Wisconsin Association of Homes and Services for the Aging, Inc.

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To: Interested Legislators

From: John Sauer, Executive Director
Tom Ramsey, Director of Government Relations

Subject: The *Columbus Park* Supreme Court Decision and the Continued Property Tax Exemption for Low Income and Senior Housing Providers

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership organization of 193 not-for-profit long-term care providers. Our members own/operate 185 not-for-profit nursing homes, of which 47 are county-operated facilities, 72 community-based residential facilities (CBRF), 50 residential care apartment complexes (RCAC), 13 HUD Section 202 Supportive Housing for the Elderly apartment complexes, and 98 apartment complexes for independent seniors. WAHSA members offer over 300 community service programs ranging from home care, hospice, Alzheimer's support and adult and child daycare to Meals on Wheels. Our members employ over 38,000 dedicated caregiving and support staff.

In a November 19, 2003 decision, the Wisconsin Supreme Court ruled that not-for-profit housing providers who lease their property must pay property taxes on that leased property unless the lessees themselves are tax-exempt. The result of that decision is virtually all property leased by low income housing providers and an uncertain amount of property leased by providers of elderly services will be placed on the tax rolls for taxable year 2004 and possibly for taxable years 2002 and 2003 as well.

WAHSA members respectfully request your support for passage of legislation this session that would not allow this to happen. That legislation could simply grandfather those residential property owners who would have qualified for a property tax exemption under s.70.11(4), Wis. Stats., as of January 1, 2003, the tax year of the 11/19/03 *Columbus Park* decision. If further discussion is warranted on whether certain low income or senior housing providers should pay property taxes, we would suggest this legislation include the creation of a Legislative Council special committee to give this issue the thorough scrutiny it deserves.

Background

Columbus Park Housing Corporation is a nonstock, nonprofit corporation in Kenosha which acquires blighted property, rehabilitates the property and leases the property to qualified low income families under Section 8 of the federal Fair Housing Act. Columbus Park sought an exemption from property

taxation from the city of Kenosha, arguing such an exemption was justified because Columbus Park was a benevolent association under s.70.11(4), Wis. Stats., whose benevolent purpose was to provide housing to low income individuals.

The City of Kenosha conceded Columbus Park's non-profit status and benevolent purpose but denied the requested property tax exemption on the grounds Columbus Park failed to meet the "lessee identity condition" under s.70.11, Wis. Stats. That provision reads in part:

> "Leasing a part of the property described in this section does not render it taxable if the lessor uses all of the leasehold income for maintenance of the leased property, construction debt retirement of the leased property or both and **if the lessee would be exempt from taxation under this chapter if it owned the property."** (Emphasis added).

Columbus Park challenged the city of Kenosha's denial of its property tax exemption and that challenge was upheld at both the circuit court and Court of Appeals levels. However, in *Columbus Park Housing Corporation v. City of Kenosha*, the Wisconsin Supreme Court reversed the decision of the Court of Appeals on a 6-1 vote, with Chief Justice Shirley Abrahamson dissenting. The Court ruled Columbus Park could not satisfy the statutory "lessee identity condition" because its tenants would not be exempt from property taxation if they owned the property and therefore did not qualify for exemption from property taxation.

Impact on Senior Housing

The Court also spoke to how it believed its ruling would apply to senior housing providers. The attorneys for Columbus Park argued that if the "lessee identity condition" is to be applied literally to all benevolent institutions under s.70.11(4), Wis. Stats., "severe consequences will result because a variety of property owned by benevolent organizations including, inter alia, nursing homes… would be denied tax exemptions." In stating they were not persuaded by this "slippery slope" argument, the Court referred to a 1995 Court of Appeals ruling (*M & I First National Bank v. Episcopal Homes Management* 195 Wis. 2d 485, 536 N.W. 2d 175 – Ct. App. 1995) and whether an agreement between residents of an assisted living center was a "residency agreement" or a "lease."

The Court wrote: "(T)he Court of Appeals noted that the <u>dominant and primary purpose</u> (emphasis added) of the residency agreement (of the assisted living center) was to pay rent for the use and occupation of property and not the provision of services to the elderly… (A)n agreement whereby residents pay an entrance fee and continue to make monthly payments in exchange for the use and occupation of property constitutes a lease… in the absence of evidence that the primary or dominant purpose of the agreement was the provision of services… Both nursing homes and continuing care facilities charge fees for the primary and dominant purpose of the provision of services. Residents in these facilities would not constitute 'lessees' for purposes of s.70.11, as there is no 'lease' in existence under the rationale of *M & I First National Bank*… Thus, our decision today will not undermine the tax-exempt status of these types of organizations."

The Problem

1) The *Columbus Park* decision may result in low income housing providers being required to pay property taxes which neither they nor their tenants can afford. If these providers are forced to

liquidate their properties (which Columbus Park already has begun), isolated to widespread homelessness may ensue. Those left homeless may well become the responsibility of the very municipalities collecting those property taxes.

2) If elderly housing providers are forced to pay and pass on new property taxes, some elderly residents will not be able to afford those new taxes. If the *Columbus Park* decision is not addressed by the Legislature in this session, those residents will have to be subsidized by the not-for-profit organization (if it is able) either for payment of property taxes and/or payment of future, unpaid services. In addition, if they are otherwise eligible, they will be permitted to file for income tax credits under the Homestead tax credit program.

3) Both circumstances cited above will become reality if the Legislature fails to address the *Columbus Park* decision in this session of the Legislature.

4) The 2003-05 Legislature concludes its activities in 9 session days, on March 11, 2004.

5) Obviously, then, immediate legislative action is needed to undo the unforeseen consequences of *Columbus Park.*

Legislative Solution

1) Amend the "lessee identity condition" language in the preamble to s.70.11, Wis. Stats., which was the issue addressed by the Supreme Court in the *Columbus Park* case. The simplest way is to grandfather those residential property owners who would have qualified for a property tax exemption under s.70.11(4) as of January 1, 2003. This method is along the lines of what is being suggested by Kenosha Mayor John Antaramian, whose city was the defendant in the *Columbus Park* case.

2) The issue that has arisen in the aftermath of this Supreme Court decision is not whether low income housing providers should pay property taxes but whether some WAHSA members who provide elderly housing services should pay property taxes. The real issue is whether an income test should be used to determine eligibility for a property tax exemption. WAHSA members have debated this issue for 14 years without a legislative solution. A 14-year debate cannot be solved in 9 legislative days; a debate simply doesn't continue for 14 years if the issue isn't complex and contentious. Rather, a Legislative Council special committee, with a reporting deadline as soon as those seeking change might want it, should be created. Such a forum would give all sides of this issue adequate time and opportunity to present their arguments. More importantly, it will give an issue of this complexity the scrutiny it warrants and needs for informed decision-making.

3) There has been some discussion about imposing a sunset date on any "pre-*Columbus Park*" fix. WAHSA members oppose the imposition of a sunset date. A sunset provision would needlessly force low income housing providers, including WHEDA, back to the bargaining table while not forcing to the bargaining table those who are comfortable with what we believe are the unintended consequences of the *Columbus Park* decision. The directive to the Legislative Council special committee can be narrow enough in scope to eliminate low income housing providers from future discussions if they are not the intended subjects of further scrutiny. In addition, the reporting deadline of a Legislative Council special committee is a de facto sunset

provision but it does not require a legislative solution, or a particular legislative solution, if the special committee decides one is not warranted. Finally, both a sunset clause and the prospect of a Legislative Council special committee likely will result in future legislation. Commercial lenders will be concerned with the uncertainty of whether currently exempt entities will be paying property taxes in the future. Until that question is decided permanently, new projects or project expansions either will be placed on hold by lenders or will be treated as if property taxes will be required to be paid. Neither solution benefits not-for-profit housing providers or their customers.

The Argument Against the Inclusion of an Income Test in Any "Pre-*Columbus Park*" Legislation

1) WAHSA members oppose the inclusion of an income test in any "pre-*Columbus Park*" legislation, as do the 53 organizations representing low income and elderly housing providers which comprise the Nonprofit Affordable Housing Coalition.

2) An income test proposal really is only a subset of a much broader issue that has been in and out of legislative debate for 14 years. At issue is the benevolency standard under s.70.11(4), Wis. Stats. Proponents of the current benevolency standard for property tax exemptions argue that it is patterned after the community benefit standard used by the IRS to grant federal income tax exemptions. Opponents argue the "benevolency" standard should be scrapped for a "charitability" standard, which would base a property tax exemption on care/services provided to the indigent. The imposition of an income test in *Columbus Park* legislation would be a de facto charitability standard but would circumvent the current benevolency standard under s.70.11(4), Wis. Stats.

3) **Since 1990, four bills have been introduced to amend the benevolency standard under s.70.11(4) and replace it with some form of a charitability standard. The 1991, 1993, 1995 and 1997 state budget bills also contained similar provisions. To date, no such bill has passed and no state budget has included a charitability standard for property tax exemptions. Indeed, since 1990, no standing committee of the Legislature has held a public hearing on the benevolency v. charitability issue.**

4) The Legislature added a provision to the 1997 budget bill to create a 10-person Benevolent Retirement Home for the Aged Task Force to "investigate the property tax exemption for benevolent retirement homes and all problems that are associated with it." The Governor selected four representatives to the Task Force; the Speaker and Senate Majority Leader selected two representatives; and each minority leader selected one representative. Five of the ten Task Force members represented not-for-profit benevolent retirement homes; the other five were either representatives of municipalities, assessors or for-profit long-term care providers.

5) Not surprisingly, the Task Force deadlocked on a 5-5 vote and issued two minority reports. The two major differences surrounded the definition of a benevolent retirement home for the aged and whether a community benefit standard or a charitability standard/income test should be used to determine eligibility for a property tax exemption.

6) The not-for-profit representatives argued a benevolent retirement home for the aged was an independent living facility for seniors, where only non-medical services were provided.

Nursing homes, community-based residential facilities (CBRF), residential care apartment complexes (RCAC) and continuing care retirement communities (CCRC) with permits under Chapter 647, Wis. Stats., would be exempted from the benevolent retirement home definition. The tax-exempt status of a benevolent retirement home, they argued, should be based on the community benefit standard used by the IRS to grant s.501(c)(3) tax exemptions.

7) The five for profit/governmental representatives argued the definition of a benevolent retirement home should include independent living facilities, CBRFs, RCACs and CCRCs; only nursing homes would be exempted. The property tax exemption for a benevolent retirement home, according to these five, should be based on a charitability standard which would be met through an income test.

8) **The two minority reports of the Benevolent Retirement Homes for the Aged Task Force were issued in August 2000. Since that time, not one bill has even been introduced on the subject. If this was a problem so desperately in need of a solution, why hasn't a bill been introduced?**

9) Most WAHSA members operate in a campus setting which may include a nursing home, a CBRF, a RCAC and/or an independent living facility (ILF) for seniors. In the case of these campuses, or benevolent retirement homes for the aged, a community benefit is provided in a number of ways: Residents of the ILF may be charged rents which enable the facility to subsidize the services of other ILF residents or to fund the underfunding of Medicaid residents in the campus nursing home. Some organizations provide substantial cash gifts to needy organizations in their communities.

10) A number of organizations offer their residents a "continuing care contract," which requires an entrance fee and a monthly service charge to pay for all their future long-term care needs. The purpose of this type of long-term care insurance is to plan for future needs through the self-payment of future care, thus minimizing the future impact on the Medicaid program. The difference between an 85-year old widow living in her own home and paying property taxes and an 85-year old widow living in tax exempt housing is the former is much more likely to need Medicaid funding for future long-term care services, a reason we believe justifies the tax exemption.

11) IRS Revenue Ruling 72-124 requires all "homes for the aged" wishing to be exempt from federal income taxation to retain any resident admitted to that home even if they no longer can pay for the services they are receiving. All WAHSA benevolent retirement homes are tax exempt under s.501(c)(3) of the IRS Code and must adhere to this provision.

12) The actual impact to low income and elderly housing providers who will have to pay property taxes as a result of the *Columbus Park* decision is unknown because assessments are not available. However, WHEDA estimates 123 of their developments, totaling 5,400 units, would be impacted by the court decision, resulting in a need for $3 million in immediate cash, or $9 million if assessors go back to taxable years 2002 and 2003.

13) **Another unknown is the potential GPR impact because of increased utilization of the Homestead tax credit. Residents of tax-exempt housing are not eligible for the Homestead tax credit program. If an income test were imposed and those tax-exempt entities lost**

their tax-exempt status, any of their residents who otherwise would be eligible for the Homestead Program would then become eligible.

14) Yet another unknown is how lending institutions will view the not-for-profit senior housing market if property tax exemptions are to be denied. Many such facilities were financed on the basis of their tax-exempt status. Some may face bankruptcy or default on their mortgages if suddenly placed on the tax rolls. What that will mean to today's senior housing residents and senior housing residents of the future is unknown.

15) We assume the administration of such an income test would be a nightmare but we can't be certain of that because we have not heard who will administer it or how. Will it be the Department of Revenue or will it be WHEDA, crossing over into a senior services sector where it has very limited current exposure? The vast majority of WAHSA members have no relationship at all with WHEDA, just like CBRFs and RCACs are foreign to WHEDA.

16) Whoever would administer an income test in an independent living facility for seniors will have their hands full because the vast majority of facilities do not collect updated income information. For most, the income information available is from the time of a resident's admission, which could be several years outdated. And the thought of a representative of the local government coming to a facility and demanding a 90-year old widow to turn over income information borders on the laughable.

17) An income test will give birth to rampant acts of income divestment. Pick any income level and astute tax attorneys or estate planners will find a loophole to circumvent the intent of the income test.

18) To date, income tests have been suggested which would establish eligibility for a property tax exemption for entities whose residents were at income levels of 30%, 50%, 60%, 80% and 140% of their county's median income. Such uncertainty makes it impossible for your constituents to tell you whether they could comply with an income test or what they must do to come into compliance. Worse yet, how does an elderly resident, who entered this facility based on the belief it is and would remain tax-exempt, deal with this uncertainty? Is this how we wish to treat our elderly citizens?

19) Based on the "primary and dominant purpose" doctrine invoked by the Supreme Court in the *Columbus Park* case, WAHSA believes virtually of its members meet that criteria (namely, that the provision of services to the elderly is the primary and dominant purpose of a nursing home, a CBRF, a RCAC, a CCRC and an independent living facility for seniors) and should remain exempt from property taxation. WAHSA argued that position in a December 16, 2003 memo to James Gultry, the administrator of the Department of Revenue (DOR) Division of State and Local Finance. A DOR response has yet to be received.

20) Despite the fact the DOR has not clarified how *Columbus Park* will impact WAHSA long-term care providers, assessors in (at last count) 14 cities have sent out *Columbus Park*-related property tax exemption review notices to not-for-profit organizations which operate nursing homes, CBRFs, RCACs, CCRCs, independent living facilities and, in one instance, a residential hospice. Why a hospice would receive a notice based on a court case involving the leasing of property is hard to fathom.

21) The determination of whether the primary and dominant purpose of a WAHSA member is housing or the provision of services to the elderly will be made by the local assessor. If a WAHSA member objects to the assessor's determination, they can challenge that determination, but only after they pay the property tax. With today's property tax climate, that adds little comfort to our not-for-profit housing providers.

22) If legislation which includes an income test as part of a *Columbus Park* fix is introduced this session, it is quite possible that no legislative solution to the *Columbus Park* decision will be passed. Under this scenario, everyone loses. We hope it doesn't come to that. We hope a bill which returns s.70.11, Wis. Stats., to its commonly accepted interpretation prior to the *Columbus Park* decision can be adopted this session of the Legislature and signed into law by the Governor.

Thank you for this opportunity to comment on an issue of potentially wide-ranging impact.