Appeal No. 2020AP940 **Cir. Ct. No. 2018CV640**

WISCONSIN COURT OF APPEALS
DISTRICT III

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.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz and Seidl, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2017-18), this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does the sales and use tax Brown County enacted in 2017 and implemented as part of its 2018 budget process "directly reduce the property tax

levy," as required by WIS. STAT. § 77.70 (2015-16),[1] if the proceeds are designated to fund new capital projects that collectively would otherwise exceed the levy limits established by WIS. STAT. § 66.0602, but the County could otherwise fund the projects by borrowing?

BACKGROUND

The relevant facts are undisputed. On May 17, 2017, the Brown County Board of Supervisors, relying on WIS. STAT. § 77.70, enacted a temporary sales and use tax ordinance (the "Ordinance") that established a 0.5% sales and use tax on purchases made in Brown County for a period of seventy-two months. The Ordinance stated that the tax would be "utilized only to reduce the property tax levy by funding" nine specific capital projects and their associated costs.[2] (Emphasis omitted.) The Ordinance also contained provisions that would sunset the sales and use tax prior to seventy-two months in any year where the mill rate exceeded the 2018 rate[3] or where the County issued any general obligation debt,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. This was the version of the statutes in effect at the time Brown County passed the sales and use tax ordinance at issue. WISCONSIN STAT. § 77.70 was amended in 2017, but those amendments became effective after the ordinance was passed, and the parties do not argue the amendments to this or any other statutes are material except as they pertain to legislative acquiescence in the longstanding interpretation of § 77.70 as authorizing Brown County's actions.

[2] Specifically, the projects and estimated costs were as follows: (1) $15 million for an "Expo Hall Project"; (2) $60 million for "Infrastructure, Roads and Facilities Projects"; (3) $20 million for "Jail and Mental Health Projects"; (4) $20 million for a "Library Project"; (5) $10 million for "Maintenance at Resch Expo Center"; (6) $10 million for "Medical Examiner and Public Safety Projects"; (7) $1 million for a "Museum Project"; (8) $6 million for a "Parks and Fairgrounds Project"; and (9) $5 million for a "Stem Research Center Project."

[3] "Mill rate" refers to a figure representing the amount per $1,000 of the assessed value of property, which is used to calculate the amount of property tax. ***Milewski v. Town of Dover***, 2017 WI 79, ¶47 n.18, 377 Wis. 2d 38, 899 N.W.2d 303.

excluding refinancing bonds. In other words, if the County issued additional debt or increased property taxes, the sales and use tax would expire.

Brown County's 2018 budget estimated the sales and use tax would generate $22,469,183 in revenue that year. Of that amount, the budget allocated $17,895,065 to be spent on the identified capital projects, including medical examiner and jail infrastructure, highway maintenance, and library expansion and relocation. The board of supervisors and county executive approved the budget in November 2017.

Following the budget's adoption, the Brown County Taxpayers Association and Frank Bennett (the "Association") commenced a lawsuit seeking a declaratory judgment that the Ordinance was invalid. That lawsuit was dismissed without prejudice in March 2018 based upon the Association's failure to provide a proper notice of claim under WIS. STAT. § 893.80. The Association subsequently filed a notice of claim seeking "an acknowledgment by Brown County that the Tax is illegal" and "the cessation of any and all actions by the County to levy, enforce or collect the Tax or spend any revenue from the Tax on the projects the County has proposed." The County disallowed the claim and filed the present action seeking a declaratory judgment that the Ordinance and 2018 budget were valid and enforceable. The Association counterclaimed, seeking injunctive and declaratory relief regarding the Ordinance's validity.

The parties filed cross-motions for summary judgment. In its ruling on the motions, the circuit court began by analyzing WIS. STAT. § 77.70, under which the Association claimed the sales and use tax was unlawful. In relevant part, the statute provides that a sales and use tax "may be imposed only for the purpose of directly reducing the property tax levy." ***Id.*** The court framed the

issue as one of statutory interpretation, and it noted that, in 1998, the Wisconsin Attorney General had issued a formal opinion regarding the meaning of the restriction in § 77.70. *See* Wis. Op. Att'y Gen. OAG 1-98, 1 (1998).[4]

The attorney general reached several key conclusions. First, he noted that some counties had been including the proceeds of a sales and use tax as a line item revenue source in the county budget alongside the countywide property tax levy. ***Id.*** at 2. Other counties had "budgeted the net proceeds of the sales and use tax as a revenue source used to offset the cost of individual items contained in the county budget." ***Id.*** The attorney general opined that "[t]he same amount of countywide property tax reduction occurs" regardless of which of these budgeting processes a county uses. ***Id.***

Second, the attorney general concluded that, despite the "only for the purpose of directly reducing the property tax levy" restriction contained in WIS. STAT. § 77.70, a sales and use tax under the statute could be used to fund new projects. Wis. Op. Att'y Gen. OAG 1-98 at 2. The attorney general stated that it would be absurd to interpret the statute in a way that prohibited some counties from spending sales and use tax revenue on projects that had not yet begun, while other counties were allowed to spend that revenue on similar projects by the mere happenstance that they had already initiated the projects using property taxes. He concluded that because there was "no such county-by-county limiting language in the statute," counties could "therefore also budget the net proceeds of the sales and

[4] The attorney general's opinion is available at: https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/1998/1998.pdf.

use tax as an offset against the cost of any individual budgetary item which can be funded by the countywide property tax." ***Id.***

Third and finally, the attorney general, interpreting the word "directly" in WIS. STAT. § 77.70, concluded that the restriction "has meaning in those instances where budgetary items cannot be funded through a countywide property tax"—for example, where taxpayers in certain jurisdictions were permitted by statute to exempt themselves from a county property tax levy for funding public library services. Wis. Op. Att'y Gen. OAG 1-98 at 3. "Although any revenue source frees up other funds to be used for other budgetary purposes, the budgeting of sales and use tax proceeds to defray the cost of items which cannot be funded by a countywide property tax constitutes indirect rather than direct property tax relief." ***Id.***

Based on the foregoing, the circuit court noted that the Association was implicitly rejecting the attorney general's opinion by asserting that only a dollar-for-dollar reduction in the property tax levy would suffice under WIS. STAT. § 77.70. Relatedly, this rejection of the attorney general's opinion allowed the Association to posit that "funding projects not in existence at the time of the sales and use tax is impermissible."

Moreover, the Association argued that even if the attorney general's opinion was correct, Brown County's sales and use tax was nonetheless invalid because in 2005 the legislature implemented the property tax levy limit contained in WIS. STAT. § 66.0602. *See* 2005 Wis. Act 25, § 1251c. Generally speaking, that statute restricted the increase in the amount of the levy to the value of new construction. *See* § 66.0602(1)(d), (2). The Association reasoned that because the County was limited to a levy increase of approximately $4.45 million under the

statute, it could not have funded the approximately $18 million in new capital projects in the 2018 budget through the countywide property tax. Brown County's property tax levy in 2018 was $90,676,735—an increase over the 2017 levy of $86,661,972, but approximately $438,000 less than the increase allowed under § 66.0602.

The circuit court ultimately rejected the Association's arguments, concluding that WIS. STAT. § 77.70 did not require that a sales and use tax be used to achieve a dollar-for-dollar reduction in the amount of the property tax levy. The court observed that § 77.70 was an enabling statute and that the language of the restriction therein was not as "cut and dry" as the Association suggested. It pointed to two specific sales and use taxes authorized by the legislature regarding major Wisconsin stadiums, noting that, unlike § 77.70, both statutes had explicitly identified what the revenue could be used for (in those cases, retiring stadium district debt). *See* WIS. STAT. §§ 77.705 and 77.706. The court also noted that the legislature had not amended § 77.70 at the time it enacted WIS. STAT. § 66.0602 despite the fact that § 66.0602, unlike § 77.70, included explicit instructions that a levy limit must be reduced by the amount of certain types of revenue. In all, the court found it "unreasonable and absurd … [to read] mechanisms into … [§] 77.70 that the Wisconsin Legislature did not place there, though it had the opportunity and know-how to do it."

The circuit court offered several additional rationales in support of its interpretation of WIS. STAT. § 77.70. It opined that the practical effect of the Association's arguments was to "usurp the decisions of the County's elected officials," who had concluded that the statutory purpose of directly reducing the property tax levy was met. Moreover, as alluded to above, the court gave significant weight to the 1998 attorney general's opinion, and it again found its

interpretation was buttressed by the legislature's decision not to amend § 77.70 despite widespread implementation of sales and use taxes among Wisconsin's counties.

Lastly, the circuit court addressed the Association's argument that the County could not spend sales and use tax proceeds on any new projects that would have exceeded the levy limits contained in WIS. STAT. § 66.0602 if funded by property taxes. The court expressly found this argument by the Association to be "the most compelling." In response, the court, again, concluded that the legislature had "delegated the discretion to Wisconsin Counties to determine the way in which they would directly reduce their property tax levy with sales and use tax revenue" and that there was no dollar-for-dollar offset required by WIS. STAT. § 77.70. The Association's interpretation was unreasonable, in the court's view, because the legislature placed no restrictions on borrowing, meaning that cash-strapped counties that could not enact a sales and use tax would likely borrow money to fund new projects. As a result, the costs of such projects would rise, and the statutory purpose of reducing the property tax burden would not be achieved. As the court noted, the Ordinance here included sunset provisions meant to ensure that the property tax levy remained the same or lower during the term in which the sales and use tax was in effect.

The Association filed a motion for reconsideration, noting the circuit court's incorrect assumptions regarding the degree of the Association's contacts with County officials prior to their enacting the sales and use tax. The court denied the motion, but it clarified that the Association's pre-litigation efforts were "immaterial … because they do not change in any way the Court's analysis or conclusion that as a matter of law, a dollar-for-dollar offset of the property tax levy by Ordinance proceeds is not the only lawful operation of Wisconsin Statutes

section 77.70." The court stated it would continue to credit the "well-reasoned and 'presumptively correct'" attorney general opinion until the legislature gave a clear indication of its intent to override that existing interpretation.

The circuit court entered judgment in favor of the County and dismissed the Association's counterclaim and third-party complaint against the Wisconsin Department of Revenue ("the Department"). The Association appeals, and we now certify the appeal to the Wisconsin Supreme Court under WIS. STAT. RULE 809.61 (2017-18).

DISCUSSION

This case concerns the interpretation and application of WIS. STAT. § 77.70 and, to a lesser extent, WIS. STAT. § 66.0602. Matters of statutory interpretation and application present questions of law that are reviewed independently. ***Jefferson v. Dane Cnty.***, 2020 WI 90, ¶13, 394 Wis. 2d 602, 951 N.W.2d 556. If the statutory language gives rise to a plain meaning, we ordinarily stop the inquiry and credit that meaning. ***Brey v. State Farm Mut. Auto. Ins. Co.***, 2020 WI App 45, ¶13, 393 Wis. 2d 574, 947 N.W.2d 205. We give statutory language its common, ordinary and accepted meaning; we interpret the language in the context of surrounding or closely related statutes; and we avoid interpretations that produce absurd or unreasonable results. ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110.

I. Interpreting WIS. STAT. § 77.70

WISCONSIN STAT. § 77.70 was enacted in 1969. *See* 1969 Wis. Laws, ch. 154, § 279m. Although the statute has always permitted counties to

enact sales and use taxes, until 1985 the Department—which is responsible for levying, enforcing, and collecting sales and use taxes—was required to distribute the tax proceeds to towns, cities and villages within a county, not to the county itself. *See* WIS. STAT. § 77.76(4) (1969-70). In 1985, the legislature made counties the recipients of the sales and use tax proceeds. 1985 Wis. Act 29, § 1500x. The parties agree that following this change, counties widely embraced sales and use taxes as a funding mechanism.[5]

At the time Brown County passed the sales and use tax at issue, WIS. STAT. § 77.70 provided, in relevant part:

> 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. *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.) The Association's argument is premised primarily on the italicized language, which it contends unambiguously renders the County's application of its sales and use tax proceeds unlawful.

Specifically, the Association argues the italicized language operates as a restriction on the expenditure of sales and use tax funds, and it does so in a particular manner. In the Association's view, all revenue generated by the sales

[5] The parties disagree about what the counties understood WIS. STAT. § 77.70 to require between the 1985 revision and the 1998 attorney general opinion, as reflected in the various ordinances the counties adopted. Insofar as any conclusions in that respect can be drawn from the content of the ordinances, we do not regard such information about the historical practices of counties during this time period as significant to the statutory interpretation issue presented.

and use tax *must* be applied as a dollar-for-dollar reduction in the property tax levy. The Association reads the clause as

> 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.

In other words, the Association argues the process laid out in the statute is to first "impose the sales tax," and second "decrease the property tax levy by the amount of the proceeds."

As a corollary, the Association contends that sales and use tax revenue cannot be used to fund new projects—at least, not projects that the County did not previously fund by using the property tax levy. The word "directly" in the statute, according to the Association, means a county must "first obtain non-sales tax funding for [a] project before funding it with sales tax revenue." Otherwise, that county has engaged "in the intervening step of funding new spending items with the revenue," in which case, the Association argues, the county has not achieved any reduction—especially not "directly"—but, rather, merely avoided an increase. The Association contends a sales and use tax is unlawful unless the property tax levy has "actually diminished."

The Association acknowledges that its interpretation of WIS. STAT. § 77.70 runs headlong into the attorney general's 1998 opinion. The attorney general rejected the interpretation that a direct reduction in the property tax levy can only occur in the manner the Association suggests. Rather, as explained above, the attorney general concluded that although a county could achieve the goal of a direct property tax reduction by a dollar-for-dollar offset of sales and use

tax proceeds against the property tax levy, that goal could *also* be achieved by offsetting the cost of individual items in the county budget. *See* Wis. Op. Att'y Gen. OAG 1-98 at 2. As to the latter point, the attorney general concluded it would be absurd to interpret § 77.70 as requiring that sales and use tax revenue could be used only to fund preexisting projects. Wis. Op. Att'y Gen. OAG 1-98 at 2. And, responding to the argument that this interpretation would read the word "directly" out of the statute, the attorney general concluded that the "direct" requirement still retained meaning in instances where a particular item is prohibited by law from being funded through the property tax levy. ***Id.*** at 3.

We tend to agree with the attorney general's well-reasoned opinion, which is of significant persuasive value. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶126, 327 Wis. 2d 572, 786 N.W.2d 177. By its plain language, WIS. STAT. § 77.70 speaks of a legislative purpose to achieve a direct reduction in the property tax levy in counties that choose to enact a sales and use tax. The statute does not specifically endorse a "dollar-for-dollar" methodology in budgeting for achieving this purpose, nor does the statute explicitly prohibit counties from using sales and use tax revenue to fund new projects. The attorney general's conclusion that § 77.70 restricts the expenditure of sales and use tax revenue to items that may otherwise be funded by property taxes is sensible.

Moreover, "a statutory interpretation by the attorney general 'is accorded even greater weight, and is regarded as presumptively correct, when the legislature later amends the statute but makes no changes in response to the attorney general's opinion.'" ***Schill***, 327 Wis. 2d 572, ¶126 & n.61 (quoting ***Staples for Staples v. Glienke***, 142 Wis. 2d 19, 28, 416 N.W.2d 920 (Ct. App. 1987)); ***Voice of Wis. Rapids, LLC v. Wisconsin Rapids Pub. Sch. Dist.***, 2015 WI App 53, ¶11, 364 Wis. 2d 429, 867 N.W.2d 825. Following the attorney general's

1998 opinion, WIS. STAT. § 77.70 has been substantively amended four times, with the legislature making no change in the relevant language.[6] As the County notes, for over twenty-two years counties have relied upon the attorney general's interpretation as the definitive interpretation of § 77.70 for purposes of setting budgets. Additionally, the County and circuit court noted neither the legislature nor the Department has provided any mechanism for offsetting in the manner the Association suggests is required.[7]

If the foregoing were the extent of the parties' arguments, we doubt certification would be warranted. The Association argues, however, that if we give the attorney general's opinion persuasive or presumptive value—as we would under existing precedent of ***Schill*** and other cases—it will seek supreme court review and argue that "this proposition of law is erroneous and should be overruled." The Wisconsin Supreme Court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court or published court of appeals opinion. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

The attorney general's opinion aside, the parties present different characterizations of the relevant language in WIS. STAT. § 77.70. The County views the statute as containing "enabling language" that permits counties to

[6] *See* 2009 Wis. Act 2, § 521; 2009 Wis. Act 28, § 1856d; 2017 Wis. Act 17, § 25; 2017 Wis. Act 58, § 34e.

[7] The County states that it lacks authority to award tax credits to any individual property owner. The circuit court noted the absence of any legislative guidance on how to otherwise account for sales and use tax revenue in a budget. Specifically, the court stated it was not clear "whether a county must draft its budget based on estimated sales and use tax revenue, or whether it must bank that revenue for a year and then proceed using a liquidated figure."

impose a sales and use tax, but does not require that they spend the revenue generated from that tax in any particular way. Rather, the County argues that the statute allows a degree of legislative discretion regarding what uses of the funds will achieve a reduction in the property tax levy, and it argues the uses here comply with the spirit of the legislation and have the intended effect. This argument has some foundation in the statutory language—rather than writing an explicit restriction on the manner in which tax revenue may be used, the legislature instead wrote that the tax can be imposed "*only for the purpose* of directly reducing the property tax levy." Sec. 77.70 (emphasis added).

The Association counters that even if one characterizes WIS. STAT. § 77.70 as an enabling statute, such a statute can still operate as a restriction by requiring a county to impose the tax in a certain way and within certain limitations. It contends that any deference to the judgment of a county legislative body as to what accomplishes a reduction in the property tax levy—save, of course, merely subtracting the amount of sales and use tax revenue from the levy—amounts to no restriction at all on the use of that revenue. Although the Association acknowledges that some language in the statute supports the County's argument, it cautions against applying a "hyperliteral" interpretation that focuses on the intent of the body authorizing the tax.

II. The meaning of WIS. STAT. § 77.70 in the context of WIS. STAT. § 66.0602

More importantly, at least in our view, the Association presents a novel argument that the sales and use tax Brown County implemented is invalid even under the attorney general's interpretation of WIS. STAT. § 77.70. This argument turns on WIS. STAT. § 66.0602, which was enacted in 2005, seven years after the attorney general issued his opinion. *See* 2005 Wis. Act 25, § 1251c. That

statute, as relevant here, restricts the amount by which a county may increase its property tax levy year-over-year "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 or … [z]ero percent." Sec. 66.0602(1)(d), (2). In other words, a county must continue its existing property tax levy unless an increase is warranted by the value of new construction. The levy limit is subject to exceptions, including a vote to exceed the limit by referendum. *See* § 66.0602(3), (4), (5).

In focusing on WIS. STAT. § 66.0602, the Association references the attorney general's conclusion that the word "directly" in WIS. STAT. § 77.70 prohibits counties from spending sales and use tax proceeds on any items that may not be funded by the countywide property tax, such as public library services for municipalities with existing services. *See* Wis. Op. Att'y Gen. OAG 1-98 at 3. It further notes, apparently correctly, that the attorney general's opinion presumes that counties can raise property taxes at will, which, at least theoretically, they could before 2005. The Association asserts that the County's levy limit increase for 2018 was between approximately $1 and $4 million, and therefore the County "could not have raised its property tax levy to pay for [the approximately $18 million in] new spending" in 2018 for projects being funded by the sales and use tax. In essence, the Association argues that the County's sales and use tax could

fund only new projects whose cost in any given year falls within the levy limit increase permissible under § 66.0602.[8]

As a result, the Association reasons that by operation of WIS. STAT. § 66.0602, at least some of the sales and use tax revenue generated does not and cannot "directly" reduce the property tax levy under WIS. STAT. § 77.70 because the revenue is being allocated to projects that, by law, could not be funded using the property tax levy in a particular year. The Association rhetorically asks, "[H]ow can the County increase spending by [$18 million] in one year, when it only has room for [$1 million] under its levy limit, and still contend that it is somehow reducing the property tax levy?"

Brown County's answer is that the sales and use tax still achieves savings for property owners in several ways, notwithstanding the County's levy limit increase for a particular year under WIS. STAT. § 66.0602. Primarily, the County asserts that if it had "not funded its needed capital improvements through a

[8] Despite the limited amount of revenue that may be generated from the sales and use tax under the Association's interpretation, WIS. STAT. § 77.70 requires that a sales and use tax be imposed "only in its entirety," meaning 0.5% of the sales or purchase price. This requirement raises questions regarding: (1) how counties going forward could properly budget, each year, their collection of sales taxes so as to comply with the Association's proposed holding; (2) whether—either administratively or lawfully—sales and use tax revenue could be "capped" once the revenue it generates hits a particular county's permitted levy limit increase; and (3) in all events, how and whether the legislature or the Department would provide guidance to counties, were a court to adopt the Association's arguments, either in whole or in part.

sales and use tax, it would have funded them through issuing debt."[9] WISCONSIN STAT. § 66.0602(3)(d)2. specifically excludes from the levy limit "amounts levied by a political subdivision for the payment of any general obligation debt service." According to the County, if it had financed its capital projects through borrowing, the interest payments would have cost taxpayers more than $13.5 million over the life of the Ordinance, and $47 million over the life of the loans. According to the County's evidentiary submissions, this approach would have eventually caused an increase in property taxes, whereas the sales and use tax will result in an overall decrease in taxes for Brown County property owners (approximately $140 between 2018 and 2023 on a median-value home). Moreover, the County notes that additional borrowing could imperil a county's credit rating.

The County points out an additional flaw that it perceives in the Association's interpretation of the joint operation of WIS. STAT. §§ 77.70 and 66.0602. The County notes that § 66.0602(2m) provides for a "[n]egative adjustment" to a county's levy limit for certain types of fee revenue, payments, or debt reduction the County receives, but that subsection does not explicitly require a reduction in the levy limit for sales and use tax revenue. The Association argues that such a provision in § 66.0602 would have been pointless because it interprets

[9] Bradley Klingsporn, Brown County's finance director, averred that the County would have issued debt to fund the projects. The Association does not dispute that borrowing was a potential alternative funding mechanism. Instead, the Association responds that it is not clear the County would have borrowed the funds and that Klingsporn's averment to the contrary is not supported by personal knowledge. In other words, the Association argues that because the County did not authorize borrowing (because it enacted the sales and use tax instead), Klingsporn could not aver that the County would have authorized borrowing. The quarreling about Klingsporn's prognosticative abilities aside, what appears material is that borrowing was a potential alternative funding mechanism, not whether the County would actually have engaged in such borrowing given all of the considerations attendant to that decision under an alternative set of facts.

§ 77.70 as requiring an offset, but, as the County contends, one would expect a greater degree of legislative clarification in § 66.0602 given the attorney general's existing opinion of § 77.70 to the contrary. *Cf.* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶40, 316 Wis. 2d 47, 762 N.W.2d 652 ("We generally presume that when the legislature enacts a statute, it is fully aware of the existing laws.").[10]

The amicus Wisconsin Counties Association stresses that the statutory issue presented by this appeal is an issue of profound statewide significance. According to the amicus, nearly all Wisconsin counties have enacted a sales and use tax pursuant to WIS. STAT. § 77.70 in reliance on the attorney general's 1998 opinion. The amicus argues that "[a]ltering the longstanding interpretation of [§ 77.70] would upend the decades-long understanding of the law and introduce uncertainty to a critically important county function—budget setting."

Relatedly, the amicus predicts disastrous consequences for Wisconsin counties should the Association's interpretation of WIS. STAT. § 77.70 prevail, presumably either in full or in part. The amicus predicts county budget shortfalls across the state, decimating essential services like child welfare, health services, and law enforcement. Additionally, according to the amicus, the Association's interpretation is doubly destructive because of the manner in which WIS. STAT. § 66.0602 operates—namely, its function in setting the previous year's property tax levy as the baseline for the following year. Thus, "a dollar-for-dollar

[10] The amicus Wisconsin Counties Association notes that WIS. STAT. § 66.0602 has been repeatedly amended since its enactment with no indication that the legislature regarded the attorney general's opinion as wrong.

offset would not only reduce the current year's levy, it would automatically and artificially lower a county's maximum available levy for the following year." The amicus argues the legislature could not have intended to create an exponential funding crisis for Wisconsin's counties by the interaction of §§ 77.70 and 66.0602.

We note two things from the foregoing argument by the amicus, both of which militate in favor of supreme court review of this case in the first instance. First, amicus's arguments in these regards cannot be gainsaid, as the Association often seems to do, and the consequences could be dramatic. But, if the court were to determine that the plain language of WIS. STAT. § 77.70—and/or its interaction with WIS. STAT. § 66.0602—compels the Association's interpretation, the amicus's concerns are arguably inconsequential from a statutory interpretation standpoint. *See* ***Anderson v. Aul***, 2015 WI 19, ¶107, 361 Wis. 2d 63, 862 N.W.2d 304 (Ziegler, J., concurring, on behalf of a majority of the court) ("[A]lthough a court may consider whether a particular interpretation of a statute would produce an absurd or unreasonable result, a court may not balance the policy concerns associated with the 'consequences of alternative interpretations.'"). The supreme court is in the best position to weigh the significance of the amicus's concerns vis-à-vis the proper interpretation of the relevant statutes.

Second, and relatedly, we further note that, if a court were to adopt the Association's view (again, either in whole or in part), the circumstances of this case might lend themselves to only a prospective application of the court's holding—i.e., "sunbursting." *See* ***State ex rel. Buswell v. Tomah Area Sch. Dist.***, 2007 WI 71, ¶¶46-47 & n.12, 301 Wis. 2d 178, 732 N.W.2d 804; *but see* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2012 WI 26, ¶¶45-47, 339 Wis. 2d 125, 810 N.W.2d 465 (declining to sunburst where the resolution of the appeal did not

require overruling any past precedent but was merely a novel issue of statutory interpretation). The decision to "sunburst" is clearly within the supreme court's province, given that it is a question of policy and involves balancing the equities peculiar to a particular case or rule so as to mitigate hardships that may occur in the retroactive application of new rules. ***Colby v. Columbia Cnty.***, 202 Wis. 2d 342, 364-65, 550 N.W.2d 124 (1996).

Returning to the merits, the amicus argues the Association's interpretation results from a misunderstanding of how sales and use taxes generate revenue. The County's sales and use tax undoubtedly results in higher prices for goods and services that residents purchase within the County, but the sales and use tax also collects from a broader purchaser base that includes nonresidents. Because the County receives funds from nonresidents, County property taxpayers receive a corresponding amount of tax relief. The amicus supports this view with specific examples of counties that saw reductions in mill rates after enacting sales and use taxes. Accordingly, the amicus argues that the Association's interpretation of WIS. STAT. § 77.70, to the extent it requires borrowing to fund County operations, places County residents in a worse position. For its part, the Association submits that most of the foregoing considerations are beside the point if the plain language of § 77.70, alone or in combination with WIS. STAT. § 66.0602, requires those results.

Another aspect of this case compels the Wisconsin Supreme Court's review. Intertwined with the merits of the basic statutory interpretation arguments is a judgment as to what, if any, significance to accord to legislative inaction following the 1998 attorney general opinion. Jurisprudence regarding legislative inaction varies greatly, and there does not appear to be clear guidance from our state's high court on how lower courts should regard it. *Compare* ***Estate of Miller***

v. Storey, 2017 WI 99, ¶¶51-52 & n.20, 378 Wis. 2d 358, 903 N.W.2d 759 (applying the legislative acquiescence canon of construction and noting that such application was warranted by Wisconsin law), *with* ***Wenke v. Gehl Co.***, 2004 WI 103, ¶¶31-37, 274 Wis. 2d 220, 682 N.W.2d 405 (declining to apply the canon and opining on its deficiencies). Moreover, here we have the unique circumstance where the legislature has not failed to act in relation to a precedential decision of one of our state's appellate courts but, rather, only in relation to an attorney general opinion, albeit a long-standing opinion on a statutory matter of clear statewide significance.

Finally, the County, the Department, and the amicus all raise concerns about the potential remedy if the Association prevails. This contingent issue, should it need to be reached, also warrants consideration and a decision from our supreme court.

The amicus asserts that adopting the Association's interpretation of WIS. STAT. § 77.70 places most Wisconsin counties in immediate violation of WIS. STAT. § 66.0602, which, it maintains, will trigger a corresponding reduction in state aid for the following year. *See* § 66.0602(6)(a). According to the amicus, the penalty provision would exacerbate the "calamity" resulting from the baseline reduction in the property tax levy, requiring the supreme court to rewrite or suspend portions of § 66.0602 and craft a remedy without any indicia of legislative guidance. As the amicus notes, the Association does not clarify what it believes the appropriate remedy should be. Despite this omission, the Association suggests an additional "remedy phase of litigation" might be necessary.

The Department, which is also a party in this case, states that it takes no position on the merits of the appeal but that it has "concerns about the potential

remedy, should Brown County's tax be found to violate state law." The Department suggests that injunctive relief might not be appropriate, given that the Association's allegations concern the way the sales and use tax revenue is used and not the County's authority to enact the tax in the first instance. Accordingly, it submits that a more appropriate remedy could be to order Brown County to spend the proceeds at issue in a particular way, such as for property tax relief.

The Department, moreover, explains that it is responsible for the collection of sales and use tax proceeds. Retailers report and remit their sales and use taxes to the Department, and the Department then makes distributions to the counties and handles refund claims. In part because state law dictates the notice and timing of any changes in the tax rates, *see* WIS. STAT. § 77.61(18) (2017-18), the Department states that it "would need at least 30 to 60 days to allow it to inform retailers to stop collecting the tax and retailers to reprogram their software to stop collection of the tax from their customers." If the court concludes the tax is unlawful, the Department therefore requests a remand to the circuit court to consider the appropriate remedy, as well as instructions to the circuit court to provide sufficient time for the Department to stop collection of the tax in an orderly fashion.

CONCLUSION

The Wisconsin Supreme Court "has been designated by the constitution and the legislature as a law-declaring court." ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985). "While the court of appeals also serves a law-declaring function, such pronouncements should not occur in cases of great moment." ***Id.*** The primary issue presented in this case is triply novel: whether the attorney general was correct in 1998, what weight should be

given to his interpretation, and also whether the tax levy limit subsequently established in WIS. STAT. § 66.0602(2) should affect that interpretation. Given the profound importance of the issues raised in this appeal, the longstanding interpretation of WIS. STAT. § 77.70 (on which many counties have relied), the potential budgetary consequences for Wisconsin's counties, the need for clarity regarding the interaction of §§ 77.70 and 66.0602, and issues regarding a potential remedy, we believe this is a case in which it would be appropriate for the supreme court, rather than the court of appeals, to render a decision. A decision by the supreme court "will help develop, clarify or harmonize the law," WIS. STAT. RULE 809.62(1r)(c) (2017-18), thereby providing much needed guidance to Wisconsin residents, attorneys, and lower courts.