to increase property taxes. In its budgeting process,

Brown County calculated the savings local taxpayers would realize through a sales and use tax instead of debt financing:

- If the County had issued debt for the projects, the property tax on a median-value home in Brown County would have ***increased*** $356.48 over the life of the Ordinance. (*Id*., ¶¶29, 33.) Instead, the sales and use tax will result in the property tax on such a home ***decreasing*** $140.20. (*Id*., ¶32.) Thus, the sales and use tax is ***saving*** taxpayers who own a median-value home ***$496.68*** over the life of the Ordinance. (*Id*., ¶¶7, 27-34.)

- In aggregate terms, if Brown County had financed its capital projects through borrowing money instead of through the sales and use tax, borrowing would have cost Brown County taxpayers $13,627,943.36 in interest payments over the six-year life of the Ordinance and $47,000,000 in interest payments over the twenty-year life of the loans. (*Id*., ¶¶29-30.)

As the circuit court concluded, Brown County's budget decisions were made by "intelligent and talented people" who conducted "ample research and put considerable thought and effort into determining how the sales and use tax revenue would reduce the property tax levy" and fund new projects. (R. 103, pp. 29, 30; A.App. 129, 130.)

This Court should affirm.

STATEMENT OF FACTS

I. BROWN COUNTY ENACTS THE ORDINANCE, WHICH STATES THE SALES AND USE TAX REVENUE "SHALL BE UTILIZED ONLY TO REDUCE THE PROPERTY TAX LEVY."

Before Wis. Stat. §77.70 was enacted in 1985, Wisconsin counties had the authority to impose a sales and use tax, but few did so because the counties themselves could not retain the net proceeds. (R. 60, p. 168; A.App. 144.) Instead, all net proceeds from a sales and use tax were required to be distributed to towns, cities, and villages within the county. (*Id.*)

Through enactment of §77.70, the legislature permitted counties to retain the proceeds of a sales and use tax if a county imposed by ordinance a sales and use tax at a rate of 0.5% "only for the purpose of directly reducing the property tax levy":

> 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. . . . [T]he 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.

Wis. Stat. §77.70.

On May 17, 2017, Brown County enacted the Ordinance by a majority vote of 23 to 3. (R. 71, p. 6.) Brown County publicly vetted the Ordinance before enacting it. The County held a public meeting on May 8, 2017 and engaged in nine public listening sessions thereafter. (R. 67, 69.) The May 17, 2017 meeting where the County enacted the Ordinance was public, and eleven citizens spoke in favor of the Ordinance and two citizens spoke in opposition to it. (R. 71, p. 2.)

The Ordinance took effect for 72 months beginning January 1, 2018 and addresses the strictures of §77.70 by indicating the sales and use tax is enacted at a rate of 0.5% and its revenue "**[s]hall be utilized only** to reduce the property tax levy":

> **9.02 Purpose**. This Ordinance enacts a temporary 72 month, 0.5 percent Brown County sales and use tax, revenues for which: 1) **Shall not be utilized** to fund any operating expenses other than lease payments associated with the below mentioned specific capital projects; and 2) **Shall be utilized only** to reduce the property tax levy by funding the below listed specific capital projects, as well as funding said specific capital projects' associated costs as deemed appropriate by Brown County administration . . . .

(R. 3, p. 1; A.App. 142. (bold in original).)

The Ordinance allocates $147,000,000 raised by the sales and use tax to nine capital projects that elected County Board members determined were "necessary" and "need[ed]" for the "long-term viability of the County." (*Id.*; R. 71, p. 2; R. 68, p. 4.) The County enacted the sales and use tax to reduce property taxes by funding needed capital projects that otherwise would have been funded through the issuance of additional debt. (R. 3; A.App. 142; R. 44, ¶7.)

Through the Ordinance, Brown County has been able to pay down existing debt and fund the listed capital projects. (R. 68.) As reflected in the Brown County Executive Committee meeting minutes of May 8, 2017, the sales and use tax has enabled Brown County to "stop bonding," and over its six-year life, the tax will decrease the County's debt approximately $69 million, from $134 million to $65 million. (*Id.*, p. 2) The decrease in the total debt also decreases the cost to pay for the debt, which, in turn, results in a decrease in the tax levy required to pay the County's debt. (*Id.*) So, by replacing the property tax levy used to pay for bonding and new debt with the sales and use tax, the Ordinance "guarantee[s] tax relief" to Brown County residents. (*Id.*)

The County determined the tax savings to residents from the sales and use tax. It did so by calculating the effect on property taxes if the County had funded the Ordinance's capital projects through issuing debt, instead of funding those projects through the sales and use tax. (R. 44, ¶¶27-34.) Had Brown County borrowed the funds, county taxpayers would have shouldered the extra costs associated with the borrowing. (*Id*., ¶29.) The County calculated those extra costs would have totaled $13,627,943.36 in interest payments over the life of the Ordinance and $47,000,000 in interest payments over the twenty-year life of the debt service. (*Id*., ¶¶29-30.)

What do these totals mean for a Brown County resident? They mean the property tax on a median-value home in Brown County would have ***increased*** $356.48 between 2018 and 2023 without the sales and use tax; instead, because of the sales and use tax, the property tax on a median-value home will ***decrease*** $140.20 in that same time period. (*Id*., ¶¶32-34.) Thus, the owner of a median-value home in Brown County ***will save $496.68 in property taxes over the life of the Ordinance*** because the County funded the

projects through the sales and use tax instead of through debt financing. (*Id.*)

In addition, Brown County imposed a mill rate[1] freeze, which provides that, if the mill rate exceeds the 2018 mill rate in any year during the Ordinance's six-year effective period, then the sales and use tax will terminate on December 31 of that year. (R. 3, p. 1; A.App. 142.) The mill rate has not increased since the County enacted the Ordinance.

The Ordinance also provides that the sales and use tax will terminate before the 72-month effective period if Brown County issues "any general obligation debt" for anything other than refinancing. (*Id.*)

II. WISCONSIN COUNTIES, INCLUDING BROWN COUNTY, ENGAGE IN MONTHS OF STRATEGIC PLANNING BEFORE ADOPTING AN ANNUAL BUDGET.

The Ordinance is but one part of a much broader county planning and budgeting process. The next two subsections discuss, in turn, Wisconsin counties' general budget process and Brown County's annual budget process.

[1] The mill rate is a "figure representing the amount per $1,000.00 of the assessed value of property, which is used to calculate the amount of property tax." *Milewski v. Town of Dover*, 2017 WI 79, ¶47 n.18, 377 Wis. 2d 38, 899 N.W.2d 303 (internal quotation marks omitted).

A. Wisconsin Counties Set Property Tax Levies In Accordance with the Statutory Levy Limit.

Wisconsin counties are statutorily required to adopt an annual budget. Wis. Stats. §§59.60, 65.90(2). A county budget is required to delineate all anticipated revenue sources to support budgeted expenditures. Wis. Stat. §65.90(2).

Once a county accounts for revenue sources and determines operating expenses, it sets the property tax levy. How a county sets the property tax levy is governed by Wis. Stat. §66.0602, which was enacted in 2005, seven years after the AG issued his 1998 Opinion interpreting Wis. Stat. §77.70. 2005 Wis. Act. 25 §1251c.

The property tax levy is calculated by adding the revenue necessary to fund county operations ("Operating Levy") to the revenue necessary to pay the county's debt limit ("Debt Levy"). (R. 103, p. 9 n.2; A.App. 109.) Section 66.0602 imposes a cap on the permissible annual percent increases to a county's Operating Levy. Wis. Stat. §66.0602(2). The cap—known as the "Levy Limit"—restricts the percent increase of the Operating Levy to the percentage increase in the county's net new construction, as established by DOR (subject to certain exclusions not

material here). *Id*. The Operating Levy is subject to the Levy Limit, but the Debt Levy is not. Wis. Stat. §66.0602(3)(d)2.; (*see* R. 44, ¶¶18-19, 41-42, Exhs. B, C). In other words, the legislature exempts debt service payments from the Levy Limit calculation. *Id*.

Subsections 66.0602(2)-(2m) require a certain decrease—or, what the legislature calls a "negative adjustment"—in a county's Levy Limit if a county realizes a certain decrease in the county's debt service, or if a county receives fee revenue from certain services, such as garbage collection, fire protection, or snow plowing. Wis. Stat. §66.0602(2)-(2m)(b)1.-(b)2. However, Wis. Stat. §66.0602 does not require any decrease in a county's Levy Limit for sales and use tax revenues. *See* Wis. Stat. §66.0602.

Section 66.0602(6) authorizes DOR to enforce Levy Limits. Wis. Stat. §66.0602(6). If a county exceeds its Levy Limit, DOR is required by law to offset, dollar-for-dollar, state aid otherwise owed to the county. Wis. Stat. §66.0602(6)(a).

DOR uses a Levy Limit Worksheet to ensure a county has complied with the statutory Levy Limits. (R. 44, ¶¶17-19, 41-42, Exhs. B, C.) The Levy Limit Worksheet contains

categories of revenues or expenditures that are to be added or subtracted from the allowable levy to perform the Levy Limit calculation. (*Id*.) The Levy Limit Worksheet excludes from the Levy Limit calculation sums a county might pay for debt service. (*Id*.) In other words, if a county borrows money for a capital project, the Levy Limit Worksheet excludes from the definition of revenues subject to the Levy Limit the county's principal and interest payments on the loans. (*Id*.) The Levy Limit Worksheet also does not provide for any deduction of proceeds from a county sales and use tax from the allowable levy, or even address such proceeds. (*Id*., ¶¶20, 41-42, Exhs. B, C.)

B. Brown County Engages in Eight Months of Strategic Planning to Establish Each Annual Budget.

In January, Brown County begins its eight-month strategic planning process that results in a final budget. (*Id*., ¶12.) During the first six months of the process, the County's Finance Department—which is responsible for implementing the budget process and verifying the County adheres to Levy Limits—helps each of the 31 distinct County departments set their respective budgets. (*Id*., ¶¶10, 13.) In August, the

Finance Department compiles the final departmental budget, which is used to formulate a proposed budget. (*Id*., ¶14.)

In September, the County Executive submits the proposed budget to the County Board for hearings, deliberation, and possible amendment. (*Id*., ¶15.) The County adopts the budget in October or November. (*Id*., ¶12.)

III. IF THE SALES AND USE TAX IS REPEALED, BROWN COUNTY WILL LOSE THE SALES AND USE TAX PROCEEDS.

Brown County has studied what economic benefits it will realize from the sales and use tax and also has studied what ill-effects it will suffer if the sales and use tax is repealed. The County accounted for estimated sales and use tax proceeds when formulating its annual budget for 2018 and 2019. (*Id*., ¶16.) The County estimated it would receive $22,458,333 in sales and use tax revenue in 2018 and estimated it would receive $24,500,000 in sales and use tax revenue in 2019.[2] (*Id*.)

Brown County submitted evidence of several adverse effects it will suffer if the Ordinance is repealed:

[2] Brown County received $22,643,051.49 in sales and use tax revenue in 2018. (R. 61, ¶12; R. 62, p. 5.)

- The County will lose the sales and use tax revenue and will have to decrease future budgets by the anticipated amount of sales and use tax revenue (which totaled $24,500,000 in 2019). (*Id*., ¶37.)

- The County will be forced to borrow to fund its capital projects, which will result in an increase in property taxes to pay for the associated interest expense. (*Id*., ¶¶7, 27-30, 35.)

- Any County budget in place—including ones in place for future years—will need to be amended to account for the change in revenue categories, even though there may not be any legal mechanism to amend the budget. (*Id*., ¶26.)

- There is a "significant risk" the County's credit rating will decrease. (*Id*., ¶38.)

IV. IN MAY 1998, THE ATTORNEY GENERAL ISSUED AN OPINION CONCLUDING AN ORDINANCE THAT ALLOCATES SALES AND USE TAX PROCEEDS TO FUND PROJECTS THAT OTHERWISE COULD BE FUNDED BY A PROPERTY TAX LEVY COMPLIES WITH WIS. STAT. §77.70.

By 1998, Wis. Stat. §77.70 had been in force for 13 years, but no court or other legal authority had interpreted the meaning of the statutory phrase "only for the purpose of directly reducing the property tax levy." (*See* R. 60, p. 169; A.App. 145.) The Corporate Counsel for Ozaukee County requested the AG to advise "how funds received from a county sales and use tax imposed under section 77.70, Stats.,

may be budgeted by the county board." (*Id*., p. 168; A.App. 144.)

In response, on May 5, 1998, the AG issued an Opinion interpreting the statutory language "the sales and use tax may be imposed only for the purpose of directly reducing the property tax levy" to permit two means of compliance with §77.70: Funds raised by a sales and use tax could be either **(a)** "budgeted to reduce the amount of the overall countywide property tax levy"; or **(b)** budgeted "to defray the cost of any item which can be funded by a countywide property tax." (*Id*.) The AG reasoned: "The same amount of countywide property tax reduction occurs whether the county board chooses to budget revenues from net proceeds of the sales and use tax as a reduction in the overall countywide property tax levy or as an offset against a portion of the costs of specific items which can be funded by the countywide property tax." (*Id*., p. 169; A.App. 145.)

The AG explained that §77.70 permits counties to use the proceeds of a sales and use tax to defray either the cost of existing projects or the cost of new projects. (*Id*.) The AG reasoned that it would be "unreasonable" to construe §77.70 to, on the one hand, permit counties that had started projects

to complete them using sales and use tax revenue, but to, on the other hand, prohibit counties that had not yet started similar projects from using sales and use tax revenue to fund such new projects at all. (*Id*., pp. 168-69; A.App. 145-46.)

The AG also provided guidance on what the word "directly" means within §77.70. To "directly" reduce the property tax levy, the AG concluded, sales and use tax revenue may be put towards budget items that could be funded from the countywide property tax levy to begin with: "[T]he budgeting of sales and use tax proceeds to defray the cost of items which cannot be funded by a countywide property tax constitutes indirect rather than direct property tax relief." (*Id*., p. 170; A.App.146.)

The AG observed that Wisconsin counties "lack statutory authority to implement a direct system of tax credits to individual property owners through distribution of property tax bills, the contents of which are specified by [DOR]." (*Id*., p. 169; A.App. 145 (brackets added).)

It appears the May 5, 1998 AG Opinion stood without challenge, either via litigation or via proposed legislative amendment to §77.70, until BCTPA challenged the Ordinance. At the time this suit was filed, 66 of Wisconsin's

72 counties had enacted a sales and use tax pursuant to §77.70. (R. 41, pp. 25-60; R. 42, pp. 1-60; *see also* https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx#txrate3 (last visited Aug. 31, 2020).)

ARGUMENT

This case involves the interpretation of Wis. Stat. §77.70. Interpretation of a statute is a question of law this Court reviews *de novo*. *Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶6, 234 Wis. 2d 335, 610 N.W.2d 129.

I. THE ORDINANCE COMPLIES WITH WIS. STAT. §77.70.

The presumptively-valid Ordinance complies with Wis. Stat. §77.70. *State ex rel. B'nal B'rith Found. v. Walworth Cnty. Bd. of Adjustment*, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973) (stating where a local government entity enacts an ordinance pursuant to statutory authority, "all ***presumptions are in favor of its validity***, and ***any person attacking it must make the fact of its invalidity clearly appear***") (emphasis added). The Ordinance complies with §77.70's enabling language that permits a county "desiring to impose county sales and use taxes" to do so by ordinance that "stat[es] its purpose" and is "imposed only for the purpose of

directly reducing the property tax levy." Brown County enacted the sales and use tax to avoid using the property tax levy to pay for the capital projects identified in the Ordinance. (R. 3; A.App. 142; R. 44, ¶7.) Accordingly, Brown County enacted the sales and use tax Ordinance "for the purpose of" funding projects that otherwise would have been funded by a countywide property tax. (*Id.*) Brown County's interpretation of §77.70 is supported by years of consistent application under the guidance of an AG Opinion and DOR, as well as the practice of dozens of other counties.

BCTPA contends the Ordinance is invalid because it contravenes §77.70, which BCTPA interprets to require counties to offset sales and use tax revenues with a dollar-for-dollar decrease in the property tax levy. (BCTPA Br., p. 9.) BCTPA is wrong. BCTPA's interpretation is contrary to the statute's text and the legislature's intent. In §77.70, the legislature did not enact any statutory terms mandating a dollar-for-dollar offset. Nor has the legislature enacted any means to effectuate the dollar-for-dollar offset BCTPA insists §77.70 requires. Therefore, it is clear the legislature has not contemplated the statute could even possibly mandate such an offset. As the circuit court aptly concluded: BCTPA's

interpretation "***reads mechanisms into the statute that simply are not present*** because the Wisconsin Legislature did not put them there. . . . If [§77.70] were to require a dollar-for-dollar reduction of a county's property tax levy, then the Wisconsin Legislature would have said so in the body of the statute, and it would have spelled out the process for Wisconsin counties to follow." (R. 103, pp. 18, 19; A.App. 118, 119 (emphasis added).) The circuit court was correct, and this Court should affirm.

A. The Ordinance and the County's Use of the Revenue Comport with the Plain Meaning of Wis. Stat. §77.70 and with the Attorney General's Interpretation of that Statute.

The goal of statutory interpretation is to discern the legislature's intent. *Doe v. Am. Nat'l Red Cross*, 176 Wis. 2d 610, 616, 500 N.W.2d 264 (1993). Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.*, ¶46. Courts presume the legislature chooses "its terms carefully and precisely to express its meaning."

Ball v. District No. 4, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (Ct. App. 1984.)

As shown in **Part I.A.1.a.** and **Part I.A.1.b.** below, Brown County's interpretation of §77.70—which the circuit court adopted—is consistent with the plain meaning of the statute's text and is consistent with the statute's plain meaning in context with other sales and use tax statutes in Chapter 77, such as the Miller Park Tax (Wis. Stat. §77.705), and the Lambeau Field Tax (Wis. Stat. §77.706), which were both enacted after §77.70. The Miller Park Tax and Lambeau Field Tax statutes explicitly mandate that sales and use tax proceeds be spent to pay the respective stadium districts' debts dollar-for-dollar, while §77.70 does not contain an explicit mandate as to how a county may spend sales and use tax proceeds. *Compare* Wis. Stats. §§77.705, 77.706 *with* Wis. Stat. §77.70. Section 77.70's contrast with §77.705 and §77.706 shows the legislature did not intend for §77.70 to require counties to offset sales and use tax proceeds dollar-for-dollar from the property tax levy. *Id.*; *Ball*, 117 Wis. 2d at 539; (*see also* R. 103, pp. 20, 26).

As shown in **Part I.A.2.** below, the County's plain meaning analysis of §77.70 is consistent with the AG's 1998 interpretation of that statute.

1. The Plain Meaning of Wis. Stat. §77.70: Wisconsin Counties May Enact a Sales and Use Tax to Fund Projects They Otherwise Could Fund Through the Property Tax Levy.

a. The Ordinance Complies with the Text of Wis. Stat. §77.70: Brown County Imposed a Sales and Use Tax "Only for the Purpose of Directly Reducing the Property Tax Levy."

Section 77.70 permits a county "desiring to impose county sales and use taxes" to do so "by the adoption of an ordinance" that "stat[es] its purpose," "refer[s] to" Chapter 77, and "impose[s]" the sales and use tax at a rate of 0.5% "only for the purpose of directly reducing the property tax levy…." Wis. Stat. §77.70.

The Ordinance complies with the four elements of §77.70: **(1)** the County chose to adopt a sales and use tax and did so by Ordinance; **(2)** the Ordinance states its purpose and refers to Chapter 77; **(3)** the Ordinance imposes a sales and use tax at a rate of 0.5%; and **(4)** the Ordinance mandates the sales and use tax revenue "[s]hall be utilized only to reduce

the property tax levy by funding specific capital projects[.]" (R. 3, p. 1; A.App. 142 (bold removed).) There is no dispute the Ordinance complies with the first three elements. BCTPA is wrong when it contends the Ordinance does not comply with the fourth element.

The Ordinance commits Brown County to using the revenue from the sales and use tax only to fund projects that the County otherwise would have funded from the property tax levy. (R. 103; A.App. 101-32; R. 44, ¶7.) The Ordinance and Brown County's action in this regard are compliant with §77.70 for three inter-related reasons. *First*, §77.70 contains enabling language that gives counties latitude as to how to reduce the property tax levy. *Second*, the sales and use tax enables Brown County to decrease its debt service—and, consequently, its property tax levy—over the six-year life of the Ordinance. *Third*, while the Ordinance's mill rate freeze is not expressly required by the statute, the freeze helps ensure the County remains compliant with §77.70.

Enabling language. Section 77.70 contains enabling language that permits counties to enact a sales and use tax ordinance if they so "desir[e]." Wis. Stat. §77.70. If counties choose to enact such an ordinance, the ordinance complies

with §77.70 if the ordinance "imposes" a sales and use tax at a rate of 0.5% and "stat[es] its purpose" for "directly reducing the property tax levy." *Id.* The statute ***allows*** counties to ***"impose"*** a sales and use tax "for the purpose of directly reducing the property tax levy," but the statute does not ***require*** counties to ***"use"*** or ***"spend"*** sales and use tax proceeds only for that purpose. *Id*. In other words, the enabling language prescribes that a sales and use tax may be imposed, but the statute does not prescribe or restrict how sales and use tax revenue must be ***spent***. *Id*. The statute does not contain any terms such as "offset," "deduct," "subtract," or "retire" that might delineate how a county must spend sales and use tax proceeds. *See id*.; *contra* Wis. Stats. §§77.705, 77.706 (both providing that sales and use tax revenue "***shall*** be used ***exclusively*** to ***retire*** the district's debt") (emphasis added). Thus, §77.70 does not direct what projects sales and use tax proceeds must fund, does not require an offset, and does not address how a (non-existent) offset from the property tax levy would be applied.

Decrease in the property tax levy. BCTPA engages in unsupported speculation about Brown County's ability to borrow funds, in an effort to cast doubt on whether the

County ***could have*** funded its capital projects by issuing debt. (BCTPA Br., pp. 42-44.) BCTPA does so to attempt to circumvent the crucial and undisputed fact that the County ***would have*** funded the projects identified in the Ordinance by issuing debt, had the County not enacted the Ordinance. (R. 44, ¶7.) When the County issues debt without otherwise modifying other budget commitments, the property tax levy increases. (*Id.*, ¶¶7, 28-29, 33.) Thus, by funding projects that otherwise would have been funded by the property tax levy, the sales and use tax acts as a substitute for the Debt Levy.

The effect is this: When a county funds projects through a sales and use tax that otherwise would have been funded by the property tax levy, the property tax levy is reduced. (R. 68, p. 2.) As reflected in the May 8, 2017 Brown County Executive Committee meeting minutes, the Ordinance will result in a decrease in the debt service and, consequently, a decrease in the total property tax levy. (*Id.*) The sales and use tax has enabled Brown County to "stop bonding," and over its six-year life, the tax will decrease the County's debt approximately $69 million, from $134 million to $65 million. (*Id.*)

BCTPA's repeated reference to an approximate $4,000,000 increase in the property tax levy from 2017 to 2018 is misleading. (BCTPA Br., pp. 4, 6, 9, 30-31.) BCTPA accounts for only the first year of the sales and use tax and, thus, BCTPA's one-year snapshot disregards the actual property tax ***savings over the 72-month life of the Ordinance*** due to the decreased debt service payments. (R. 68, p. 2; R. 44, ¶¶27-34.) Because funding the Ordinance projects through debt financing would have cost Brown County taxpayers $13,627,943.36 in interest payments over the six-year life of the Ordinance and $47,000,000 in interest payments over the twenty-year life of the debt service, the property tax levy may well have increased more than $4,000,000 from 2017 to 2018 absent the sales and use tax. (R. 44, ¶¶29-30.) Brown County delivered to its residents "guarantee[d] tax relief" by replacing the property tax levy used to service debt with the sales and use tax. (R. 68, p. 2.)

Mill rate freeze. The Ordinance's mill rate freeze helps ensure compliance with §77.70 because the freeze prohibits any increase in the mill rate—*i.e.*, any proportional increase in property taxes—during the term of the sales and

use tax. (R. 3, p. 1; A.App. 142.) If the mill rate increases, the Ordinance automatically sunsets. (*Id.*)

As shown, the text of the Ordinance complies with §77.70's requirement that a sales and use tax may be "imposed only for the purpose of directly reducing the [County's] property tax levy[.]" (R. 103; A.App. 101-32.)

b. A Comparison of Wis. Stat. §77.70 with Wis. Stats. §§77.705, 77.706 Shows the Legislature Did Not Intend Wis. Stat. §77.70 to Require a Dollar-for-Dollar Offset.

As part of a plain meaning analysis, a statute "is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes[.]" *Kalal*, 271 Wis. 2d 633, ¶46. A comparison of Wis. Stat. §77.70 with other "surrounding or closely related" statutes in Chapter 77 shows the legislature did not intend §77.70 to require the offset BCTPA urges.

In 1995 and 1999, the legislature enacted the Miller Park Tax (§77.705) and the Lambeau Field Tax (§77.706), respectively. Those statutes provide that the respective stadium districts "may impose a sales tax and a use tax"; that "[t]hose taxes may be imposed only in their entirety"; and

that the revenue derived from a sales and use tax authorized by the statutes "***shall be used exclusively to retire the district's debt***." Wis. Stats. §§77.705, 77.706 (emphasis added).

Thus, while §77.705, §77.706, and §77.70 all contain language authorizing the imposition of a sales and use tax, and while they all contain language stating the sales and use tax may be "imposed only in their entirety," the stadium tax statutes contain a key distinction from §77.70: Unlike §77.70, the stadium tax statutes contain language in a separate clause mandating that proceeds from sales and use taxes "***shall be used exclusively to retire***" each stadium district's debts. Wis. Stats. §§77.705, 77.706 (emphasis added). In the stadium tax statutes, the legislature authorizes the tax, but then separately mandates that the tax proceeds be spent to pay the respective districts' debts dollar-for-dollar, instead of being used for any other purpose. *Id*.; (*see also* R. 103, p. 20; A.App. 120). In contrast, §77.70 authorizes the tax and, in doing so, provides that the "purpose" must be for levy reduction, but §77.70 does not specifically mandate how counties spend their sales and use tax revenue.

This difference cannot be explained away as a legislative oversight or a simple linguistic improvement from one statute to the next. If the legislature had intended to enact in §77.70 a strict spending constraint, it would have done so. *Ball*, 117 Wis. 2d at 539 (stating courts presume the legislature chooses "its terms carefully and precisely to express its meaning").

BCTPA attempts to dismiss the significance of the stadium tax statutes by calling the circuit court's conclusion as to those statutes "nonsense," (BCTPA Br., p. 25), and by asserting there are "reasons for the difference" between those statutes and §77.70, (*id*., pp. 25-28). BCTPA contends the difference between §77.70 and §77.705, §77.706 is meaningless for the purpose of construing §77.70 because: (1) the stadium tax statutes have automatic sunset provisions; and (2) the drafters of the stadium tax statutes maybe thought those statutes should be drafted with more "clarity" than §77.70. (*Id*., pp. 26-28.) Neither of these claimed "reasons for the difference" supports BCTPA's argument: (1) the Ordinance also has automatic sunset provisions, (R. 3; A.App. 142-43); and (2) what BCTPA wants to believe the

stadium tax drafters might have had in mind is BCTPA's unsupported speculation, (BCTPA Br., pp. 27-28).

2. A 1998 Attorney General Opinion Supports Brown County's Interpretation of Wis. Stat. §77.70.

AG Opinions hold persuasive value and are deemed "presumptively correct." *Schill v. Wis. Rapids Sch. Dist*., 2010 WI 86, ¶126, 327 Wis. 2d 572, 786 N.W.2d 177 (lead opinion) (citing *Town of Vernon v. Waukesha Cnty*., 102 Wis. 2d 686, 692, 307 N.W.2d 277 (1981) (stating an AG Opinion is "particularly persuasive" where the AG's interpretation of a statute "has been given a practical and uniform effect over a long period of time")). BCTPA fails to rebut the presumption that the 1998 AG Opinion—which interprets Wis. Stat. §77.70 to mean a county may enact a sales and use tax ordinance to finance capital projects that otherwise could be funded by a property tax levy—is correct. (R. 60, p. 168; A.App. 144.)

Indeed, the AG's Opinion is consistent with the plain meaning of the statute. As the AG reasoned: "The same amount of countywide property tax reduction occurs whether the county board chooses to budget revenues from net proceeds of the sales and use tax as a reduction in the overall

countywide property tax levy or as an offset against a portion of the costs of specific items which can be funded by the countywide property tax." (*Id*., p. 169; A.App. 145.) In other words, "by subtracting the sales and use tax revenue from the total property tax, and then determining the net the property tax must be levied, a county has directly reduced its property tax levy." (R. 103, p. 25; A.App. 125.)

In the twenty-two years since the AG issued his Opinion interpreting §77.70, the legislature has taken no action to substantively amend that statute. Such legislative acquiescence suggests the legislature agrees with the AG's interpretation. *Cf. Voice of Wis. Rapids, LLC v. Wis. Rapids Sch. Dist*., 2015 WI App 53, ¶11, 364 Wis. 2d 429, 867 N.W.2d 825 (deeming "significant" "legislative acquiescence" to AG Opinions pertaining to public records statutes).

B. Wisconsin Stat. §77.70 Does Not Require Wisconsin Counties to Offset Sales and Use Tax Proceeds Dollar-for-Dollar From the Property Tax Levy.

BCTPA contends Wis. Stat. §77.70 requires Wisconsin counties to offset sales and use tax proceeds dollar-for-dollar from the property tax levy. (BCTPA Br., p. 9.) BCTPA

argues its interpretation is supported by the plain meaning of the statute, by the Levy Limits Wis. Stat. §66.0602 imposes, by the historical practice of Wisconsin counties, and by legislative history. As discussed more fully in **Parts I.B.1.-6.** below, BCTPA is wrong for several reasons.

First, as the circuit court correctly concluded, BCTPA's interpretation of §77.70 is contrary to the plain meaning of the statute. (R. 103, pp. 18-19; A.App. 118-19.)

Additionally, §66.0602 does not support BCTPA's interpretation. (BCTPA Br., pp. 38-40.) When it enacted §66.0602 in 2005, the legislature did not indicate that the levy be decreased whenever a county receives sales and use tax proceeds – the statute does not mention sales and use tax proceeds. If, as BCTPA contends, §77.70 requires a county to offset its sales and use tax revenue dollar-for-dollar from its property tax levy, then the legislature would have accounted for that requirement in §66.0602(2m) and directed the DOR to include such a dollar-for-dollar offset calculation in the Levy Limit Worksheet.

Further, the sales and use tax ordinances enacted in other counties do not support BCTPA's interpretation of §77.70 but, rather, support Brown County's interpretation.

Only ***two*** out of 66 ordinances mention the dollar-for-dollar offset that BCTPA argues §77.70 mandates. Wisconsin counties may decide to budget in such a way as to account for such an offset, but §77.70 does not require it, and 64 Wisconsin counties have not even suggested such an approach in their respective ordinances.

The legislative history of §77.70 also does not support BCTPA's interpretation. BCTPA has not identified anything in the legislative history indicating the legislature intended to mandate the dollar-for-dollar offset BCTPA argues for here.

Beyond there being no support for BCTPA's interpretation of §77.70 in the statute's text, in the surrounding statutes, in the practice of other counties, or in the legislative history, BCTPA's interpretation—if adopted—would lead to unreasonable results and would impermissibly usurp the legislative process.

1. BCTPA's Interpretation is Contrary to the Plain Meaning of Wis. Stat. §77.70: The Statute's Text Does Not Provide for a Dollar-for-Dollar Offset.

The first—and fatal—problem with BCTPA's interpretation of Wis. Stat. §77.70 is BCTPA's interpretation is inconsistent with the statute's text. *Cf. Kalal*, 271 Wis. 2d

633, ¶¶44-45. Had the legislature intended §77.70 to require counties to offset sales and use tax proceeds dollar-for-dollar from the property tax levy, as BCTPA contends, the legislature would have used the term "offset" and "would have spelled out the process for Wisconsin counties to follow" to apply such an offset. (R. 103, pp. 18-19; A.App. 118-19); *Cf. Ball*, 117 Wis. 2d at 539. But the legislature did not do so. Thus, BCTPA's interpretation of §77.70 "reads mechanisms into the statute that simply are not present because the Wisconsin Legislature did not put them there." (R. 103, pp. 18-19; A.App. 118-19.)

The statute is to be construed as written, not as BCTPA might want it to be written. *Columbus Park Hous. Corp. v. City of Kenosha*, 2003 WI 143, ¶¶34, 40, 267 Wis. 2d 59, 671 N.W.2d 633. Although BCTPA insists §77.70 is "easily understandable," (BCTPA Br., p. 12), BCTPA practically laments the legislature did not draft §77.70 more clearly to bear the meaning BCTPA wants, (*id*., pp. 27-28).

Additionally, inherent in BCTPA's "dollar-for-dollar offset" interpretation is the notion that §77.70 prohibits counties from funding through a sales and use tax new capital projects that have not already begun at the time the sales and

use tax is enacted. (BCTPA Br., p. 38.) However, the 1998 AG Opinion rejected the notion that the statute bars funding new projects. (R. 60, p. 169; A.App. 145.) In fact, the AG concluded §77.70 ***does*** permit the funding of new projects through a sales and use tax. (*Id*.) The AG concluded—and the circuit court agreed—it would be ***unreasonable*** to construe §77.70 to, on the one hand, permit counties that had started projects to complete them using sales and use tax revenue, but, on the other hand, to prohibit counties that had not yet started similar projects from using sales and use tax revenue to fund such new projects at all. (*Id*., pp. 169-70; A.App. 145-46; R. 103, p. 26; A.App. 126.) BCTPA attacks the AG's reasoning in this regard by—remarkably—arguing it is ***not*** unreasonable to "forc[e] counties to first raise the property tax levy before lowering it with a sales tax[.]" (BCTPA, pp. 34-35.) BCTPA acknowledges this is inefficient. (*Id*., p. 35.)

Such needless inefficiency is anathema to the good governance practices BCTPA purports to champion. BCTPA would rather have counties plan capital projects, borrow millions of dollars to pay for those projects, take on the costly interest expense associated with the debt, increase property

tax levies to pay for the debt, absorb all of the professional costs and fees associated with debt issuance, and ***then*** impose a sales and use tax to decrease the debt burden. (*Id.*) Besides being inconsistent with the plain meaning of §77.70, BCTPA's approach is a double-whammy of bad policy: BCTPA's approach requires greater bureaucratic intervention and greater government debt carry, while it simultaneously imposes a greater tax burden on the taxpayers as they wait for their counties to enact a sales and use tax to provide relief from their already-increased property taxes. If adopted, BCTPA's interpretation of §77.70 would cost counties and taxpayers millions more than the efficient, common-sense approach §77.70 permits and Brown County chose. (*See, e.g.*, R. 68, p. 2; R. 44, ¶¶29-30.)

It is apparent the legislature does not interpret §77.70 to bar new capital projects. If the legislature believed the AG's interpretation of §77.70 was incorrect, it would have "corrected" him by amending the statute. The legislature has not done so, even though it has had 22 years to act on any misinterpretation the AG might have applied to §77.70. *Cf. Voice of Wis. Rapids*, 364 Wis. 2d 429, ¶11 (stating "legislative acquiescence" to an AG Opinion is "significant").

The legislature has ***not even accounted for the possibility §77.70 could require a dollar-for-dollar offset***: It has not enacted any mechanism to effectuate such an offset. (R. 103, pp. 18-19, 22; A.App. 118-19, 122; R. 44, ¶¶17-20, Exhs. B, C); Wis. Stat. §66.0602. Indeed, counties lack the authority to issue tax credits that would be necessary if §77.70 required an offset. (R. 60, p. 169; A.App. 145.) The legislature's implied acceptance of the AG's interpretation—as well as its acceptance of the dozens of other Wisconsin county sales and use tax ordinances that are consistent with the AG's interpretation, (*see* Part I.B.3. *infra*)—shows BCTPA's "dollar-for-dollar offset" interpretation of §77.70 is contrary to the statute's plain meaning and the legislature's intent, rendering BCTPA's interpretation unreasonable. *Cf. Bruno v. Milw. Cnty.*, 2003 WI 28, ¶¶ 19-20, 22, 260 Wis. 2d 633, 660 N.W.2d 656.

2. The Levy Limits Under Wis. Stat. §66.0602 Do Not Require a Dollar-for-Dollar Offset.

BCTPA suggests the 1998 AG Opinion would turn out differently today because of the 2005 introduction of Levy Limits, as codified in Wis. Stat. §66.0602. (BCTPA Br., pp.

38-40.) BCTPA is wrong. In fact, §66.0602 ***supports*** the County's interpretation.

The Wisconsin legislature enacted §66.0602 twenty years after it enacted §77.70. Despite having been aware of §77.70 for decades, the legislature did not require in §66.0602 a decrease in the levy when a county receives revenue from a sales and use tax. *Heritage Farms, Inc. v. Markel Ins. Co*., 2009 WI 27, ¶40, 316 Wis. 2d 47, 762 N.W.2d 652 (courts presume the legislature is aware of existing law when it enacts a statute); *see* Wis. Stat. §66.0602. If, as BCTPA contends, §77.70 requires a county to offset its property tax levy dollar-for-dollar with sales and use tax proceeds, then the legislature would have accounted for that requirement in §66.0602(2m) and directed DOR to include such a dollar-for-dollar offset calculation in the Levy Limit Worksheet. *Cf. Ball*, 117 Wis. 2d at 539. However, neither §66.0602 nor any other statute requires a levy to be offset by sales and use tax revenues. *See* Wis. Stat. §66.0602. The fact the legislature did not include an offset for sales and use tax revenues when it enacted §66.0602 further shows the legislature made a concerted choice in §77.70 ***not*** to require a one-dollar

reduction in the property tax levy for every dollar of sales and use tax revenue.

In addition, DOR—the state entity charged with ensuring county compliance with the Levy Limit—does not interpret §77.70 to require the dollar-for-dollar offset BCTPA urges: DOR's Levy Limit Worksheet does not even address county revenue derived from a sales and use tax. (*See* R. 44, ¶¶41-42, Exhs. B, C.)

Thus, the provisions of §66.0602 and the important compliance work of DOR further illustrate BCTPA's interpretation contravenes the legislature's intent. Section 66.0602 and DOR's Levy Limit Worksheet show the legislature never contemplated that §77.70 might impose the offset BCTPA conjures. BCTPA's interpretation nullifies the effect of §66.0602, which is an absurd result this Court should avoid. *See Abraham v. Milw. Mut. Ins. Co.*, 115 Wis. 2d 678, 681-82, 341 N.W.2d 414 (Ct. App. 1983) (an interpretation of one statute that nullifies the effect of another statute is an absurd result).

Nevertheless, BCTPA contends the Levy Limit forbids the expenditure of sales and use tax proceeds on anything other than a dollar-for-dollar offset from the property tax

levy, asserting the Levy Limit bars counties from increasing the property tax levy by however much they want to spend for new projects. (BCTPA Br., pp. 30-31, 38-42.) BCTPA's argument fails because §66.0602 ***exempts debt service payments from the Levy Limit calculation***. Wis. Stat. §66.0602(3)(d)2.; (*see* R. 44, ¶¶18-19, 41-42, Exhs. B, C). Brown County could have—and, without the sales and use tax, indisputably ***would have***—issued general obligation debt and passed the interest costs onto county property taxpayers for many years to pay for the projects identified in the Ordinance. (R. 44, ¶¶7, 29-30.) However, Brown County did not issue any debt to pay for those projects and, therefore, the County is reducing the property tax levy by foregoing debt service payments, which fall outside the Levy Limit calculation. (*Id*., ¶19); Wis. Stat. §66.0602(3)(d)2.

In short, §66.0602 lends no support to BCTPA's interpretation and, instead, supports Brown County's interpretation of §77.70.

3. The Sales and Use Tax Ordinances Other Wisconsin Counties Have Enacted Do Not Support BCTPA's Interpretation of Wis. Stat. §77.70 But, Rather, Support Brown County's Interpretation.

Even though BCTPA agrees Wis. Stat. §77.70 is unambiguous, it urges the Court to employ canons of construction that generally apply only when a statute is ambiguous, *i.e.*, the text of the statute bears more than one reasonable meaning. (BCTPA Br., pp. 12-17); *Kalal*, 271 Wis. 2d 633, ¶¶46-47, 50-51. BCTPA asserts the Court should consider the "practice of counties implementing sales taxes" after §77.70 was enacted in 1985. (BCTPA Br., p. 14.)

BCTPA argues there is a "clear trend" showing sales and use tax ordinances enacted in the 1980s "were much more likely" to be "consistent with the clear import" of §77.70, which BCTPA believes requires sales and use tax revenues to offset the property tax levy dollar-for-dollar. (*Id*., pp. 9, 15.) The record shows BCTPA is wrong.[3]

In the second half of the 1980s, 24 counties enacted sales and use tax ordinances. None of these ordinances

[3] With the exception of Waushara County, all 66 sales and use tax ordinances adopted by Wisconsin counties are included in the record at R. 41, pp. 25-60 and R. 42, pp. 1-60 (the Waushara ordinance in the record is not that county's sales and use tax ordinance, (R. 42, p. 58)).

mandates that sales and use tax revenues be offset dollar-for-dollar from the property tax levy. (*See* note 4 *infra*.) And only 5 of the 24 1980s ordinances reference property tax relief and/or provide that the sales and use tax revenue should not be used for new or expanded county services.[4] Thus, after the legislature enacted §77.70, the "clear trend" was that county boards did ***not*** view §77.70 as mandating a dollar-for-dollar offset of sales and use tax proceeds from the property tax levy, or—with five exceptions—as otherwise forbidding sales and use tax revenue to fund new capital projects.

This trend continued. In the 1990s and 2000-2010s, 41 counties enacted sales and use tax ordinances. Of those 41 ordinances, only two—Eau Claire County's and Grant County's—mandate a dollar-for-dollar offset from the property tax levy.[5] (R. 41, pp. 48, 54.)

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[4] The five referenced ordinances were enacted in the following counties: Door, Dunn, Jackson, Marathon, and Pierce. (R. 41, pp. 45, 47, 60; R. 42, p. 13, 27; https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx#txrate3.) Meanwhile, the other 19 ordinances enacted in the 1980s generally quote the language of §77.70 and/or state the sales and use tax is imposed in accordance with Chapter 77: Ashland, Barron, Buffalo, Burnett, Columbia, Iowa, Langlade, Lincoln, Marquette, Oneida, Polk, Portage, Richland, Rusk, Sawyer, St. Croix, Vilas, Walworth, and Waupaca. (R. 41, pp. 26, 27, 33, 34, 40, 58; R. 42, pp. 11, 12, 16, 22, 28, 29, 35, 37, 41, 45, 50, 51, 57; *see also* https://www.revenue.wi.gov/Pages/FAQS/pcs-taxrates.aspx#txrate3.)

[5] Nearly a two-thirds majority—27 out of 41—of the 1990s and 2000-2010s sales and use tax ordinances generally quote §77.70 and/or state

Thus, closer scrutiny of all county sales and use tax ordinances refutes BCTPA's contention that ordinances enacted soon after 1985 hewed more closely to what BCTPA believes is §77.70's purpose, while ordinances enacted relatively later began to stray from that supposed purpose.

Regardless of any trend—and without conceding that any trend lends interpretative support in this case—of the sixty-six Wisconsin counties that have enacted a sales and use tax ordinance, only ***two*** of them have enacted an ordinance that offsets sales and use tax proceeds dollar-for-dollar from the property tax levy, which alone rebuts BCTPA's contention that §77.70 has mandated such an offset since

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the tax is imposed in accordance with Chapter 77: Adams, Bayfield, Brown, Calumet, Chippewa, Crawford, Dane, Douglas, Florence, Fond du Lac, Forest, Green, Green Lake, Jefferson, Kenosha, Kewaunee, Lafayette, Marinette, Ozaukee, Price, Rock, Shawano, Sheboygan, Taylor, Vernon, Washburn, and Wood. (R. 41, pp. 25, 30, 31-32, 35-36, 37-38, 41, 42-43, 46, 49, 50, 51, 55, 57; R. 42, pp. 1, 3, 4-5, 8, 14, 25, 34, 36, 42, 43-44, 46, 48-49, 52, 60.) The counties of Brown, Calumet, Green, Kenosha, and Sheboygan also earmark the sales and use tax proceeds for specific purposes. (R. 41, pp. 31-32, 35-36, 55; R. 42, pp. 3, 43-44.)

Meanwhile, nine of the 1990s and 2000-2010s sales and use tax ordinances reference property tax relief and/or provide that the sales and use tax revenue should not be used for new or expanded county services: Clark, Dodge, Iron, Juneau, LaCrosse, Milwaukee, Monroe, Pepin, and Trempeleau. (R. 41, pp. 39, 44, 59; R. 42, pp. 2, 7, 17, 19, 26, 47.) And three of the 1990s and 2000-2010s ordinances direct sales and use tax proceeds to pay for capital projects and to offset the property tax levy, but ***not*** offset the existing operating tax levy dollar-for-dollar: Oconto, Sauk, and Washington. (R. 42, pp. 20, 39, 55.)

1985. (R. 41, pp. 48, 54; BCTPA Br., p. 9.) Because §77.70 does not require such an offset, there would not be any need for a county enacting a sales and use tax to include one. (R. 103; A.App. 101-32.)

Instead, §77.70 gives counties wide latitude as to how they "impose" a sales and use tax "for the purpose of directly reducing the property tax levy." The variation of sales and use tax ordinances shows there are several ways to comply with §77.70. The practices of other Wisconsin counties support Brown County's interpretation of §77.70 and discredit BCTPA's interpretation.

4. The Legislative History of Wis. Stat. §77.70 Does Not Support BCTPA's Interpretation.

BCTPA also is incorrect that Wis. Stat. §77.70's legislative history supports its interpretation. (BCTPA Br., pp. 12-14.)

Generally, courts consult legislative history only when a statute is ambiguous. *Kalal*, 271 Wis. 2d 633, ¶¶46, 50-51. Because the parties agree §77.70 is unambiguous, the Court need not—and should not—consult legislative history. *Id*.

Even if the Court were inclined to consult §77.70's legislative history, that history does not support BCTPA's

"dollar-for-dollar offset" interpretation. Before the legislature enacted §77.70, the bill was amended from stating "for property tax relief" to stating "directly reducing the property tax levy." (R. 59, Exh. L.) While that amendment may have made the statute more specific, that amendment does not indicate the legislature intended for counties to apply a dollar-for-dollar offset – property tax relief occurs with the cessation of annual property tax increases. (*Cf.* R. 60; A.App. 144-47.) Nor does a Legislative Reference Bureau Informational Bulletin addressing a Brown County sales and use tax that was ***repealed before it took effect*** suggest the legislature intended to enact a dollar-for-dollar offset. (BCTPA Br., pp. 15-16.)

Other extrinsic sources upon which BCTPA relies—such as public statements by elected officials as reported in news articles—do not support BCTPA's interpretation of §77.70. (*Id.*, pp. 14-15.) As an initial matter, "[i]t is not appropriate . . . for a court to rely on the statements of a member of the legislature as to what the legislature intended when enacting a statute." *Labor and Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 356, 344 N.W.2d 177 (1984) (per curiam); *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731,

1749, -- U.S. -- (2020) (stating "it is ultimately the provisions of" a statute's text "rather than the principal concerns of our legislators by which we are governed"). In fact, the news articles BCTPA relies on are ***inadmissible hearsay*** that may not be considered on summary judgment.[6] *Streff v. Town of Delafield*, 190 Wis. 2d 348, 359 n.4, 526 N.W.2d 822 (Ct. App. 1994) (stating a newspaper article is "clearly hearsay" and, therefore, is not admissible evidence on which summary judgment must be based).

However, even if the Court were to consider hearsay news articles from 1985 concerning the newly-enacted §77.70, those articles support ***the County's*** interpretation of the statute. BCTPA addresses a news report about a proposed ordinance Dane County ***did not enact*** and addresses Senator Feingold's public statement about "lowering property tax bills." (BCTPA Br., p. 14, 15.) Neither indicates §77.70 mandates an offset. Meanwhile, BCTPA ignores that Governor Earl viewed the new statute as a means for "***hold[ing] down property-tax increases*** . . . ." (R. 59, Exh. V (emphasis added).) Thus, the 1985 public statements of

[6] Brown County requested the circuit court strike these and other extrinsic sources BCTPA relied on in summary judgment briefing. (R. 65, p. 8 n.5.)

elected representatives are ***consistent*** with the AG's interpretation—an interpretation to which the legislature has acquiesced and on which Wisconsin counties have relied—that counties may enact sales and use tax ordinances "to defray the cost of any item which can be funded by a countywide property tax." (R. 60, p. 168; A.App. 144.) That is what Brown County has done. (R. 3; A.App. 142-43.)

In sum, the parties agree §77.70 is unambiguous. (BCTPA Br., pp. 9-12.) However, to the extent the statute possibly could be interpreted in more than one sense, Brown County's interpretation is reasonable, while BCTPA's interpretation is unreasonable. BCTPA's interpretation is unreasonable not only because it is inconsistent with the statute's text and the legislature's intent, but also because—as reinforced more fully in the next subsection—it leads to other unreasonable results.

5. Interpreting Wis. Stat. §77.70 to Require a Dollar-for-Dollar Offset Would Lead to Unreasonable or Absurd Results.

Courts are to construe statutes in a manner that avoids unreasonable or absurd results. *Kalal*, 271 Wis. 2d 633, ¶46. As shown above, BCTPA's "dollar-for-dollar offset"

interpretation of Wis. Stat. §77.70 leads to the unreasonable/absurd result of incorporating into the statute an offset that the legislature did not enact – or even contemplate when it enacted statutes governing county budgets. (R. 103, pp. 18-19, 22, A.App. 118-19, 122); *see* Wis. Stat. §66.0602; *Crown Castle USA, Inc. v. Orion Const. Group, LLC*, 2012 WI 29, ¶21, 339 Wis. 2d 252, 811 N.W.2d 332 (declining to adopt statutory interpretation that creates "internal incoherence" among statutes).

Because the legislature did not contemplate a mandatory dollar-for-dollar offset—and, therefore, did not enact any provisions for effectuating one—governmental actors will face uncertainty as to how to implement such an offset, if the Court were to accept BCTPA's interpretation. As the AG noted in 1998, counties lack the inherent authority to implement a direct tax credit to property owners, and must follow DOR guidelines on tax billing. (R. 60, p. 169, A.App. 145.) But DOR's guidelines do not contain any mechanism to credit property owners for property tax rebates or offsets based on sales and use tax revenues. Contrary to BCTPA's intimation, the PC-400 form does not serve such a function. (*Compare* BCTPA Br., p. 50 *with* R. 91, ¶¶5, 11-13 *and* R.

95, ¶¶4-5, 10-11, Exh. A.) There is no statutory mechanism for counties to offset sales and use tax revenues against individual property owner taxes, because the legislature did not intend for there to be a such an offset when it enacted §77.70.

Moreover, no Wisconsin statute, including §77.70, directs how DOR—as the agency responsible for ensuring county compliance with Levy Limits—is to deduct sales and use tax revenues from the property tax levy. DOR's Levy Limit worksheet does not even address any deduction of sales and use tax proceeds from the allowable property tax levy. (R. 44, ¶¶17-20 and Exh. B.)

BCTPA's interpretation of §77.70 would create the absurd results of nullifying provisions of §66.0602, producing "internal incoherence" among statutes, and yielding "unfortunate consequence[s]." *McQuestion v. Crawford*, 2009 WI App 35, ¶12, 316 Wis. 2d 494, 765 N.W.2d 822; *see also Abraham*, 115 Wis. 2d at 682; *Crown Castle*, 339 Wis. 2d 252, ¶21; (BCTPA Br., p. 36 (stating "we do not expect the legislature to contradict itself")).

Beyond requiring DOR and counties to invent the mechanism for an offset without any statutory guidance,

BCTPA's interpretation leads to at least ***two other*** unreasonable/absurd results: **(1)** Brown County will lose its sales and use tax revenue, will incur enormous debt, and could see its credit rating decrease; and **(2)** Brown County's careful budgeting process will be upended.

First, if the sales and use tax Ordinance is ruled invalid, Brown County will be obligated to fund its capital projects through issuing debt. (R. 44, ¶7.) Accordingly, if this Court reverses the circuit court's decision, Brown County and its taxpayers will face the following adverse consequences, *McQuestion*, 316 Wis. 2d 494, ¶12 (interpretation that would create "unfortunate consequence[s]" was unreasonable/absurd):

- The County will lose the sales and use tax revenue and will have to decrease future budgets by the anticipated amount of sales and use tax revenue. (R. 44, ¶37.)

- The County will be forced to borrow to fund its capital projects, which will result in an increase in property taxes to pay for the associated interest expense. (*Id*., ¶¶7, 27-30, 35.)

- Any County budget in place—including ones in place for future years—will need to be amended to account for the change in revenue categories, even though there may be no legal mechanism to amend the budget. (*Id*., ¶26.)

- There is "significant risk" the County's credit rating will decrease. (*Id*., ¶38.)

If the proceeds of the sales and use tax were not available, Brown County would have to fund capital projects from borrowing money. (*Id*., ¶¶7, 35.) Borrowing money costs money. (*See id*., ¶¶29-30.) To pay for the projects identified in the Ordinance, Brown County could have issued general obligation debt and passed the interest costs on to county property taxpayers for many years. (*Id*.) Instead, Brown County acted in a fiscally responsible fashion by choosing the "pay-in-cash" method of financing its capital projects. (*See id*., ¶¶29-38.)

Second, if BCTPA's interpretation is adopted, Brown County's careful budgeting process will be upended. The County drafted, proposed, and enacted the Ordinance to fund nine capital projects through a sales and use tax and—as the circuit court found—in doing so, also "ensured that the property tax levy was reduced over the . . . life of the Ordinance." (R. 103, p. 29; A.App. 129.) The County's careful planning also is reflected in the Ordinance's mill rate freeze and the sunset provisions. (R. 3; A.App. 142-43.) As the circuit court found, Brown County's budget decisions

were made by "intelligent and talented people" who conducted "ample research and put considerable thought and effort into determining how the sales and use tax revenue would reduce the property tax levy" and fund new projects. (R. 103, pp. 29-30; A.App. 129-30.) This Court should avoid the unreasonable result of upending the County's careful budgeting process – a result that would occur if BCTPA's interpretation of §77.70 were accepted. *Cf. McQuestion*, 316 Wis. 2d 494, ¶12.

Moreover, a judicially-mandated offset that is not legislatively recognized would create confusion and lead to disparate application of the offset, unless there is substantial judicial intervention to guide counties in their budgeting practices. If BCTPA's interpretation of §77.70 were accepted, the appellate courts or the circuit court would be tasked with determining how and when the dollar-for-dollar offset is to be implemented, thereby writing into §77.70 provisions that are not present.

6. BCTPA's Interpretation of the Statute Impermissibly Usurps the Legislative Process.

Finally, Brown County agrees with the circuit court that judicial acceptance of BCTPA's "dollar-for-dollar offset"

interpretation of Wis. Stat. §77.70 would impermissibly usurp the legislative prerogative. (R. 103, pp. 22-24; A.App. 122-24.) When the legislature expressed that a sales and use tax "may be imposed" by counties, and those counties could then use the revenue "only for the purpose of directly reducing the property tax levy," the legislature "left ample discretion to Wisconsin counties' elected officials as to how they would directly reduce their respective property tax levies." (R. 103, p. 22; A.App. 122). Whether a county decides to enact a sales and use tax ordinance "is a matter for the voters to decide through their elected representatives." (*Id*.)

Through the actions of its elected officials, Brown County exercised the option to enact a sales and use tax. Before enacting the sales and use tax Ordinance, Brown County conducted public meetings and held public listening sessions. (R. 67, p. 1; R. 68, pp. 2-5; R. 69; R, 70, p. 1; R. 71, pp. 1-2, 6.) The County heard from local citizens, who spoke both for and against the proposed Ordinance, and ultimately the County enacted the Ordinance by a 23 to 3 vote. (R. 71, pp. 1-2, 6.) In doing so, Brown County made the deliberate policy choice to decrease its debt $69,000,000 over the life of the Ordinance and save county taxpayers the $47,000,000

they otherwise would have had to pay in interest costs had the County funded its capital projects through debt rather than through the sales and use tax. (R. 68, p. 2; R. 44, ¶¶7, 29-30.) Thus, the County Board—and, by extension, the voters who elected that Board—overwhelmingly chose to grant County residents "guaranteed tax relief" by replacing the property tax levy used to pay for bonding and new debt with the sales and use tax. (R. 68, p. 2.)

In what the circuit court deemed "an unacceptable usurpation of the legislative process," BCTPA's challenge to the Ordinance amounts to its post-hoc second-guessing of the County's concerted judgment as to how to fund capital improvements that County Board members deemed "necessary" and "need[ed]" for the "long-term viability of the County." (R. 103, p. 24; A.App. 124; R. 71, p. 2; R. 68, p. 4.) The ballot box—not the courtroom—is the appropriate place for BCTPA to register its disagreement with the legislative prescriptions of §77.70 and the informed budget choices of Brown County's elected representatives.

CONCLUSION

In sum, the plain meaning of Wis. Stat. §77.70 permits counties to fund through a sales and use tax ordinance capital

projects that otherwise could be funded though the property tax levy. When a county does so, it enacts the sales and use tax "for the purpose of directly reducing the property tax levy." Wis. Stat. §77.70. For decades—and in accord with a presumptively correct AG Opinion—dozens of Wisconsin counties have interpreted §77.70 in that fashion when enacting sales and use tax ordinances. The legislature has not amended the statute to provide otherwise. There is no support in the text, surrounding statutes, or historical practice for BCTPA's "dollar-for-dollar offset" interpretation of §77.70. Indeed, BCTPA's interpretation is contrary to the statute's plain meaning and would lead to unreasonable results. This Court should affirm.

Respectfully submitted and dated at Milwaukee, Wisconsin this 3rd day of September, 2020.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (c), Stats. for a brief produced with the following font:

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CERTIFICATE 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.

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