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**MEMORANDUM**

DATE: Friday, March 09, 2018

TO: Bob Ziegelbauer, County Executive  
Manitowoc County Board of Supervisors

FROM: Peter J. Conrad, Corporation Counsel

SUBJECT: Use of County Sales Tax Proceeds

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Recently, there has been discussion on the potential imposition of a countywide sales tax. To that end, you have asked several questions regarding the potential use of sales tax proceeds. Following is a description of the questions asked as well as an analysis and my opinion on the answer to those questions.

**QUESTIONS PRESENTED**

1. Can a county sales tax be used exclusively to reduce the property tax levy?
2. Can the County distribute sales tax proceeds only to certain entities (said another way, can the County exclude any municipal entity listed in the statute that permits distribution)?
3. Can the County direct a municipality on how to use sales tax proceeds if those revenues are distributed to municipalities?
4. Can the County use an intergovernmental agreement to control how a municipality uses sales tax proceeds?

**BRIEF ANSWERS**

1. No. Funds received from a sales tax may be used to reduce the amount of the overall countywide levy or to defray the cost of any item that can be funded by a countywide property tax, which under today's laws is limited to capital items purchased with general obligation debt.

2. No. Wisconsin Stat. § 77.76(3) provides that if a county chooses to distribute sales tax revenue, it must do so to all four of the municipal entities listed - towns, cities, villages, and school districts.

3. No. A county lacks the power to dictate the purpose to which county sales tax revenues may be put if those revenues are distributed to the towns, villages, cities, and school districts.

4. No. Wisconsin Stat. § 77.76(3) states that if a county is not going to retain sales tax revenue it must “distribute” the funds to the towns, villages, cities, and school districts in the county; accordingly, counties are without power to enter into intergovernmental agreements that circumvent that statutory directive.

## DISCUSSION

### I. CAN A COUNTY SALES TAX BE USED EXCLUSIVELY TO REDUCE THE LEVY?

No. Pursuant to a 1998 opinion of the Attorney General, funds received from a countywide sales tax may be used to reduce the amount of the overall countywide levy or to defray the cost of any item that can be funded by a countywide property tax.<sup>1</sup>

However, a county’s ability to use sales tax funds for “any item that can be funded by a countywide property tax” was greatly curtailed since the time the Attorney General drafted that opinion. Thus, the applicability of the 1998 Attorney General’s Opinion is significantly limited.

In 1998, the Attorney General was asked: “[H]ow funds received from a county sales and use tax imposed under section 77.70, Stats., may be budgeted by the county board.” Opinion of Wis. Att’y Gen. to Dennis Kenealy, Corporation Counsel, Ozaukee County, OAG 1-98 (May 5, 1998), [https://docs.legis.wisconsin.gov/misc/oag/archival/\\_22](https://docs.legis.wisconsin.gov/misc/oag/archival/_22). The Attorney General opined that “funds received from a county sales and use tax under section 77.70 may be budgeted by the county board to reduce the amount of the countywide property tax levy or to defray the cost of any budget item which can be funded by a countywide property tax.” *Id.* The Attorney General based his opinion on the following rationale:

Some counties have also 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. 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.* (emphasis added).

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<sup>1</sup> To date, there is no case law interpreting this statute. Therefore, the Attorney General opinion is entitled to persuasive authority. *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 692, 307 N.W.2d 227 (1981).

The key difference between when the Attorney General wrote his opinion and today regards the use of sales tax revenue as an offset against items that could be funded by the countywide property tax. At the time of the Attorney General opinion, there were no statutory limits on the county raising property taxes to pay for any applicable countywide expense. For example, if a county desired to increase the Human Services Department's budget by \$1 million, it could simply increase the countywide levy by that amount at its discretion and without limitation. However, in 2006 pursuant to 2005 Act 25, the state imposed strict "levy limits" on local governments, including counties. In doing so, a county could no longer simply raise property taxes to offset increases in expenses. Thus, the Attorney General's "offset" rationale ceased to apply to those items that could no longer be funded by the countywide property tax; specifically, the entire operations portion of the budget.

However, offsets would still be permissible to levy limit exceptions that otherwise may be funded by the countywide property tax. In this case, the notable exception is general obligation debt service as debt service repayments are not subject to levy limits. Wis. Stat. § 66.0602(3)(d)2. General obligation debt service cannot be used to pay for operating expenses. Wis. Stat. § 67.04(5)(a).<sup>2</sup> Thus, applying the 1998 Attorney General opinion to the laws of today, it would be permissible to use a countywide sales tax to pay for capital items as those items can be purchased with general obligation debt.<sup>3</sup>

Additionally, the Attorney General opined that it did not matter if the sales tax was used to pay for items prospectively or retrospectively:

With respect to the funding of specific items, I have considered the possibility that the statute could be construed to require that the net proceeds of the sales and use tax be used only to defray the cost of existing projects, as opposed to new items. A statute, however, should be construed so as to avoid unreasonable and absurd results. It would be unreasonable to construe the statutory restriction so that counties which had already started certain projects could use sales and use tax revenues to complete them while other counties contemplating the initiation of similar projects could not use sales and use tax revenues to fund them at all. Since there is no such county-by-county limiting language in the statute, it is my opinion that the extent of the authority to use sales and use tax revenues in connection with individual budget items does not vary from county to county.

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<sup>2</sup> Wisconsin Stat. § 67.04(5)(a) reads as follows:

(5) (a) Except as provided in par. (b), the proceeds of any municipal bonds or notes issued by a county under this chapter shall not be used to fund the operating expenses of the general fund of the county or to fund the operating expenses of any special revenue fund of the county that is supported by property taxes.

<sup>3</sup> The same rationale would apply to limit the use of sales tax funds by cities, villages, towns, and school districts; however, as noted *infra* the County would not have control in determining how any of those entities would use those funds, nor would the County have a mechanism to "punish" a city, town, village, or school district for misusing sales tax funds.

Opinion of Wis. Att’y Gen. to Dennis Kenealy, Corporation Counsel, Ozaukee County, OAG 1-98 (May 5, 1998), [https://docs.legis.wisconsin.gov/misc/oag/archival/\\_22](https://docs.legis.wisconsin.gov/misc/oag/archival/_22) (Internal citation omitted).

Therefore, under the Attorney General’s rationale, it would likewise be permissible to use sales tax revenue to pay down existing general obligation bonds. However, any savings that result from paying down the County’s debt service could not be redistributed or applied to operational expenses. As the Attorney General explained:

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.*

Accordingly, any monies previously budgeted to pay for general obligation debt service that are paid for by county sales tax revenue could only be used to directly reduce the tax levy or offset capital expenditures.

II. CAN THE COUNTY DISTRIBUTE SALES TAX PROCEEDS ONLY TO TOWNS, VILLAGES, AND CITIES AND EXCLUDE SCHOOL DISTRICTS?

No. Wisconsin Stat. § 77.76(3) provides that if a county chooses to distribute sales tax revenue, it must distribute that revenue to all four of the municipal entities listed (towns, cities, villages, and school districts). That statute uses the conjunctive word “and” in listing the entities to which the county would distribute. Therefore, under the rules of statutory construction, a county cannot vary from that list, *i.e.* a county must either distribute to all or none.

Wisconsin Stat. § 77.76(3) reads:

From the appropriation under s. 20.835 (4) (g) the department of revenue shall distribute 98.25 percent of the county taxes reported for each enacting county, minus the county portion of the retailers’ discounts, to the county and shall indicate the taxes reported by each taxpayer, no later than 75 days following the last day of the calendar quarter in which such amounts were reported. In this subsection, the “county portion of the retailers’ discount” is the amount determined by multiplying the total retailers’ discount by a fraction the numerator of which is the gross county sales and use taxes payable and the denominator of which is the sum of the gross state and county sales and use taxes payable. The county taxes distributed shall be increased or decreased to reflect subsequent refunds, audit adjustments, and all other adjustments of the county taxes previously distributed. Interest paid on refunds of county sales and use taxes shall be paid from the appropriation under s. 20.835 (4) (g) at the rate paid by this state under s. 77.60 (1) (a). The county may

retain the amount it receives or it may distribute all or a portion of the amount it receives to the towns, villages, cities, and school districts in the county.<sup>4</sup> After receiving notice from the department of revenue, a county shall reimburse the department for the amount by which any refunds, including interest, of the county's sales and use taxes that the department pays or allows in a reporting period exceeds the amount of the county's sales and use taxes otherwise payable to the county under this subsection for the same or subsequent reporting period.<sup>5</sup> Any county receiving a report under this subsection is subject to the duties of confidentiality to which the department of revenue is subject under s. 77.61 (5) and (6).

Wis. Stat. § 77.76(3) (emphasis added).

There is no case law on point interpreting this statute. Therefore, it is necessary to conduct a proper interpretation pursuant to the customary rules of statutory interpretation. When interpreting a statute, a court must look to the plain language of the statute. *Jerry M. v. Dennis L.M.*, 198 Wis. 2d 10, 17, 542 N.W.2d 162 (Ct. App. 1995). If the statute is clear and unambiguous, there is no need to look beyond the plain language to ascertain its meaning. *Id.* Statutory language is given its common, ordinary, and accepted meaning. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language 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. *Id.* at ¶ 46. Statutory language is to be avoided to avoid absurd or unreasonable results. *Id.* “Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Id.* A court cannot disregard the “plain, clear words of the statute.” *Id.*

In this case the statute is clear and unambiguous. It states that a county may distribute to the “the towns, villages, cities, and school districts in the county.” The word “and” is conjunctive. *Town of Grand Chute v. City of Appleton*, 91 Wis. 2d 293, 297, 282 N.W.2d 629 (1979 Ct. App.). The conjunctive means that all requirements must be met. *Green Bay Broadcasting Co. v. Redevelopment Authority of the City of Green Bay*, 116 Wis. 2d 1, 21, 342 N.W.2d 27 (1983). As the Wisconsin Supreme Court noted *Green Bay Broadcasting Co.* when citing the treatise *Statutory Construction* by Sutherland with approval:

Where two or more requirements are provided in a section and it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statutes, the conjunctive “and” should be used.

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<sup>4</sup> Given the statutory language “school districts in the county” sales tax revenue would be distributed out of the County. For example, the school district of Kewaunee includes land in the Town of Two Creeks, which would constitute a “school district in the county”; therefore, if the County choose to distribute sale tax revenue some of that revenue would go to the Kewaunee School District.

<sup>5</sup> If the County distributes sales tax proceeds to the towns, villages, cities, and school districts and there was an overpayment by the state such that the County must reimburse the state (including interest), the County would be solely liable for paying the reimbursement as there is no provision or allowance in the statute for the County to recoup any monies from the towns, villages, cities, and school districts.

*Id.* (citing 1A Sutherland, *Statutory Construction* (4<sup>th</sup> ed.), sec. 21.14, pp. 90-1).

The plain language of the statute provides a county with two options - retain the sales tax revenue or distribute all or a portion to all four entities listed (towns, villages, cities, and school districts in the county). There is no statutory language that permits a county to choose which municipalities, either as a class (*e.g.* all towns) or individually (*e.g.* the City of Manitowoc), will receive sales tax revenue.<sup>6</sup>

I would further note that permitting sales tax revenue to be distributed only to select municipalities could lead to an absurd result. By way of example, if the County ignored the statutory mandate to distribute to all of the municipalities listed, it could redistribute sales tax revenue that was collected countywide to only one municipality despite that municipality making minimal contribution to the sales tax revenues collected, *e.g.* a town with little or no taxable commercial activity. This result is particularly absurd in light of the statute's purpose of directly reducing the property tax levy as no other municipalities' tax levy would be reduced. *See* Wis. Stat. § 77.70 (“[T]he county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy....”).

Counties only have such power as granted by the legislature. *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981). In this case, the legislature has dictated that if a county chooses to distribute sales tax monies to its municipalities it must distribute to all of them. The allowance to distribute to the towns, villages, cities, and school districts is simply an all or nothing proposition.

### III. CAN THE COUNTY DIRECT A MUNICIPALITY ON HOW TO USE SALES TAX PROCEEDS IF DISTRIBUTED TO MUNICIPALITIES?

No. The Attorney General opined in 1971 that a county does not have the authority to dictate how a municipality uses sales tax funds distributed to it. While the county sales tax law was amended in 1985,<sup>7</sup> the amendments are not material to the Attorney General's opinion and no court has held otherwise. Stated simply, a county lacks the power to dictate the purpose to which county sales tax revenues may be put if those revenues are distributed to the towns, villages, cities, and school districts.

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<sup>6</sup> While not conclusive alone, I also note that the legislature used the plural when referring to the municipalities to which a county could distribute sales tax revenue (*i.e.* it stated towns, villages, cities, and schools districts). Referring to the four municipalities in such manner again emphasizes the legislative intent that no one municipality or municipal unit may be favored by a county over any other unit.

<sup>7</sup> Wisconsin counties have had the authority to enact a countywide sales tax since 1969. However, until 1985 a county that adopted the tax was required to distribute all of the sales tax revenue collected to the towns, villages, and cities in the county. In 1985 the legislature amended the law to give counties the option of retaining the sales tax revenues for its own use or distributing all or a portion thereof to the towns, villages, cities, and school districts in the county. However, when providing a county with this option, the legislature kept the term “distribute,” which again shows a legislative intent that a county is without discretion if it choose to pass along sales tax revenues.

In 1971, the Racine County Corporation Counsel asked the Attorney General “whether the county may dictate the purposes and use to which the sales tax revenues may be put and, if so, whether the proposed ordinance is a valid implementation of that power.” 60 Wis. Op. Att’y Gen. 387 (1971). The Attorney General opined that the county did not have the power to require a municipality to apply the sales tax credit to any particular purpose. *Id.* In support of his opinion, the Attorney General noted that “[c]ounty boards have only such power as are expressly conferred by statute or necessarily implies therefrom.” *Id.* (citing *Maier v. Racine County*, 1 Wis. 2d 384, 84 N.W.2d 76 (1957)). He then went on to explain that the statute that permits a county to adopt a sales tax and distribute the revenues to the municipalities, but that the statute was silent as to how the municipalities may use the tax revenue. *Id.* Thus, he concluded there was no express power conferred. The Attorney General further concluded that “it cannot necessarily be implied from the language of the statute that the county board has authority to dictate the uses to which the sales tax revenues may be put.” *Id.*

While it is correct that in 1971 the county was required to distribute all of sales tax revenue collected to the towns, villages, and cities in the county, that change would not alter the Attorney General opinion. The Attorney General based his opinion on: 1) the statute not expressly stating that the county had such power; and 2) a lack of a basis to imply that the county had such power. The fact that a county has discretion retain or distribute sales tax revenue does not change either of those two things. The statute still does not expressly state that a county may dictate how a town, village, city, or school district may use sales tax revenues, and there still is no basis to imply such power. For these reasons, it is plain that if the County chooses to distribute sales tax revenues to the towns, villages, cities, and school districts it may not dictate how those municipalities use the revenue.

#### IV. CAN THE COUNTY USE AN INTERGOVERNMENTAL AGREEMENT TO CONTROL HOW A MUNICIPALITY USES SALES TAX PROCEEDS.

No. Wisconsin Stat. § 77.76(3) states that if a county is not going to retain sales tax revenue it must distribute the funds to the towns, villages, cities, and school districts in the county. There is no provision in the statutes that permits a county to treat the sales tax revenue as monies that it may appropriate to other entities at the county’s discretion. Absent such authorization, counties are without power to enter into intergovernmental agreements that circumvent the statutory directive to distribute sales tax revenue to towns, villages, cities, and school districts.

Intergovernmental agreements permit municipalities to “contract with other municipalities and with federally recognized Indian tribes and bands in this state, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.” Wis. Stat. § 66.0301(2) (emphasis added). Using an intergovernmental agreement to appropriate funds to a town, village, city, or school district with the caveat that the recipient use those funds only for certain activities is neither receiving or furnishing a service<sup>8</sup> nor exercising a joint power.

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<sup>8</sup> “Service” is defined as: “The act of doing something useful for a person or company for a fee.” Black’s Law Dictionary 1372 (7ed. 1999).

Further, as noted *supra*, to the extent sales tax revenues are included in the county's budget, those funds can only be used for countywide capital projects. Appropriating funds to municipalities plainly does not constitute such a use. Accordingly, the legislature did not grant counties the authority to enter into intergovernmental agreements for such purpose.

Recently, the Attorney General has considered an analogous question, *i.e.* whether a county can appropriate money to a private nonprofit corporation that has the sole mission of operating a food pantry in the county for the benefit of the county's citizens. Opinion of Wis. Att'y Gen. to Tony Kordus, Corporation Counsel, Shawano County, OAG 01-17 (Sep. 1, 2017), [https://docs.legis.wisconsin.gov/misc/oag/recent/oag\\_1\\_17](https://docs.legis.wisconsin.gov/misc/oag/recent/oag_1_17). The Attorney General concluded that the county was without authority to appropriate such money. In his analysis, the Attorney General began by first noting that "a county board has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power." *Id.* (citing *Town of Vernon v. Waukesha Cty.*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981)). The Attorney General then went on to analyze the powers of the county board.

First, he noted that under Wis. Stat. § 59.51(2)<sup>9</sup> "the board can 'appropriate money' only 'to carry into effect any of the board's powers and duties.'" Opinion of Wis. Att'y Gen. to Tony Kordus, Corporation Counsel, Shawano County, OAG 01-17 (Sep. 1, 2017), [https://docs.legis.wisconsin.gov/misc/oag/recent/oag\\_1\\_17](https://docs.legis.wisconsin.gov/misc/oag/recent/oag_1_17). The Attorney General then went on to review a multitude of specific functions for which the county board had authority. He concluded:

Because the statute specifically addresses a county board's authority in this area without granting the authority to make appropriations to nonprofits, county boards do not have the authority, either express or implied, to make such appropriations.

*Id.*

The legislature used the word "distribute" to describe the county's authority in passing sales tax revenue on to the towns, villages, cities, and school districts. Thus, the legislature specifically addressed the county board's authority.

The legislature did not authorize a county to "appropriate" such funds, *see* Wis. Stat. § 59.51(2). In a distribution system, the county merely acts as a pass through, and cannot attach any strings. *See e.g.* Wis. Stat. § 75.05 ("The county treasurer shall distribute and retain funds paid to redeem land subject to a tax certificate as follows..."). The legislature is presumed to understand the language it uses. *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 26, 339 Wis. 2d 125, 810 N.W.2d 465. The legislature gave counties the discretion to pass along sales tax

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<sup>9</sup> Wisconsin Stat. § 59.51(2) reads:

(2) GENERAL AUTHORITY. The board may represent the county, have the management of the business and concerns of the county in all cases where no other provision is made, apportion and levy taxes and appropriate money to carry into effect any of the board's powers and duties.



revenue to the towns, villages, cities, and school districts in the county, but made sure that the county would have no say in how those funds were used.

In this case, Wis. Stat. § 77.76(3) states the procedure that a county must follow if it relinquishes sales tax revenues to municipalities, *i.e.* “it may distribute all or a portion of the amount it receives...” There is no authorization for the county to deviate from that procedure. Therefore, counties are without power to enter into intergovernmental agreements that circumvent the statutory directive to distribute sales tax revenue to towns, villages, cities, and school districts.