

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

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Email Correspondence

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To: James Gultry, Department of Revenue

From: John Sauer, WAHSA

Subject: Clarification of the Columbus Park Decision

Thank you for taking the time to speak with me last week about the *Columbus Park* decision. As we discussed, the Supreme Court's ruling has generated a number of questions with respect to the provision of health, housing and services to the elderly and persons with disabilities.

First, a bit of background and perspective. In the *Columbus Park* decision, the organization argued that if the Supreme Court were to interpret s. 70.11 (4), Wis. Stats., literally, "severe consequences will result because a variety of property owned by benevolent organizations including, inter alia, nursing homes....would be denied tax exemptions." They pointed to a 1995 Court of Appeals decision (*M&I First National Bank v. Episcopal Homes Management*) in which the "residency agreement" of an assisted living center for the elderly was ruled a leasing arrangement by the Court of Appeals, despite language in the agreement which said it was not a lease. Columbus Park argued that if the residents of the assisted living center in the *M&I* decision were ruled to be lessees, and those lessees would not themselves be tax exempt if they owned the assisted living center, the assisted living center would not have been exempt from property taxation under a literal interpretation of the preamble to s. 70.11, Wis. Stats. They also argued its application to benevolent associations such as nursing homes could jeopardize their tax exempt status.

The Supreme Court literally interpreted the preamble to 70.11, Wis. Stats. but distinguished the holding in *M&I First National Bank*. The Court noted that in the *M&I* case "the dominant and primary purpose of the residency agreement was to pay rent for the use and occupation of property and not the provision of services for the elderly." **Thus, the Court stated that "the thrust of the Court of Appeals opinion in *M&I First National Bank*, for our purposes, is that an 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."** (Emphasis added).

The Court concluded: "We are not persuaded by Columbus Park's slippery slope argument... **"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 the M&I First National Bank... . **Thus, our decision today will not undermine the tax-exempt status of these types of organizations.**" (Emphasis added).

Clarifying Questions:

Under the Court's decision, therefore, the test for exemption from property taxes for benevolent retirement homes for the aged is not only their benevolency but also whether their residency agreement is considered a lease. The Court also held that nursing homes and continuing care facilities charge fees for the "primary and dominant" purpose of the provision of services. Because the primary purpose of a continuing care residency agreement is the provision of services for the elderly, those facilities should continue to be exempt.

We believe several issues are in need of clarification and respectfully request that your Department provide guidance on the following questions:

1. The *Columbus Park* decision clearly states that not-for-profit nursing homes and continuing care facilities will continue to be exempt from property taxes (§ 45). Chapter 647, Wis. Stats., defines continuing care contracts and restricts their use to providers that are granted a permit by the Office of the Commissioner of Insurance. Providers with a Chapter 647 permit are typically referred to as Continuing Care Retirement Communities, or CCRCs. Approximately twenty-two Wisconsin providers have been granted a Chapter 647 CCRC permit.

Section 647.01(2), Wis. Stats., defines a "continuing care contract" to mean a contract entered into on or after January 1, 1985, to provide nursing services, medical services or personal care services, in addition to maintenance services, for the duration of a person's life or for a term in excess of one year, conditioned upon any of the following payments:

- (a) An entrance fee in excess of \$10,000.
- (b) Providing for the transfer of at least \$10,000 if the amount is expressed in dollars or 50% of the person's estate if the amount is expressed as a percentage of the person's estate to the service provider upon the person's death.

Question:

We assume that not-for-profit nursing homes and CCRC providers with a Chapter 647 permit will remain exempt from property taxes. Is this also DOR's opinion?

2. In addition to the Chapter 647 CCRCs referenced above, there are numerous continuing care campuses throughout the State which mirror the Chapter 647 CCRCs in their settings and service packages, except they don't require an entrance fee in excess of \$10,000. For lack of a better term, we will refer to these entities as non-Chapter 647 continuing care campuses. Similar to Chapter 647 CCRCs, these facilities also offer

senior housing, assisted living (CBRF/RCAC) and/or skilled nursing care. This type of facility (as well as CCRCs) offers what is referred to as a “continuum of care:” As an individual’s needs increase, they are given priority status on that facility to move from the senior housing, where their needs are more supportive in nature, to assisted living and finally to skilled nursing care. The primary reason for living within a continuing care facility is it enables individuals to access the care and services they need at the time and place they need them. Both the Supreme Court in *Columbus Park* and the Court of Appeals in *M&I First National Bank* referred to “continuing care facilities,” not solely those issued permits under Chapter 647, Wis. Stats., as facilities which charge fees for the primary and dominant purpose of the provision of services.

Question:

We assume that not-for-profit non-Chapter 647 continuing care facilities, which, like Chapter 647 CCRCs, offer senior housing, assisted living and skilled nursing on a campus setting, will remain exempt from property taxes. Is this also DOR’s opinion?

3. A “community based residential facility,” or CBRF, is defined under s.50.01(1g), Wis. Stats., to mean “a place where 5 or more adults who are not related to the operator or administrator and who do not require care above intermediate level nursing care reside and receive care, treatment or services that are above the level of room and board, but that include no more than three hours of nursing care per week per resident.” (Emphasis added).

A consumer brochure offered by the Department of Health and Family Services (DHFS), which licenses CBRFs, provides the following information (see: <http://dhfs.wisconsin.gov/bqaconsumer/AssistedLiving/CBRFchoose.htm>)

WHO SHOULD CONSIDER A CBRF?

The need for some type of lifestyle change is usually first identified when a person has difficulty in one or more of the following areas:

Self-care

Diminishing health, physical or mental abilities

Lack of community support services

Family not available to provide care or supervision

Limited financial resources

WHAT GROUPS OF PEOPLE ARE SERVED BY CBRFs?

Target groups served by CBRFs include, but are not limited to, the following:

The frail elderly and elderly persons with dementia

Persons with developmental disabilities

Persons with a controlled mental or emotional disorders

Persons recovering from chemical dependency

Corrections clients; i.e., persons on probation or parole
Persons with physical disabilities
Persons with traumatic brain injury
Persons with AIDS
Pregnant women needing counseling

It is desirable that a CBRF provide services to a specialized target group in order to meet the unique needs of such individuals. This information must be written in the program statement of each CBRF.

Clearly, the primary and dominant purpose of a CBRF is the provision of services.

Question:

We assume that not-for-profit CBRF providers licensed under Chapter 50, Wis. Stats., and regulated under HFS 83, Wis. Adm. Code, will remain exempt from property taxes. Is this also DOR's opinion?

4. A "residential care apartment complex", or RCAC, is defined under s.50.01(1d), Wis. Stats., to mean "a place where 5 or more adults reside that consists of independent apartments, each of which has an individual lockable entrance and exit, a kitchen, including a stove, and individual bathroom, sleeping and living areas, and that provides, to a person who resides in the place, not more than 28 hours per week of services that are supportive, personal and nursing services." (Emphasis added).

The allowance of "up to 28 hours per week of services that are supportive, personal and nursing services" authorizes persons living in a RCAC to receive services equivalent to care and services provided by skilled nursing homes. Some view RCACs as a nursing home replacement model. Once again, the primary and dominant purpose of a RCAC is the provision of services.

Question:

We assume that not-for-profit RCAC providers registered or certified under Chapter 50, Wis. Stats., and regulated under HFS 89, Wis. Adm. Code, will remain exempt from property taxes. Is this also DOR's opinion?

5. "Housing for older persons" is known by many other names including: homes for the aged, retirement homes for the aged, independent living facilities and senior apartments. HUD Section 202 Supportive Housing for the Elderly also could be listed under this category. These housing units for the elderly either can be freestanding or part of a continuing care campus. **They offer a service package that is supportive rather than medical in nature. That service package, along with the special focus on the needs of the elderly, distinguishes this type of housing from other rental housing units.**

Indeed, government has acknowledged this distinction between "housing for older persons" and regular rental housing in two key areas.

S.106.50(5m), Wis. Stats., exempts “housing for older persons” from the statutory prohibition against discrimination in housing based on age or family status. The language mirrors the same exemption provided for “housing for older persons” from the federal prohibition against discrimination in housing based on familial status contained in 42 U.S.C. 3601-19, the Fair Housing Amendments Act of 1988. The rationale for this exemption is provided in the “Background” section of 24 CFR 100, the proposed federal rule defining “significant facilities and services” for “housing for older persons:” The purpose of the prohibition against discrimination on the basis of familial status and the ‘housing for older persons’ exemption is to protect families with children from discrimination in housing without unfairly limiting housing choices for elderly persons.”

S.106.50(1m)(m), Wis. Stats., defines “housing for older persons” to mean any of the following:

1. Housing provided under any state or federal program that the secretary of the Department (of Workforce Development) determines is specifically designed and operated to assist elderly persons, as defined in the state or federal program.
2. Housing solely intended for, and solely occupied by, persons 62 years of age or older.
3. Housing primarily intended and primarily operated for occupancy by at least one person 55 years of age or older per dwelling unit. However, under s.106.50(5m), Wis. Stats., this provision can only be met if:

(a)1e. The owner of the housing maintains records containing written verification that all of the following factors apply to the housing:

(a)1e b. At least 80% of the dwelling units are occupied by at least one person 55 years of age or older.

(a)1e c. Policies are published and procedures are adhered to that demonstrate an intent by the owner or manager to provide housing for older persons aged 55 or older. The owner or manager may document compliance by maintaining records containing written verification of the ages of the occupancy of the housing.

This language mirrors the language found in the federal Fair Housing Amendments Act of 1988, except the federal law requires the secretary of the U.S. Department of Housing and Urban Development (HUD) to develop regulations for housing for persons 55 years of age or older which require **“the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons.”** (Emphasis added). Those requirements are found in 24 CFR Part 100 Subpart E.

In its overview of the rule, the Department (HUD) indicated a flexible standard for “significant facilities and services specifically designed to meet the physical or social

needs of older persons” is necessary **“in order to reflect regional variations in services and facilities that distinguish housing for older persons from other similar housing, as well as variations determined by geography of the site or by the differences in the nature or cost of the housing in question. To do otherwise could unnecessarily restrict housing opportunities for older persons by holding all housing to a single arbitrary standard that was not intended by the framers of the (Fair Housing Amendments) Act.”** (Emphasis added).

“The Department believes that the Fair Housing Act imposes a strict burden upon a person claiming the exemption to provide credible and objective evidence showing that the facilities and services offered by the housing provider were designed, constructed or adapted to meet the particularized needs of older persons. **In order to be considered as sufficient to qualify a housing facility for the exemption, the evidence must show that the housing in question is clearly distinguished from the bulk of other housing (except for other older persons’ housing) in a particular area, by the existence of those facilities and services which set the housing facility apart as housing intended for and operated as housing for older persons.** Absent such evidence, the familial status prohibitions of the Act will apply.” (Emphasis added).

Thus, both federal and state statute and federal code recognize a distinction between regular rental housing and “housing for older persons” based on the facilities and services they provide. Although the code does not specify the services which must be provided in “housing for older persons,” those services generally relate to the accessibility of the apartment units to elderly individuals with mobility, hearing and visual impairments. Items such as grab bars, ramps, emergency call lights or notification systems, and raised letters/Braille in elevators distinguish elderly housing from regular rental housing. Most housing for older persons also offers housekeeping aid, personal assistance, transportation services and limited health monitoring, services not available in regular rental housing. In addition, for “housing for older persons” which is part of a continuing care campus, the continuing care contract offers priority admission to the assisted living facility and/or the skilled nursing facility for individuals living in those housing units, and with it, the peace of mind in knowing that their future service needs have been prearranged.

The needs of individuals residing in “housing for older person” quite simply cannot be adequately met in regular rental housing. The dominant and primary purpose individuals reside in such housing, and not in regular rental housing, is to have those special needs of the elderly met. It’s the services provided to meet those needs which differentiates “housing for older persons” from regular rental housing and it’s the reason such property should remain tax exempt.

As noted earlier, “housing for older persons” is know by many names. To the Internal Revenue Service (IRS), it is know as “homes for the aged.” In 1972, the IRS issued Revenue Ruling 72-124, which exempts “homes for the aged” from federal taxation. The policy consideration which was addressed in this revenue ruling is that the aged, as a class, are highly susceptible to forms of distress (in addition to financial distress) because

of their advanced years. Examples of the special needs of the aged include suitable housing, physical and mental health care, civic, cultural and recreational activities, and an overall environment conducive to dignity and independence. Satisfaction of the needs may constitute “charitable purposes” even though direct charitable assistance may not be provided.

Under IRS Revenue Ruling 72-124, a “home for the aged” which otherwise qualifies for a federal tax exemption under s.501(c)(3) of the IRS Code will qualify for charitable status only if it operates to satisfy all three of these basic needs of aged persons: 1) **The need for suitable housing**, which would be met if an organization provides residential facilities that are specifically designed to meet the physical, emotional, recreational, social, religious and similar needs of aged persons. The IRS has cited the following as evidence of compliance: Grab-bars by bath tubs and toilets, wide entrance-exit doorways, ramps and elevators for wheelchair access, floors designed to prevent slips and falls, windows at eye level for residents confined to wheelchairs, emergency 24-hour alarm service and conveniently located electrical outlets and cabinets to avoid strenuous stretching or bending (similar to the types of services in “housing for older persons” which are required by the federal Fair Housing Amendments Act of 1988); 2) **The need for health care**, which would be met if an organization either directly provides or arranges for health care services designed to maintain the physical and mental well-being of its residents. IRS Revenue Ruling 72-124 does not require the presence of substantial on-site nursing or health care facilities. It is acceptable practice for a facility to provide an employee on 24-hour call to give temporary aid in emergencies, contact professional help and to ensure that the steps necessary to render care are implemented, as well as provide transportation for medical examination and follow-up treatment; and 3) **The need for financial security**, which would be met if an organization: A) Maintains a policy of financial assistance which would guarantee continued residence at the facility for any resident who is no longer able to pay for services provided; B) Provides services to its residents at the lowest feasible cost; and C) Maintains a payment structure set at a level that is within the financial reach of a significant segment of the community’s elderly persons.

The IRS continues to audit Wisconsin “homes for the aged” to determine their compliance with IRS Revenue Ruling 72-124. And, once again, it is the service requirements of these “homes for the aged” which distinguish them from regular rental housing. If an elderly individual simply wished to rent an apartment and occupy that space, with no concern for special services aimed at the elderly, they have no need for “housing for older persons” or “homes for the aged.” But if they want their elderly-specific needs addressed, they will seek the services provided in “homes for the aged” or “housing for older persons.” For it is those elderly-specific services which are the primary and dominant purpose of such housing and the key distinction between elderly housing and regular rental housing.

Question:

Based on the above state and federal laws and rulings, we assume that not-for-profit “homes for the aged” will remain exempt from property taxes. Is this also DOR’s opinion?

Thank you for the opportunity to present these important clarifying questions to you and for your interest in this matter. I would greatly appreciate an opportunity to meet with you to discuss these issues and will follow up with you later this week.