

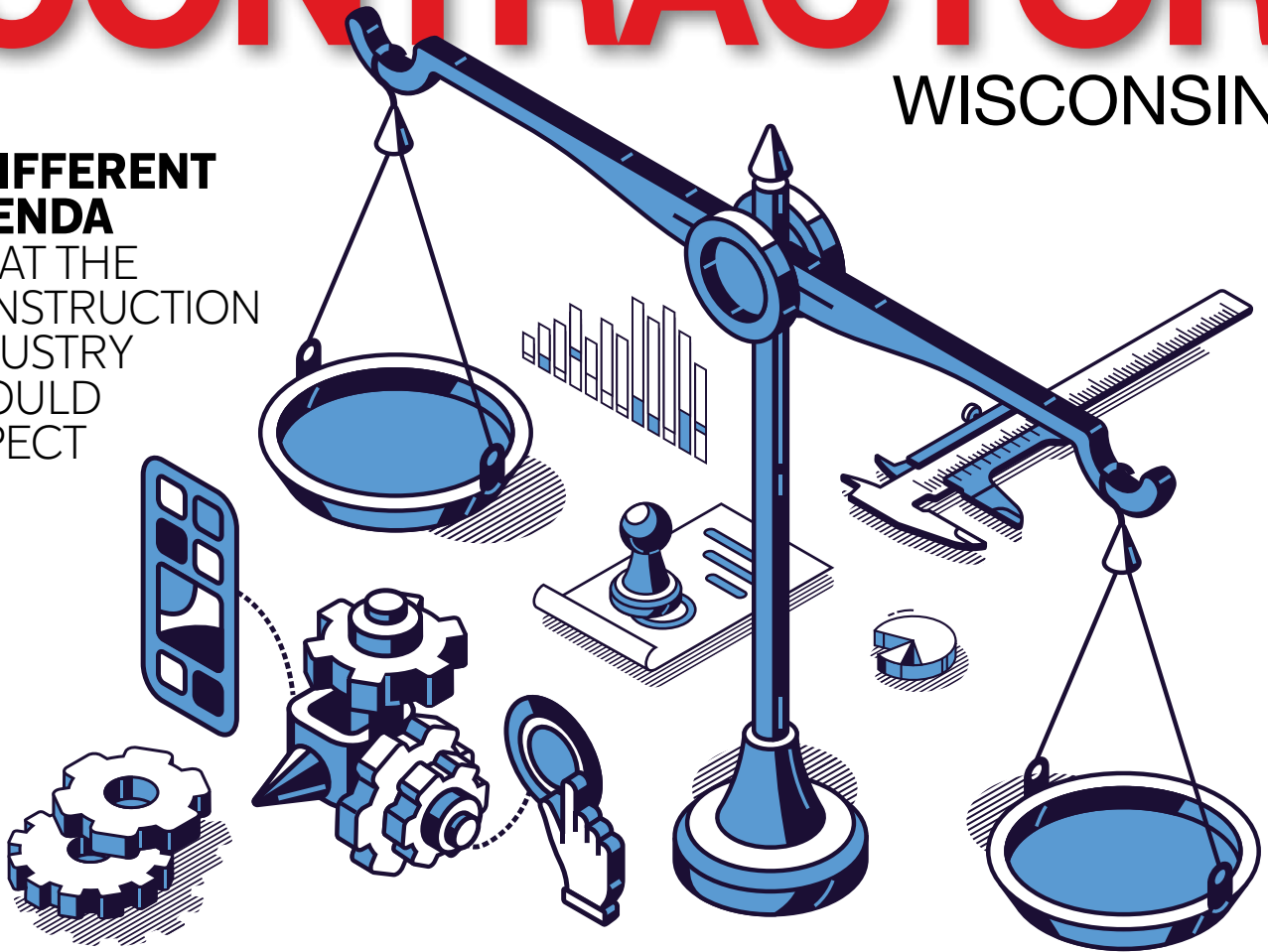
MERIT SHOP

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WISCONSIN

A DIFFERENT AGENDA

WHAT THE CONSTRUCTION INDUSTRY SHOULD EXPECT



ELECTION & POLITICS

WILL WISCONSIN "BUILD BACK BETTER?"

BUDGET
PERSPECTIVES

LEGISLATIVE
REFORM

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REBECCA KLEEFISCH COLUMN
PAGE 7

Q & A
WITH STEVE KLESSIG
PAGE 17



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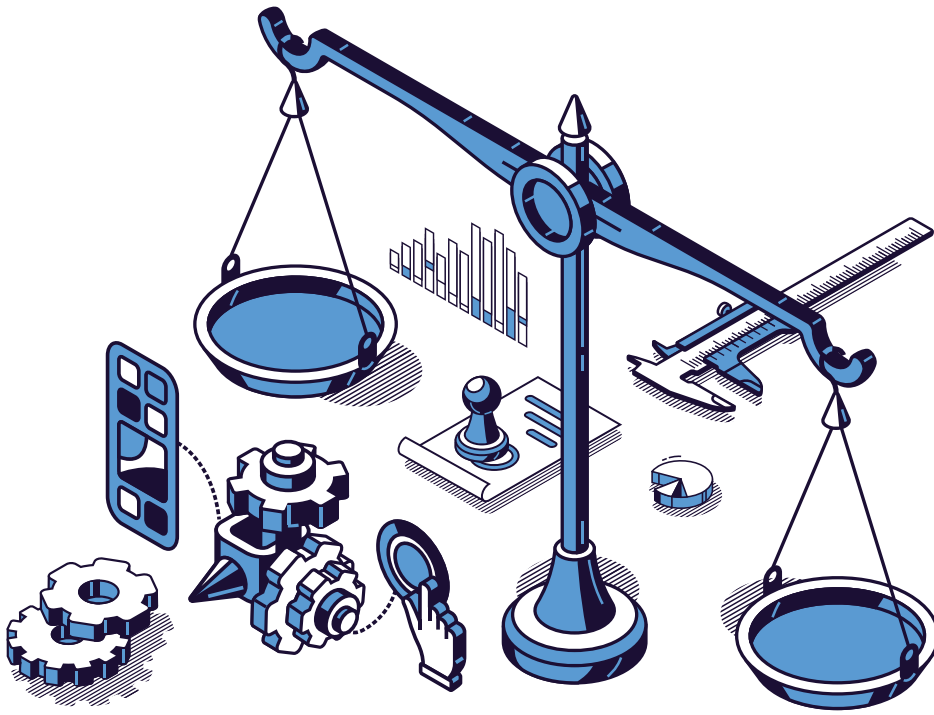
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ELECTION & POLITICS

WILL WISCONSIN "BUILD BACK BETTER?"

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FROM OUR PRESIDENT

ABC of Wisconsin member generosity



AS THE OLD SAYING GOES, THERE ARE TWO TYPES OF PEOPLE: WORK HORSES AND SHOW HORSES. In my decades of serving ABC of Wisconsin members, I can say without a doubt that you are work horses.

This extends to your generous giving back to your local community in the form of volunteering, serving on boards and committees, and opening your wallets. This was most recently apparent during the early days of the COVID-19 public health crisis. In countless cases, ABC members donated thousands of N-95 masks to their local front line health care providers without saying “look at me” or even sending out a press release.

The same can be said for political giving. ABC members’ support led to so many of our legislative champions being re-elected in the November elections in the face of overwhelming and unprecedented spending from the crony capitalists and construction unions who want to undue the free market, open competition laws on the books in Wisconsin. Many of those donations were made outside of the ABC political giving programs.

ABC members donate to politicians for many reasons: because they like them, their kids are

friends, etc. Candidates are happy with any donation, but it is important that the candidate knows why you are supporting them, which is where the ABC political giving programs can help.

By donating to candidates through the ABC of Wisconsin political giving programs, you can **DOUBLE** your impact. Through the ABC conduit program, for instance, the candidate knows you made the donation, but it’s done so through ABC. The candidate sees that you provided the support, but also that you believe in merit and open competition in construction that are so closely associated with ABC.

While the 2020 November elections are still fresh in our memory, there will be at least two special elections for two Wisconsin legislative seats in spring 2021. We need your continued political support to make sure that ABC of Wisconsin champions are elected and they know that you stand with ABC on free enterprise issues.

Contact John Schulze at jschulze@abcwi.org or 608-244-5883 to learn how you can join the fight for open competition and free enterprise in construction in 2021.

— John Mielke

“
IN COUNTLESS
CASES, ABC
MEMBERS
DONATED
THOUSANDS
OF N-95
MASKS TO
THEIR LOCAL
FRONT LINE
HEALTH CARE
PROVIDERS.

2020 ABC OF WISCONSIN POLITICAL ROI



Associated Builders and Contractors

ABC of Wisconsin members have had a decade of winning. We have seen tremendous success because free-enterprise, free-market legislators and governors, regardless of party, listen to us. And thanks to efforts of our members, ABC of Wisconsin has delivered an impressive ROI.

ISSUES TO WATCH



As we have seen most recently in Virginia and Nevada, merit contractors' hard fought victories that took decades to achieve can be reversed in a single election. If the win was important, it is equally as important to continue to fight every year.



BEN BRUBECK | ABC National Vice President of Regulatory, Labor and State Affairs



▲ NEVADA

In 2015, the state banned government mandated project labor agreements and raised the state prevailing wage threshold from \$100,000 to \$250,000. In, 2019 prevailing wage threshold was decreased back to \$100,000, and the ban on government-mandated project labor agreements was reinstated. In addition, all contractors that bid on public work to use apprentices on between 3-10% of the total hours worked.

▼ WISCONSIN

Gov. Tony Evers reinstated prevailing wage and repealed project labor agreement neutrality and right to work in his first state budget. Fortunately, free-enterprise merit legislators removed it.



In my two decades as a state Senator, I have served with five governors and have seen the balance of power shift between parties more times than I can count. Through it all, ABC of Wisconsin has been a forceful voice of free enterprise in construction. As a newly-elected Congressman, I look forward to joining ABC's fight for merit contractors in D.C.

CONGRESSMAN SCOTT FITZGERALD | Former Wis. State Senate Republican Leader



WISCONSIN'S 10-YEAR MERIT SHOP SCORECARD

- ✓ 2020 | Construction deemed essential business during COVID-19: **PASSED**
- ✗ 2020 | Attacks on lowest responsible bidder and design-bid-build for public projects: **DEFEATED**
- ✗ 2020 | Unnecessary fire and smoke damper inspection regulation: **DEFEATED**
- ✗ 2019 | Pro-union "responsible bidder" preference: **DEFEATED**
- ✗ 2019 | Return of state prevailing wage: **DEFEATED**
- ✗ 2019 – Return of project labor agreements: **DEFEATED**
- ✓ 2018 | Apprenticeship ratio reform: **PASSED**
- ✓ 2018 | Personal property tax exemption for equipment and machinery: **PASSED**
- ✓ 2018 | High school seniors can participate in adult apprenticeship: **PASSED**
- ✓ 2017 | Wisconsin prevailing wage law repealed: **PASSED**
- ✓ 2017 | Project labor agreement neutrality: **PASSED**
- ✓ 2016 | Sales tax exemption pass through for construction materials: **PASSED**
- ✓ 2015 | Wisconsin prevailing wage law reformed: **PASSED**
- ✓ 2015 | Right to work: **PASSED**
- ✓ 2014 | Statewide commercial plan review: **PASSED**
- ✓ 2011 | Repeal prevailing wage on quasi-private projects: **PASSED**

WHAT'S NEXT FOR THE ABC OF WISCONSIN JOBS AMBASSADOR?"

By Rebecca Kleefisch – ABC of Wisconsin Jobs Ambassador

“Construction is the leading-edge indicator of economic health.” I’ve said it probably a hundred times in my professional life which has spanned a variety of careers. I’ve been a journalist, public relations pro, lieutenant governor, federal agency director, and now, your ABC of Wisconsin Jobs Ambassador. But through those changes, there has been an economic constant: construction has always foretold the direction of the economy. It’s one of the reasons I deeply respect the construction industry, particularly ABC members whose dedication to merit, ethics and free markets is unparalleled. Whatever is due to happen economically, you go through it first, and show the rest of us the way.

When I was elected Wisconsin’s lieutenant governor, it was on the heels of the Great Recession. Construction companies had been the canaries in the economic coal mine. Scholars and armchair experts alike saw the waning of new construction business as a predictor of the sickening business climate. When the construction industry began to see a resurgence, delays in projects due to growing demand, and increased retirements due to Baby Boomers’ belief in a restored economy, consumer confidence and the rest of industry followed the lead. I watched and learned how the construction industry survivors pared back and strategized, diversified their business models, and got creative with human resources. I respected construction deeply then.

In the last year as your Jobs Ambassador, my admiration for the entrepreneurs, tradespeople and apprentices in this industry has grown. I’ve met you on job sites and at SuperCon. I’ve heard your challenges and concerns in seminars and in your offices. I’ve laughed with you at events and told some of your remarkable stories in “Money Jobs,” the video micro-series to increase public awareness of the great jobs in construction. I’ve done radio and speaking appearances detailing the special and important nature of the apprenticeship path to the middle class. I’ve also helped elect politicians who sympathize with and advocate for the merit-based construction industry.

It’s this work that remains one of the most pressing obligations of the merit-based construction industry. We must move past 2020, encourage good and helpful rule-making and legislation, and nurture the industry that predicts economic growth. That’s why, going into 2021, I will build on my experiences in 2020 to help develop policy designed to support you. You are literally building Wisconsin as your life’s work, and it’s time to make government work for those who build this state. That effort will start with listening.


As my access to you has increased, so has my knowledge base of your needs, hopes and challenges. Simply by producing Money Jobs, I’ve seen all three. In the shadow of the Wisconsin Dells, normally bustling with happy vacationers, I watched as a newly-minted state representative met with company executives concerned about fresh bureaucratic layers to a plan approval process. It wasn’t the first time I had heard about this impending irritation for construction companies, as another Money Jobs shoot had brought the issue to my attention in talk in between takes.

That shoot itself allowed me to meet a bright plumbing apprentice

who was adopted from Haiti, where the fresh water he facilitates with ease daily in Wisconsin is a luxury in his birth country. Then there was the story of the young woman carpentry apprentice whose mom was okay with her daughter’s choice of construction...until the mom realized her child wanted to work on job sites and not behind a desk. It has been eye-opening, stereotype-breaking, and informative, and I want to know more. The best way to learn more is to listen to experts, and so in 2021, that is what I will do.

Expect me to continue to share the occasional cool story through Money Jobs and, once we are freer to be indoors at gatherings to network, to join you for events to talk business and politics. But the fresh layer to our relationship is to formalize the listening. As your Jobs Ambassador, I will travel the state to hear your needs, ideas, and concerns in listening sessions. Some will be in common areas with multiple companies. Some will be at your offices. Some will focus on things like labor market development, healthcare, or regulatory reform. Some will focus on executive topics; others will lean into the life experiences of workers. But all of the listening sessions will have a purpose: to establish the common hopes and concerns of ABC members so that we can develop the right policies to tackle them. Our goal is to build the plan for the future of Wisconsin construction, as advised by ABC members.

There is no more resilient, clever, hardworking group to take guidance from. As COVID-19 swept through the state, I watched ABC and its members advocate for construction’s essential spot in the economy. Companies developed plans to make employees, customers, and the public feel safe with practices to sanitize job sites and offices and protect Wisconsinites. And just as ABC members adapted to the pandemic environment and offered an example of best practices to the rest of the state, so too, will ABC be on the leading edge when it comes to policy formation for a better, brighter future post-COVID.

ABC members can be a guiding light into 2021 just by offering opinions and observations, ideas and solutions. I will be there to listen and learn, document what I hear from you and provide an agenda that you inspired. Knowing ABC members, I imagine your ideas will be full of ways to create efficiencies, provide for more and better opportunities and cut red tape. Just like you, I want to see Wisconsin’s economy restored. This is the point at which other sectors of the economy look to you, the predictors of the future, for an indication of what happens next. I think what happens next is going to be good. I think the construction industry, with a great policy plan that came from listening to smart people, will guide our state back to prosperity. My plan is to listen to you in 2021. 



ELECTION SCO

CONGRESS



Scott Fitzgerald
Elected 60%



Glenn Grothman
Re-elected 59%



Tom Tiffany
Re-elected 60%

STATE SENATE



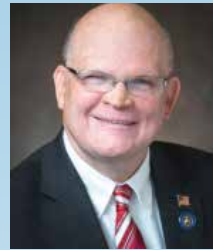
Rob Cowles
Re-elected unopposed



Alberta Darling
Re-elected 54%



Mary Felzkowski
Elected 66%



Dan Feyen
Re-elected 59%



Rob Stafsholt
Defeated Democrat
incumbent 62%



Duey Stroebel
Re-elected unopposed



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Janel Brandtjen
Re-elected unopposed



Robert Brooks
Re-elected unopposed



Barb Ditrach
Re-elected 58%



James Edming
Re-elected 70%



Rick Gundrum
Re-elected unopposed



Cody Horlacher
Re-elected 62%



Rob Hutton
Defeated 49%



Terry Katsma
Re-elected 59%



Mike Kuglitsch
Re-elected unopposed



Dan Knodl
Re-elected 51%



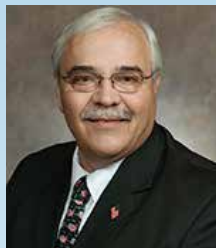
Scott Krug
Re-elected 60%



John Macco
Re-elected 52%



Gae Magnafici
Re-elected 64%



Jeff Mursau
Re-elected unopposed



Jon Plumer
Re-elected 59%



Tim Ramthun
Re-elected unopposed



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Re-elected 50%



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Travis Tranel
Re-elected 59%



Ron Tusler
Re-elected 59%



Chuck Wichgers
Re-elected 69%



Shannon Zimmerman
Re-elected 56%





BU PER



**SENATOR
HOWARD
MARKLEIN,**
CO-CHAIR,
WISCONSIN
JOINT
COMMITTEE
ON FINANCE

WISCONSIN'S NEXT BUDGET WILL BE "TRANSFORMATIONAL"

REPUBLICAN PERSPECTIVE

New Senate Majority Leader Devin LeMahieu (R-Oostburg) has appointed me to serve as co-chair of the Legislature's budget-writing Joint Committee on Finance (JFC). I am filling very big shoes left behind by Sen. Alberta Darling (R-River Hills), who served as co-chair for 10 years. I sincerely appreciate Sen. Darling's friendship and mentorship as I transition to this new role.

As I look toward these new responsibilities, I am building on the experience of three budgets as a member of the JFC and my background as a CPA. I am always watching the state's revenue collections, reviewing forecasts and analyzing trends. I ask a lot of questions and talk to the nonpartisan Legislative Fiscal Bureau (LFB) on a regular basis. I am approaching the next budget with my eyes wide open.

When the state shut down in April 2020, I figured that we were in for a terrible budget shortfall. However, the

economy was extremely strong for the first nine months of the fiscal year (July 2019 to March 2020). The strength of our state's economy and very positive tax collections placed us in a terrific position when the COVID-19 storm hit us in March. Tax collections for April to June were softer than expected when we wrote the budget last year, but actual collections and additional projections tell us that we're doing better than expected.

While we are in a good position right now and have beat our estimates, we have not fully realized the fiscal impact of the COVID-19 statewide shutdown. We do not know how long the tail will be on our economic recovery.

Fortunately, the Wisconsin Legislature's reforms and prudence over the last 10 years has built up a "rainy day fund" of nearly \$761.8 million. State law requires us to transfer half of any excess of actual general fund tax collections over the amount estimated in the budget to the fund.

As we look toward the next state budget, it is clear

WHILE WE ARE IN A GOOD POSITION RIGHT NOW AND
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STATEWIDE SHUTDOWN.

BUDGET PERSPECTIVES



REP. EVAN GOYKE,
RANKING
ASSEMBLY
DEMOCRATIC
MEMBER,
JOINT
COMMITTEE
ON
FINANCE

WISCONSIN NEEDS NEW FUNDING MECHANISMS TO SOLVE BUDGET CHALLENGES

DEMOCRAT PERSPECTIVE

In 2020, the United States census was completed nationwide. In 2021, Wisconsin, like other states, will engage in a redistricting process. This is likely to be one the most important and contentious political debates of the 2021-2022 legislative session. With all eyes on political redistricting, so much of the other data collected through the census may go overlooked. And it shouldn't, as it reveals an unsettling truth about Wisconsin: we aren't growing fast enough. Warning signs have existed for years, but the 2020 census should be a call to action for Wisconsin policy makers. We must be innovative – or at the least action-oriented – to create local conditions that are ready and resourced to grow. Here are a few ideas to begin that conversation.

First, let's start with the data. From 1990-2000, Wisconsin grew by 9.6%. From 2000-2010, 6.0%. So far, from 2010-2019 we have only grown 2.4% – one

of the slowest growth decades in our history. The final 2020 numbers may paint a slightly different picture, but it's likely we will finish the decade with a growth rate below 3%. We are also aging. In 2000 our average age was 36; by 2010, it was 38.5; and estimated in 2019 at 39.1. We are below average in growth and above average in age. These trends are seen across the state and in Democratic and Republican districts alike. There should be, at the very least, bipartisan agreement that these trends, if not reversed, paint a difficult future for our workforce, housing demand, and the strain of lower growth in state revenues while demands on our healthcare and aging systems multiply.

When I begin to think of legislative solutions to these challenges, my mind begins locally. Each community is unique and has unique assets and challenges. Some have retained strong manufacturing while others rely on tourism. Some have a college or university while others are rooted in agriculture. A one-

WE MUST BE INNOVATIVE – OR AT THE LEAST
ACTION-ORIENTED – TO CREATE LOCAL
CONDITIONS THAT ARE READY AND
RESOURCED TO GROW.

REPUBLICAN PERSPECTIVE


that we may need to utilize the rainy day fund. This will require an act of the Legislature. It will also require us to set our priorities, analyze our state's needs and make tough decisions.

AS WE LOOK
TOWARD THE
NEXT STATE
BUDGET,
IT IS CLEAR
THAT WE MAY
NEED TO
UTILIZE THE
RAINY DAY
FUND.

The coming budget will be transformational. We have changed the way we do a lot of state business. A vast number of state offices are sitting empty right now as state employees work from home. Will they return? Do they need to return to an office building? We have waived some permitting, streamlined processes and made our government more nimble. We have created flexibility to allow ourselves to respond to the pandemic. We are doing things differently. We must ask ourselves how we can transform into the future.

While this may be a transformational budget, it may also be a stabilizing budget. We may need to hold steady on our spending and evaluate the true economic impact of the COVID-19 pandemic before we take on new spending or huge new

initiatives. This is truly a year unlike any other.

Tough decisions have put us in a good position, despite the challenges created by the COVID-19 pandemic. I am proud of our work to steward your tax dollars and I will continue to watch our states' checkbook. I take this job very seriously. 

DEMOCRATIC PERSPECTIVE

size-fits-all solution doesn't work. So the state should empower and resource local units of government to address and invest in their unique solutions. Here are a few ideas to do that.

Improve local government funding. Local governments rely on funding from three major sources: state aid, property tax, and locally collected revenues like fees and parking tickets (I donate my fair share each year). Wisconsin has long ranked as one of the highest property tax states in the country. One reason is frozen or declining state aid. That formula, called "Shared Revenue," was frozen in place in 2001. Local governments cannot raise their revenues. Most states allow certain communities, especially their largest cities or metro areas, to levy a local sales tax. For example, conservative majority states like Missouri and Utah allow their largest metro areas to enact unique and specific forms of taxation. More liberal states, like Pennsylvania and Minnesota, have similarly empowered their largest communities to control specific forms of revenue collection. Regardless of the form, the goal is to diversify the revenue streams to avoid over reliance on a single source and to allow the communities to be properly resourced



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to meet their demands. In Wisconsin, our lack of diverse local government funding results in the continued over-reliance on the property tax and local fees and leaves too many municipalities with reoccurring budget challenges.

There are similar needs beyond the state's largest cities. Over the last several legislative sessions, Republican legislators have (quietly) tried to raise taxes in certain places through the Premier Resort Area Tax (PRAT). The PRAT is one of the only exceptions to the local option sales tax, but is limited in statute to a small number of communities. In 2019, Republicans tried to carve our exceptions to the statute to allow Sturgeon Bay, Minocqua, and Tomahawk to levy a local PRAT. A better solution would be to modernize the state's funding formula to recognize the changes that have occurred since 2001 and to ensure the formula is flexible and responsive as communities continue to change. A frozen funding formula cannot respond to changing needs and leaves local governments, large and small, with no other option but to increase property taxes and local fees.

The most commonly used local development tool is the Tax Incremental District (TID or TIF). TIDs are well known and many have been successful across the state. However, there are limitations with the state's current TID law and ways other states use TIDs to promote development. Each legislative session, TID law is the source of debate, which have created unique political coalitions. But these debates are largely around the edges of the TID issue and include individual exceptions for a given TID, changes to TID boundaries, or how the revenue can be used. These are important debates, but they are too narrowly focused.

Some states allow TIDs beyond a property tax base increment. For example Tennessee, Illinois, Utah and Washington allow a TID financed through increased sales and use taxes. Other states, like Missouri, allow financing through increased "economic activity," which could capture portions of income taxes as well as sales taxes. Moving away from exclusively property tax-based TIDs may help address some of the reoccurring problems the Legislature tries to deal with each session, as well as allow creative, new types of development and growth. Additionally, as outlined above, continued pressure on property tax revenues and deferring those revenues via a TID can heighten the challenges of funding local governments. Lastly, when based only on property, TIDs often result in one Wisconsin community competing against another Wisconsin community for new development. This parochial limitation prevents region-wide development strategies and collaboration to better leverage local resources.

The state government loves TIDs. We collect the increased income and sales tax created throughout the life of the TID, while bearing little of the additional costs of services that the local governments have extended to the new development. A new partnership between state and local governments to include new, creative TIDs would share the risks as well as potentially increase the size and scope of the development. These new development tools could be used for massive projects that

could benefit entire regions. Some states have used this model to develop new modes of transportation, something desperately needed in Wisconsin and a common feature in some of the country's fastest growing communities.

The debate over TIDs has recently extended into the debate about housing. There is no doubt that Wisconsin needs more housing, especially more affordable housing. A number of different legislative proposals have been introduced to address workforce housing. Both parties have joined for some success in this


area, specifically a bill that created a new, state level low income housing tax credit at 4% (2017 Act 176).

Other efforts have stalled in the Legislature. Some states have additional mechanisms for leveraging investment into housing. Illinois, for example, provides a 50% income tax credit for private investment to affordable housing projects, includ-

ing real property, and allows that credit to be transferred to the project itself. In 2019, this program generated over \$15 million and was used to create 1,180 units. Wisconsin does not have a similar program.

In addition to new sources of investment, greater local partnerships that allow increased leverage of state investment should be increased. Particularly good at lending to local entities, Wisconsin's 22 Community Development Financial Institutions (CDFIs) should be at the heart of our regrowth. CDFIs are community-level organizations that lend to economic and housing development projects. Like local government funding, one-size-fits-all state level policy doesn't meet the diverse needs of communities across the state. Using CDFIs as investment partners with increased state dollars increases the creativity of state investment to meet local needs and will help the investment reach all corners of the state.

My neighborhood in Milwaukee is a good example of how a new strategy in state economic development could be beneficial. We have several commercial corridors with high vacancy rates. These corridors need a series of smaller projects rather than one large project. We don't have a \$20 million dollar investment need in one space, however. We have twenty, one-million-dollar projects (many less than \$1 million). Traditionally the state has preferred larger projects (i.e. Foxconn) in place of multiple smaller projects. This makes some sense, as the state level government is not integrated into the community as well as local government or local lenders. This is where increased local partnerships are needed and Wisconsin's CDFIs have a great track record of success in these smaller, local projects that are already operating in every corner of the state.

Wisconsin needs to get growing. Under the political debate over redistricting, the Legislature should heed the warning signs within the census and engage in a meaningful debate over policies that can help us better compete. We need to attract and retain more people and the status quo isn't working. It's time we take action, use successful examples from around the country, and invest in ourselves. As the new decade begins, now is the time to put us on a track of growth. 

THE STATE SHOULD EMPOWER AND RESOURCE LOCAL UNITS OF GOVERNMENT TO ADDRESS AND INVEST IN THEIR UNIQUE SOLUTIONS.

WHAT THE CONSTRUCTION INDUSTRY SHOULD
EXPECT FROM BIDEN'S "BUILD BACK BETTER" PLAN

A DIFFERENT AGENDA

By Vance Walter – Manager of Legislative and Political Affairs, ABC National

On inauguration day, Jan. 20, 2021, President-elect Joe Biden will officially drop the second half of his hyphenated title to become the 46th President of the United States. While many questions will remain about the changes to come under the forthcoming administration, one thing will be clear: the 46th President is very likely to pursue a decidedly different agenda than the outgoing 45th President, Donald Trump, did in his four years in the oval office.

Whether President-elect Biden will achieve his slogan of "Build[ing] Back Better," however, will be determined by the policies his administration pursues and ultimately delivers upon. The chances of those policies succeeding, at least for the first two years, have been significantly boosted by the outcome of two Senate runoff elections in Georgia on Jan. 5, 2021 that delivered a Democratic Senate majority.

Democrats will now have a slim majority control of both chambers of the 117th Congress after retaining control of the U.S. House of Representatives, initially winning the lower chamber in 2018. As President-elect Biden prepares for his first day in office, Vice President-elect Kamala Harris will assume the role of president of the evenly divided, 50-50 Senate and will be able to cast tie-breaking votes, giving Democrats control of the upper chamber.

Although Democrats maintained functional control of the House of Representatives, the Republicans' unexpected gain of seats is seen as a critical victory for the GOP and a blow to Democrats, who had hoped to pad their majority and instead now face infighting among the progressive and moderate wings of the party. In all, the

Democratic House majority will begin the 117th Congress with nine more member of the House than Republicans – the smallest majority since 1944, assuming Republicans hold the net 12 seats gained in 2020. With an even slimmer governing majority to be actually seated in Washington due to several executive branch appointments from the House Democrats' ranks, a progressive House agenda will face significant challenges in the new year.

With the 2022 midterm elections already on the horizon, Democrats will face an emboldened Republican effort to take back the majority lost in 2018. And if past is prologue, Republicans will be favored to do just that, as the party occupying the White House typically loses seats in the midterms – a trend that will likely be spurred on now that the Senate will be controlled by Democrats. Since the end of World War II, the party holding the presidency has lost an average of 27 House seats in midterm elections and, more recently, 63 flipped in 2010 and 41 seats in 2018. Republicans will be facing a much more manageable delta in 2022, as they will need to net roughly a dozen seats to gain a majority.

On balance, the results of all of the elections held this cycle, while headlined by a Democratic trifecta at the federal level, show a strong message of continued division of the electorate and, therefore, a likely balance of power between both parties. Despite the now-federal trifecta, Democrats' victory was won with a relatively hollow legislative mandate, given the underperformance by Democrats down ballot in November. For example, following President Barack Obama's 2008 win at the presidential level, Democrats had a U.S. Senate majority of 58 – 41 (one vacancy) and a House majority of 256 – 178.



struction industry's backlog continues to shrink, as many new projects have been significantly affected by the pandemic. With most states considering construction to be essential, however, the industry is ready to help lead the way to preserve jobs thanks in part to the significant pre-existing backlog.

As Biden has promised to pursue various workplace safety issues related to COVID-19, such as establishing an OSHA temporary emergency standard for COVID-19, his agencies will likely reverse many of President Trump's deregulatory accomplishments.

Labor Law:

Biden's "Strengthening Worker Organizing, Collective Bargaining and Unions" agenda is filled with anti-free enterprise proposals that have been opposed by workers, small businesses, and large firms in the merit shop construction industry.

Biden's labor law agenda is centered around achieving the policy goals of the big-labor-lauded Protecting the Right to Organize (PRO) Act. This legislation, which passed the Democratic-controlled House in 2020, would strip away workers' free choice in union elections by instituting backdoor card check, codify an Obama-era joint-employer standard, limit independent contractors' rights by codifying California's "ABC" test, eliminate right-to-work protections across the country, and roll back many other products of the Trump administration's Department of Labor.

A Democratic-controlled Senate is poised to attempt to advance the PRO Act that was previously blocked by their Republican counterparts in the 116th Congress. Should the legislation ultimately be passed in Congress, the legislative filibuster would likely have to be removed in the U.S. Senate, which would require significant political capital to achieve.

Regardless of the PRO Act's fate, the Biden Administration will look to implement as many of the PRO Act's provisions as possible through the agency rule making process.

The Biden administration's stance on labor policy is also expected to significantly depart from their predecessors. How different of an approach though, will hinge on the leanings of Biden's Secretary of Labor nominee Boston Mayor Marty Walsh, who spent decades

With historically thin margins, the Democrats' legislative and regulatory priorities – such as further COVID-19 relief, the Protecting the Right to Organize Act, efforts to make tax-related changes, and an investment in America's crumbling infrastructure – will remain a challenge to achieve, with the partisan battle lines, highlighted below, already drawn.

COVID-19 Recovery:

Discussions at the end of the 116th Congress produced a targeted COVID-19 relief package roughly totaling \$900 billion centered around several merit shop construction industry-supported small business items, including additional funding for PPP loans, full deductibility of PPP loans, expansion of PPP loans to 501(c)6 organizations, and extension and expansion of the employee retention tax credit. The package also included additional appropriations for COVID-19 related priorities such as testing and vaccine distribution.

This package will provide the industry's small businesses with much-needed aid, as throughout the existence of the PPP, the construction industry received roughly 12% of loans, totaling more than \$65 million in relief – the third highest of any sector. Notably missing, however, are liability protections for businesses operating through the pandemic.

As the economy continues to recover in some areas, the con-

as a union member and leader, most recently as head of Boston's Building and Construction Trades Council. Walsh's hand will guide many of the merit shop construction industry-relevant rules and regulations while he serves in the Frances Perkins building.

Taxes:

As is the case with several other issues, the likelihood that the Biden Administration would be able to make significant tax-related changes greatly hinges on the possible repeal of the legislative filibuster, as a 50 vote Republican Senate minority is not inclined to support the proposed tax increases. If the agenda listed below is to pass into law, Democrats could also resort to the budget reconciliation process to get a tax increase of any kind over the finish line, as was the case for the Republican tax cuts in 2017

Among many more minor proposed changes to the tax code, President-elect Biden is expected to attempt the following tax changes:

- Return to a top individual tax rate of 39.6% at the \$400,000 bracket threshold compared to the highest current rate of 37% established starting in 2018 under the Tax Cuts and Jobs Act.
- Increase the C-Corporation income tax rate to 28% from a flat 21% under the Tax Cuts and Jobs Act, which reduced the Obama-era rates from a graduated high of 35%.
- For corporations with at least \$100 million in annual income, impose a new 15% alternative minimum tax on reported book income (versus the income reported on corporate tax returns).

United States infrastructure a D+ grade, which is the same mark it received in 2013, while also noting the need to spend \$4.5 trillion by 2025 in order to improve the state of the country's roads, bridges, dams, airports, schools, etc.

However, delivering on a substantial infrastructure investment has proved to be elusive for Washington lawmakers. With user-generated revenue streams taking historic losses, in addition to state and municipal budgets facing unprecedented demands, Congress has decided, at least for now, to punt on the issue. However, as was the case for President Trump, the incoming Biden Administration will seek to pass a long-term transformational infrastructure package.

The success of Biden's \$2 trillion "Build Back Better" infrastructure plan, which seeks to pair COVID-19 economic stimulus with an infrastructure investment to include investments in schools, water systems, transit, universal broadband and 5G, will depend on the political will of the administration and Congress. As we learned in 2017 when, President Trump and then-Speaker of the House Paul Ryan decided to prioritize much-needed tax reform, any hope for an infrastructure initiative died as the ensuing battle faded into election year-politics.

However, with COVID-19 relief still needed at the state and local level, a "shot clock" set on a one-year extension of highway funding to expire in September, and an expectedly eager Department of Transportation and Labor, infrastructure advocates remain cautiously optimistic.

The details of Biden's plan are still yet to be seen; however, Congressional Democrats showed their hand when they passed an infrastructure plan dubbed H.R. 2, the Moving Forward Act, that would have spent more than \$1.5 trillion on surface transportation, airport, school, housing, healthcare, energy, water and broadband infrastructure. However, the bill excluded many critical priorities for the construction industry while implementing numerous anti-merit shop provisions, such as government-mandated project labor agreements, inflationary Davis-Bacon prevailing wage requirements, and the Obama-era contractor blacklisting rule.

Touted as one of one of the Biden administration's priority issues, passing a comprehensive infrastructure package will have a short window for a bipartisan infrastructure compromise. However, with the emergence of a Democratic-controlled Senate, the appetite for direct federal spending will remain in vogue. Biden's pick to lead his infrastructure efforts, former South Bend mayor and presidential candidate, Pete Buttigieg, will likely face an uphill battle in unfamiliar waters in Washington. Buttigieg beat out other high-profile potential picks for the DOT post, including the Building Trades Unions preferred choice, former DOT Deputy Secretary John Porcari.

While it is unclear exactly where Buttigieg stands on merit shop contractor priorities that are germane to an infrastructure investment like Project Labor Agreements, ABC expects the Biden administration to expand PLA requirements. The President-elect has stated his support for the Obama executive order that mandates PLAs (that was not rescinded under President Trump like it was in the past Republican Administrations) on federal and federally-assisted projects, excluding nonunion bidders from the process. [ABC Wisconsin](#)

BIDEN'S BUSINESS TAX PLAN VS. CURRENT AND OLD LAW

BUSINESS	OLD LAW	TAX CUTS & JOB ACT	BIDEN'S TAX PLAN
CORPORATE TAX RATE	15%, 25% 34%, 35%	21%	28%
PASS-THROUGH TAX RATE	10%, 15% 25%, 28% 33%, 35% 39.6%	10%, 12% 22%, 24% 32%, 35%, 37%	10%, 12%, 22% 24%, 32%, 35%, 39.6%
CORPORATE AMT	20%	REPEALED	REINSTATED FOR CORPS WITH NET INCOME OVER \$100M (15% MIN. TAX)

Should the plan be signed into law, although it is unlikely all together, contractors will have to decide, with their financial advisers, how they will factor in the effects of the plan into their strategy.

Infrastructure:

The one item of political consensus in an era of partisanship is that an infrastructure investment is needed—and has been for some time. The American Society of Civil Engineers gives the existing



Q&A

QUESTIONS AND ANSWERS WITH

STEVE KLESSIG

2021 CHAIR OF THE BOARD OF DIRECTORS
FOR ASSOCIATED BUILDERS AND
CONTRACTORS

Steve is only the second ABC of Wisconsin member to become Chair of ABC National.

What drew you to become involved and “climb the ladder” from committee member to chapter chair to national chair?

“I was encouraged by my company, Keller, which was a founding member of ABC Wisconsin. I did not consider the opportunity to become involved as climbing the ladder, but instead making a difference. I raised my hand a lot, and ABC gave me the opportunity to gain experience. That experience went from the chapter legislative committee to chapter board to chapter chair, and then on to the national board, national chair-elect and now national chair. I am honored to serve my association and this industry through leadership.”

What were some of the Wisconsin chapter’s accomplishments you were most proud of, and what do you regret leaving undone?

“I am most proud of the time spent on the governmental affairs committee. I have a passion for legislative advocacy, and that is where my accomplishments came from. Specifically, I have always had a passion for the building code because it affects the membership of ABC, both locally and nationally.”

If there was one thing you would want everyone in the United States to know about ABC, what would it be?

“We have a big tent and cherish our members. We stand for free enterprise and the free execution of business on a level playing field in the construction industry.”

What are your goals for 2021?

“ABC is a vast association with 21,000 company members and 69 chapters. So, the goals are not my goals, but the goals for the greater good. These yearly goals are established through a strategic planning process we execute in the spring. These goals revolve around safety, workforce development, political advocacy and membership growth.

“My personal goals are not only to lead the association in achieving those goals, but also grow our membership and help

our members recover stronger from one of the most devastating economic and health crises our country has ever faced.”

What do you think the major challenges facing merit contractors over the next couple of years will be?

“The Wisconsin construction industry fared well because of the things ABC Wisconsin has done, but that’s not the case across the country. I must look past my own state and own chapter to help those chapters across the country devastated by COVID. Additionally, certain national political tides move against our merit-based philosophy. We must move against that tide, and that movement effectively takes place at the local, grassroots level.”

What kind of people do you find most difficult to work with, and why?

“People that do not chose different ways to innovate.”

At the end of your term as national chair, how will you measure success?

“I do not think I will measure success, but instead it will be measured by my peers and accomplishing my goals. The yardstick is already there.”


What did you learn from being a long-time local official that will help you be an effective national chair?

“I was on the Brillion school board for 30 years and on the Wisconsin Association of School Boards state board of directors for 12 years. During that time, I learned you must collaborate and encourage those in your sphere of influence to listen to you.”

Besides your love of sushi, what is one thing that may surprise people about you?

“I’m a farm boy, and I married a farm girl.”

Who inspires you, and why?

“The answer is in this question is ‘why.’ Because of Simon Sinek’s TED Talk called “Start with Why,” I am inspired because that is the way great leaders inspire action.” 

LEGISLATIVE REFORM

UNCERTAINTY LOOMS FOR CONTRACTORS AFTER WITHDRAWAL OF SPRINKLER OPINION

By Jake Curtis – Attorney at von Briesen & Roper, s.c.

Ask any project manager or general contractor on a major construction project in Wisconsin how much time is spent navigating the bureaucratic maze to obtain necessary permits, complying with permit conditions, and rectifying any alleged failure to meet permit conditions, and the answers may be both surprising and disappointing. The myriad of

requirements imposed by state agencies add to the regulatory burden, including environmental regulations by the Department of Natural Resources (DNR) and the Department of Agriculture, Trade and Consumer Protection (DATCP), workforce requirements by the Department of Workforce Development (DWD), and professional licensure expectations imposed by the Department of Safety and Professional Services (DSPS).

To be clear, agencies are rightly tasked with establishing building codes, permit conditions, and construction standards for purposes of maintaining public safety. But for far too long, Wisconsin's regulatory regime lacked clarity and specificity. And if there is one thing the regulated community demands, it is certainty. In 2011, Gov. Scott Walker and the Wisconsin Legislature began implementing long-needed reforms to Wisconsin's administrative law framework.

The process was long and tedious, often overshadowed by sexier reforms like Act 10. But the reforms were no less revolutionary, at least within the context of Wisconsin's "proud" heritage of progressive governance.

Issued amid the many reforms was an opinion by then-Attorney General Brad Schimel. It made clear a state agency could not promulgate a standard that imposed a greater restriction than that allowed by statute. However, this past fall, the Wisconsin Department of Justice under Attorney General Josh Kaul (DOJ) issued a new opinion that could represent the first substantive attempt to undermine the last decade's administrative reforms. What follows is a brief overview of the legislative and legal reforms that reoriented the administrative state and an analysis as to how the recent DOJ opinion could unwind it all.



FOR FAR TOO LONG,
WISCONSIN'S
REGULATORY
REGIME LACKED
CLARITY
AND SPECIFICITY.



THE ADMINISTRATIVE LAW REVOLUTION

2011 Act 21. In 2011, much attention was given to Act 10, Gov. Walker's signature reform to public-sector collective bargaining. But much of what we now consider the standard rule-making process in Wisconsin was first set out in 2011 Act 21. At its core, Act 21 provides that no agency may implement or enforce any standard, requirement, or threshold (including as a term or condition of any license it issues) unless such action is explicitly required or permitted by statute or rule. Gone are the days of implied or perceived authority. Additionally, for each proposed rule, the act required agencies to submit a "statement of scope" to the governor for review and prepare an economic-impact analysis relating to specific businesses, business sectors, public-utility ratepayers, local governmental units, and the state's economy as a whole.

2017 Acts 39, 57, and 108. Act 39 addressed concerns over the lengthy periods of time that agencies were given to promulgate rules. An agency must now submit a proposed rule to the legislature before a scope statement expires, resulting in a 30-month deadline. This requirement adds certainty to the process for the regulated community.

Act 57 is the state version of the federal REINS Act. Wisconsin agencies must now determine whether a proposed rule will impose \$10 million or more in implementation and compliance costs over a two-year period. If there is such a finding, an agency may not promulgate the rule absent authorizing legislation or germane modification to the proposed rule to reduce the costs below the \$10 million threshold. In addition, the Department of Administration must review an agency's scope statement prior to presentation to the governor to ensure an agency has explicit authority to promulgate a given rule (note the connection to Act 21).

Act 108 created an expedited process for the repeal of certain "unauthorized rules." (If the law that authorized a rule's promulgation has since been repealed or amended, the rule is considered "unauthorized" — again, note the connection to Act 21.) Any such rules, in addition to rules that are obsolete, duplicative, superseded, or economically burdensome, must be included in a biennial report to the legislature's Joint Committee for the Review of Administrative Rules. The report must also describe any actions taken by an agency, if any, to address each of the problematic rules listed.

Tetra Tech. In June 2018, the Wisconsin Supreme Court issued *Tetra Tech v. Wisconsin Department of Revenue*. In an opinion authored by then-Justice Daniel Kelly, the court decided to end its "practice of deferring to administrative agencies' conclusions of law."

In dispatching with its previous three-tiered deference structure — in which agencies' conclusions could be given "great weight," "due weight," or "no weight," depending on various factors — the court

explained that "allowing an administrative agency to authoritatively interpret the law raises the possibility that our deference doctrine has allowed some part of the state's judicial power to take up residence in the executive branch of government." The Court explained that it must "be assiduous in patrolling the borders between the branches," adding: "This is not just a practical matter of efficient and effective government. We maintain this separation because it provides structural protection against depredations on our liberties."

The Court summarized its findings on the exclusive nature of judicial power emphatically: "We conclude that only the judiciary may authoritatively interpret and apply the law in cases before our courts. The executive may not intrude on this duty, and the judiciary may not cede it. If our deference doctrine allows either, we must reject it."

2018 Act 369. If all this weren't enough, in passing Senate Bill 884 in December 2018, the legislature advanced one final series of reforms. First, Act 369 essentially adopted the Tetra Tech analysis, prohibiting courts from affording deference to an agency's interpretation of law and agencies from seeking deference based on their interpretation of any law in any proceeding.

It also addressed "sue and settle" tactics, whereby a party — often an activist group — will sue a sympathetic agency, and the agency in turn will settle the lawsuit by changing its regulations. This avoids the usual rule-making process because the agency can claim the lawsuit forced it to make the adjustments. Under the Act, by contrast, if an action is for injunctive relief or a proposed consent decree is included, the Joint Finance Committee has the opportunity to "passively review" the agreement: The committee can simply do nothing for 14 days and let the settlement proceed; or, it can schedule a meeting to review the agreement, after which point the attorney general can proceed only with the approval of the committee.

Act 369 further required that all agency guidance documents must be posted online for the public to view, and that a public hearing must be held to receive public comment. While certain agencies under Gov. Walker had already adopted this requirement for guidance, it was important to demand it administration-wide. Finally, it allowed the Joint Committee for the Review of Administrative Rules to suspend a rule multiple times. Previously, if JCRAR acted to suspend a rule by introducing bills to repeal it in each house of the legislature, it could not do so again if the effort failed.

SEIU v. Vos. Much of Act 369 (as well as Act 370 relating to the legislature's review of settlement agreements) was addressed this summer by the Wisconsin Supreme Court in *SEIU v. Vos*, 2020 WI 67. The court unanimously upheld the provision that allows a legislative committee to suspend rules issued by executive branch agencies multiple times; however, it did provide a warning — "an endless suspension of rules" without enacting a legislative bill "could not

stand.” With respect to the codification of Tetra Tech, Justice Brian Hagedorn, writing for the unanimous majority, opined “[g]iven our own decision that courts should not defer to the legal conclusions of an agency, a statute instructing agencies not to ask for such deference is facially constitutional.”

Unfortunately, the court splintered when it came to Act 369’s regulation of guidance documents. Writing for the four-member majority on this issue, Justice Kelly concluded the Act’s prohibition “from communicating with the public through the issuance of guidance documents without first going through a preclearance process and including legislatively-mandated content” was problematic because “they insert the legislature as a gatekeeper between the analytical predicate to the execution of the laws and the actual execution itself.” Justice Hagedorn dissented, arguing “[g]uidance documents regulate executive branch communications with the public – a permissible and longstanding area of legislative regulation.”

THE SPRINKLER OPINIONS

In addition to the above reforms, Attorney General Schimel issued a formal opinion in 2017 regarding the application of Act 21 to two questions posed by DSPS. This fall, the current attorney general issued a competing opinion which withdrew the Schimel opinion. It is necessary for the regulated community to understand the impact of both.

The Schimel “Sprinkler Opinion.” Under Wisconsin statute, DSPS had to require an automatic fire sprinkler system in “every multifamily dwelling that contains ... [m]ore than 20 dwelling units.”

DSPS had responded to this mandate by promulgating what became known as the Sprinkler Rule, which provided that an automatic sprinkler system must be installed in every multifamily dwelling that “contain[s] more than four dwelling units.” The conflict between the statute and administrative code was clear.

Noting the implied authority that Wisconsin courts had recognized prior to Act 21, including the ability to promulgate rules “fairly implied from the statutes under which it operates,” the opinion established that “Act 21 completely and fundamentally altered [the] balance, moving discretion away from agencies and to the Legislature.” Act 21 specifically added three requirements under Wis. Stat. § 227.11(2)(a).

First, agencies do not possess any inherent or implied authority to promulgate rules or enforce standards, requirements or thresholds and that agencies only possess authority “that is explicitly conferred on the agency by the legislature.” Second, statements of “legislative intent, purpose, findings, or policy” found in statutory or nonstatutory provisions do not confer or augment agency rulemaking authority. Similarly, agency rulemaking authority does not arise from statutory provisions “describing the agency’s general power or duties.” Finally, statutory provisions containing “a specific standard, requirement, or threshold” do not “confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive.”

After determining that the DSPS rule and the state statute both contained a requirement covering the same conduct, the opinion found the requirement in the DSPS Sprinkler Rule more “limit[ing] on the use or enjoyment of property or a facility” than the Wisconsin

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FOLLOWING TEN YEARS OF SIGNIFICANT REFORMS TO THE RULEMAKING PROCESS THE REGULATED COMMUNITY ONCE AGAIN FACES UNCERTAINTY.

Statute. The opinion provided a key example – “while a builder of a five-unit multifamily dwelling would not be required to install a sprinkler system under the Wisconsin Statutes’ sprinkler-system requirement ... that same builder would be required to install a sprinkler system under the Sprinkler Rule’s sprinkler-system requirement.” The opinion also concluded that while DSPS did possess the general power to “adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities,” the language was really “describing the agency’s general power and duties” and therefore did not confer rule-making authority.”

The Kaul “Sprinkler Opinion.” On Oct. 27, 2020, Attorney General Kaul issued a formal opinion which withdrew former Attorney General Schimel’s Sprinkler Opinion. The new opinion concluded that the plain language of Wis. Stat. § 227.11(2)(a)2. “does not alter explicit grants of rulemaking authority, regardless of whether the rulemaking provision in which the authority is granted could be characterized as broad or ‘general.’” In addition, Attorney General Kaul opined that the plain language of Wis. Stat. § 227.11(2)(a)3. does not “alter an agency’s ability to promulgate, enforce, or administer a different standard enacted pursuant to a second statutory source of rulemaking authority.” (emphasis added).

In addressing the question under sub-2., the Kaul Opinion pointed to other examples of broad rulemaking authority provided to DOT, DOA, and DHS. Specifically, with respect to DSPS and the Sprinkler Rule, the Kaul Opinion referenced DSPS’ mandate to “adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities.” The Kaul Opinion began by emphasizing “[w]hile an agency must stay within the boundaries that the Legislature has provided, this does not require that ‘the exact words used in an administrative rule appear in the statute.’”

In specifically addressing sub-2., the Kaul Opinion zeroed in on the last clause – “beyond the rule-making authority that is explicitly conferred on the agency by the legislature.” The Kaul Opinion found the second clause “makes clear that this provision does not alter existing, explicit authority.” Ultimately, this means that “if the Legislature explicitly confers rulemaking authority in a statute – such as by stating that an agency ‘shall adopt reasonable and proper rules and regulations’ ... section 227.11(2)(a)2. does not alter that authority.” The Kaul Opinion argued the Sprinkler Opinion’s “focus on whether a provision can be characterized as a ‘general powers or duties’ provision was mistaken” and instead it should have “interpreted all of the relevant statutes authorizing rulemaking.” (emphasis in original).

Addressing the heart of the Sprinkler Opinion and sub-3., the Kaul Opinion emphasized it simply codified a principle of administrative common law – “when the Legislature in one statute directs an agency to promulgate a specific standard, the agency may not rely on that statutory authority to promulgate a different standard.” Put another way, the Kaul Opinion found sub-3. does not alter explicit rulemaking found in other statutes. The Kaul Opinion provided the following illustration to cement its point: “where the Legislature

establishes a statutory floor to ensure minimum safety standards while separately directing an agency to promulgate rules on a broad range of topics encompassing the minimum standards, the existence of the minimum statutory standards will not alter the agency’s explicit statutory authority to promulgate rules in accordance with the broader grant of authority.”

CONCLUSION

Following 10 years of significant reforms to the rulemaking process and much needed legal interpretations such as Tetra Tech and the Schimel Sprinkler Opinion, the regulated community once again faces uncertainty. The Kaul Sprinkler Opinion held that sub-3. “provides that when one statute

dictates a specific standard, an agency may not rely on that standard to promulgate another, more restrictive standard.” (emphasis in original). The Kaul Sprinkler Opinion failed to recognize that this was the exact scenario the regulated community faced when interpreting the number of sprinklers required in multifamily buildings.

Under the Kaul framework, despite the clear statutory language, because DSPS could point to broader, and in many cases, more general rulemaking authority, it would have been allowed to impose the more restrictive standard requiring sprinklers in multifamily dwellings with more than four dwelling units. How a member of the regulated community should have interpreted the three competing interests – sprinklers required for multifamily dwellings that contain more than 20 dwelling units (the statute), multifamily dwellings that contain more than four dwelling units (the DSPS rule), and the broader DSPS rule allowing the adoption of “reasonable and proper rules” (the broad DSPS authority) – is left completely unanswered by the Kaul Sprinkler Opinion. [Wisconsin](#)

Jake Curtis is an attorney at von Briesen & Roper, s.c. and previously served as Chief Legal Counsel at the Wisconsin Department of Natural Resources in the Walker Administration.

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