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

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Talking Points on "Pre-*Columbus Park* Legislation

1) In its November 19, 2003 decision in *Columbus Park Housing Corporation v. City of Kenosha*, the Wisconsin Supreme Court did not discuss income tests as a basis for granting a property tax exemption to not-for-profit residential property owners. The decision was based solely on the Court's interpretation of the "lessee identity condition" found in s.70.11, Wis. Stats., which states that property leased by a tax exempt entity will remain tax exempt "if the lessee would be exempt from taxation under this chapter if it owned the property."

2) The elderly residents of independent living facilities for seniors are not themselves tax exempt; nor are those who lease/rent low income housing units. Under the *Columbus Park* decision, therefore, those leased properties no longer would be tax exempt. The impact on low income and elderly housing recipients could be devastating if a legislative solution to "fix" this problem is not passed in this session of the Legislature.

3) Such a legislative solution could follow along the lines suggested by Kenosha Mayor John Antaramian: Grandfather all not-for-profit residential property owners who lease their property and would have qualified for a property tax exemption as of January 1, 2003, the taxable year of the *Columbus Park* decision. This would address the immediate problem brought about by the *Columbus Park* decision. Other pertinent issues, including the use of an income test to determine eligibility for a tax exemption, could be the subject of a Legislative Council special committee, which would provide appropriate time to scrutinize an issue of this complexity, time that is not available as the March 11th conclusion date of the 2003-05 legislative session rapidly approaches.

4) 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.

5) 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.

6) **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.**

7) 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.

8) 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.

9) 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.
10) 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.

11) **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?**

12) 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.

13) 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.

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) 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.

16) 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.

17) **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.**

18) 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.
19) 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 <u>not</u> 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.

20) 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.

21) 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?

22) 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.

23) 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.

24) 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.

25) 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.