

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

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February 3, 2004

To: Interested Legislators

From: John Sauer, Executive Director

Subject: The *Columbus Park* Supreme Court Decision and the Imposition of a Property Tax on Low Income and Senior Housing Providers and Households

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership organization of not-for-profit long-term care providers. Our members own/operate 185 nursing homes, of which 47 are county-operated facilities, 72 community-based residential facilities (CBRF), 50 residential care apartment complexes (RCAC), 104 senior apartment complexes, 13 HUD Section 202 Housing for the Elderly complexes, and serve elderly and disabled persons through programs ranging from hospice, home care, children and adult day care to Meals on Wheels.

Background – *Columbus Park* Decision

In November 2003, the Wisconsin Supreme Court ruled in *Columbus Park Housing Corporation v. City of Kenosha* that the preamble to s.70.11, Wis. Stats., requires property which is leased by a tax-exempt housing provider to be taxed if the lessee would not be exempt from property taxation if it owned the property. **The result of this court decision is that without a legislative solution by the end of this 2003-05 legislative session, virtually all owners of low income housing can expect to have their previously exempt property placed on the tax rolls for tax year 2004 and possibly retroactive to tax years 2002 and 2003.**

We are aware that a number of organizations representing low income housing providers have been working with various legislators in seeking what in essence would be a pre-*Columbus Park* legislative solution to ensure the property they lease to low income lessees remains tax exempt. We fully support their efforts.

WAHSA members to date have not entered the fray because our reading of the *Columbus Park* decision leads us to believe it does not apply to not-for-profit nursing homes, CBRFs, RCACs, continuing care retirement communities (CCRC) or housing for older persons/benevolent retirement

homes for the aged. Our interpretation of the Court's decision is that a residency agreement between a resident and the above-listed long-term care providers is not a lease, and therefore is not subject to the "lessee identity" requirement in the preamble to s.70.11, Wis. Stats., since the "primary and dominant purpose" of that residency agreement is the provision of services to the elderly, rather than merely paying rent for the use and occupation of property. Specifically, the Court wrote in *Columbus Park*:

"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."

(For further clarification of our interpretation of the *Columbus Park* decision, please see the attached memo from WAHSA Executive Director John Sauer to James Gulty, Administrator of the Department of Revenue (DOR) Division of State and Local Finance, dated December 16, 2003).

However, since the DOR response to our memo seeking clarification of the *Columbus Park* decision as it relates to benevolent retirement homes offered no such clarification (please see the attached), since assessors in the cities of Milwaukee, Madison, Racine, Wauwatosa, Waukesha, West Bend and Eau Claire already have sent *Columbus Park*-related property tax exemption review notices to not-for-profit nursing homes, CBRFs and RCACs (and in one instance, a residential hospice – Please note the attached notice from the assessor of the City of Wauwatosa was dated 1/7/04, sixteen days before the DOR issued its memo offering guidance on this issue to all Wisconsin assessors), and since some organizations apparently have chosen to exploit the potentially devastating impact the *Columbus Park* decision could have on low income households by pursuing a decades-long desire to tax certain, unspecified benevolent retirement homes, WAHSA members have been forced to enter the fray.

We believe there are certain "givens" tied to this issue:

- 1) No one wants to see low income tenants currently living in tax exempt housing be forced to pay property taxes, especially since many, if not most, would be unable to do so.
- 2) If the Legislature fails to address the *Columbus Park* decision by the end of this legislative floorperiod, the tax exempt properties which currently house those low income individuals and families will be placed on the property tax rolls at least for tax year 2004 and possibly for tax years 2002 and 2003.
- 3) The 2003-05 legislative session ends in approximately 11 floorperiod days, on March 11, 2004.

Legislative Action Requested

With such a short timeframe and a consensus on the need to address *Columbus Park*'s potentially devastating impact on low income individuals and families (indeed, it's our understanding Columbus Park Housing Corporation of Kenosha, the plaintiff in this Supreme Court case and an organization which rehabilitates blighted housing to lease to low income renters, currently faces liquidation because of the Court's decision), **it would appear a legislative solution would be quite simple: Amend s.70.11, Wis. Stats., to return the statute to its commonly accepted interpretation prior to *Columbus Park*.** (Please see the attached draft legislation offered by the Non-Profit Affordable Housing Coalition, which WAHSA supports).

But nothing is simple when it comes to the desire of some municipalities to place on the property tax rolls certain, unspecified benevolent retirement homes for the aged. And that's really the issue before

us today: It's not whether low-income housing providers should pay property taxes; it's the continuation of a 14-year battle over whether a property tax exemption for benevolent retirement homes should be based on an income standard. **This simple legislative solution to rollback *Columbus Park* is being jeopardized by those more interested in taxing certain elderly housing providers than they are in protecting low income households from the unintended consequences of *Columbus Park*.**

Review of Legislative History

S.70.11(4), Wis. Stats., exempts from general property taxes "property owned and used exclusively by... religious, educational or benevolent associations, including benevolent nursing homes and retirement homes for the aged." The Legislature has grappled with the definition of and criteria for "benevolent association" and "benevolent retirement homes for the aged" for more than a decade, culminating with the creation under 1997 Act 27 of a 10-member Benevolent Retirement Home for the Aged Task Force. The facilitator to the Task Force was former State Representative Tom Ourada, who then was serving in his capacity as executive assistant to former DOR Secretary Cate Zeuske. (For an unofficial chronology of this issue, please see the attached memo from WAHSA Executive Director John Sauer to Tom Ourada, dated January 4, 2000. The attachments referred to in that memo are not attached but would be made available upon request). The Task Force was directed to "investigate the property tax exemption for benevolent retirement homes and all problems that are associated with it."

The Task Force met six times from December 1999 through June 2000. In his August 4, 2000 report to legislative leaders, Ourada wrote: "Members agreed that the current exemption language for benevolent retirement homes lacks clarity and so provides little guidance for establishing what is exempt or taxable to either assessors or those who build and manage retirement facilities. However, consensus could not be reached regarding the scope of the Task Force and the standard to use to exempt retirement homes. As a result, the work of the Task Force has culminated in two minority reports, each of which has the support of five members."

Simply stated, the five members of the Task Force representing not-for-profit long-term care providers argued a benevolent retirement home should be defined to include only unlicensed, non-health-related apartment complexes for the elderly (excluding nursing homes, CBRFs, RCACs and CCRCs) and its tax exempt status should be based on a community benefits standards similar to that imposed by the IRS under s.501(c)(3). (Please see the attached copy of the not-for-profit representatives' final report and a brief description of the IRS standard).

The five Task Force members representing municipalities and for-profit long-term care providers argued the definition of a benevolent retirement home should include all licensed and unlicensed long-term care settings, except nursing homes, and its tax exempt status should be based on an income test. (A copy of that 92-page document is not attached but is available upon request).

Since the issuance of those two conflicting reports in August 2000, no legislation even has been introduced to address this issue.

Nothing has changed as it pertains to the taxation of benevolent retirement homes since August 2000, nothing, that is, except the *Columbus Park Housing* decision. And since that decision, we are aware of at least four different income tests being proposed for not-for-profit housing providers, despite the fact the *Columbus Park* decision never addressed an income test and, as noted earlier, specifically stated its decision should have no effect on the tax-exempt status of nursing homes, continuing care facilities and "these types of organizations." Ironically, the League of Wisconsin Municipalities, in its *amicus*

curiae brief in the *Columbus Park* case, made virtually the same point (as did the cities of Milwaukee and Kenosha in their briefs): Namely, that benevolent nursing homes and retirement homes for the aged have no need to be concerned that they will “suddenly find themselves without an exemption from general property taxes” if the Court were to decide against *Columbus Park* because “these entities have been expressly granted exemptions by the legislature.”

Thus, the Court and municipalities themselves have stated the *Columbus Park* decision has no effect on the current tax exempt status of “nursing homes and continuing care facilities... and these types of organizations” (the Court) and benevolent nursing homes and retirement homes for the aged (the League of Wisconsin Municipalities and the cities of Milwaukee and Kenosha). Yet, the organizations representing cities and local municipalities now are seeking legislation to base the continued tax-exempt status of some or all not-for-profit long-term care providers on one of four or more income tests, all under the guise of *Columbus Park*. That strikes our members as hypocritical. Worse yet, low-income housing providers and households are being used for political leverage in a battle not of their making.

Low income housing providers and those they serve should not be held hostage in an unrelated battle over whether some or all benevolent retirement homes should pay property taxes. We urge the Legislature to pass legislation this session to amend s.70.11, Wis. Stats., to its commonly accepted interpretation prior to the *Columbus Park* decision and to save the discussion on the complex and contentious issue of taxing benevolent retirement homes, if such a discussion is deemed necessary, for next session.

Thank you for the opportunity to discuss this important issue.