

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

BEAVER DAM COMMUNITY
HOSPITALS, INC.,

Plaintiff-Respondent,

Appeal No. 2011-AP-1479

v.

CITY OF BEAVER DAM,

Defendant-Appellant.

**APPEAL FROM THE CIRCUIT COURT OF DODGE
COUNTY CASE NO. 2010-CV-690,
THE HONORABLE BRIAN A. PFITZINGER, PRESIDING**

**BRIEF OF WISCONSIN ASSOCIATION OF HOMES &
SERVICES FOR THE AGING, INC., WISCONSIN
HOSPITAL ASSOCIATION AND RURAL WISCONSIN
HEALTH COOPERATIVE AS
AMICUS CURIAE**

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INTRODUCTION

Wisconsin Association of Homes & Services for the Aging, Inc., Wisconsin Hospital Association and Rural Wisconsin Health Cooperative are not-for-profit membership organizations with members throughout the state who own and operate nursing homes and assisted living facilities that are licensed, certified or registered under Wisconsin Statutes Chapter 50. Nearly all of their respective members are nonprofit organizations with missions that are dedicated to serving the elderly and others who are in need of care, such as nursing services, assisted long term care, health care and other personal care needs.

In 2009, the Legislature enacted several changes to Wis. Stat. § 70.11 to clarify the property tax exemptions for property owned by certain nonprofit organizations. These amendments represented the culmination of nearly two decades of legislative proposals, studies by the Wisconsin Legislative Council and the Wisconsin Department of Revenue, and litigation involving property tax exemptions for facilities that provide services and housing for the elderly, the frail elderly and those in need of nursing services. Briefly stated, the following changes were enacted as part of 2009 Wisconsin Act 28:

- Renumbered Wis. Stat. § 70.11(4) to § 70.11(4)(a) and amended it to specifically exempt properties owned by nonprofit entities and used as facilities licensed, certified or registered under Chapter 50 of the Statutes;
- Amended § 70.11 (Intro.) and created § 70.11(4)(b) to address the use of leasehold income generated by operation of nonprofit residential housing;
- Created § 70.11(4a) to govern the exemption for property used as low-income housing by nonprofit entities;
- Created § 70.11(4b) to govern the exemption for certain property financed by the Wisconsin Housing and Economic Development Authority ("WHEDA"); and
- Created § 70.11(4d) to govern the exemption for property used as retirement homes for the aged by nonprofit entities.

Each of these specific exemptions have their own criteria that must be satisfied to establish exemption from property tax.

By these Act 28 amendments, the Legislature intended to change the tests for exemption for these specific types of uses of

property owned and operated by nonprofit organizations, including a change from a subjective test of "benevolent use" of the property to clear objective criteria to establish an exempt use of the property.

ANALYSIS

I. THE LANGUAGE OF § 70.11(4)(a) WITH RESPECT TO COMMUNITY BASED RESIDENTIAL FACILITIES IS CLEAR AND UNAMBIGUOUS

In relevant part, Act 28 revised § 70.11(4)(a) to exempt:

Property owned and used exclusively . . . by a nonprofit entity that is operated as a facility that is licensed, certified, or registered under ch. 50, including benevolent nursing homes and retirement homes for the aged. . .

2009 Wisconsin Act 28 § 1516d.

Facilities licensed, certified, or registered under Chapter 50 include care and services residential facilities, such as community based residential facilities ("CBRFs"), residential care apartment complexes, adult family homes and nursing homes, as well as hospices, hospitals and rural medical centers.

Leaving aside nursing homes for the moment, for a Chapter 50 facility including a CBRF to be exempt under Wis. Stat.

§ 70.11(4)(a), both ownership and use criteria must be satisfied.

First, the property must be owned by a nonprofit entity. Second, the property must be used for the exempt purpose specified by

the Legislature--namely, the property must be used as a facility licensed, certified or registered under Chapter 50 and the property must not be used for profit. The instant case involves a CBRF, not a nursing home. Therefore, it is not necessary to determine whether the exemption for Chapter 50 facilities under § 70.11(4)(a) applies to all nursing homes or only benevolent nursing homes. Moreover, no reasonable reading of the statute can lead one to conclude that a nonprofit owner of a Chapter 50 facility must show, in addition to the specified ownership and use requirements, that its use of the property is also benevolent.

II. THE STATUTES DO NOT REQUIRE A SEPARATE SHOWING OF BENEVOLENCE FOR CHAPTER 50 FACILITIES TO QUALIFY FOR EXEMPTION

A. IN ENACTING 2009 WISCONSIN ACT 28, THE LEGISLATURE CLEARLY INTENDED TO CHANGE THE EXEMPTION REQUIREMENTS FOR SPECIFIC CATEGORIES OF PROPERTIES

The Legislature amended § 70.11(4) (now § 70.11(4)(a)) and created §§ 70.11(4)(b), 70.11(4a), 70.11(4b) and 70.11(4d) with specific requirements for each to add certainty to the exemption statutes for these categories of properties. Prior to Act 28, there were repeated efforts to define what constitutes a benevolent use of property for retirement homes, assisted living facilities and nursing homes, among

others. The terms "benevolent association" and "benevolent use of the property" were subjective and were difficult to apply. These efforts to define benevolence included legislative proposals, Legislative Council and Department of Revenue studies and litigation which are discussed further in section IV below.

Prior to Act 28, nonprofit assisted living facilities, retirement homes and nursing homes had been included in the general category of benevolent associations. In enacting Act 28, the Legislature added specific requirements for exemption of each of those types of facilities, including adding a separate category in § 70.11(4)(a) for CBRFs and other Chapter 50 facilities. In order to effect its intention of providing specific objective criteria as it relates to those facilities, the Legislature also chose to remove the word "benevolent" as a criterion for exemption of Chapter 50 facilities (with possible exception of certain nursing homes which are not at issue here). It would be impermissible for the court, in effect, to amend the statute to mandate that nonprofit Chapter 50 facilities must also separately show that the use of the property is benevolent.

B. RETENTION OF THE PHRASE "INCLUDING BENEVOLENT NURSING HOMES" DOES NOT CREATE AMBIGUITY AS TO ALL CHAPTER 50 FACILITIES AND IS NOT SUPERFLUOUS

Prior to enactment of Act 28, Wis. Stat. § 70.11(4)

provided exemptions for property owned and used exclusively by "benevolent associations, including benevolent nursing homes and retirement homes for the aged". The specific enumeration of benevolent nursing homes and retirement homes for the aged had been in § 70.11(4) since 1967. Ch. 64, Laws of Wisconsin 1967.

Act 28 removed the phrase "and retirement homes for the aged" from § 70.11(4) and moved those facilities into § 70.11(4)(d). The specific category for facilities that are licensed, certified, or registered under Chapter 50 was added to the renumbered § 70.11(4)(a) and the longstanding enumeration of benevolent nursing homes was retained.

In making these changes, why did the Legislature not delete the phrase "including benevolent nursing homes" from Wis. Stat. § 70.11(4)(a)? For purposes of the instant appeal, the retention of this phrase is not relevant. This case involves a CBRF, not a nursing home. Moreover, no party to this appeal is arguing that by listing "benevolent nursing homes" after the reference to Chapter 50 facilities, only benevolent nursing homes

are eligible for exemption. Further, the retention of "including benevolent nursing homes," while adding Chapter 50 facilities to the statute, of which nursing homes are a part, does not make the reference to benevolent nursing homes superfluous. Benevolent nursing homes are just one of a number of Chapter 50 facilities that are exempt under the statute.

Even if the Wisconsin Department of Revenue construes the Act 28 revisions as precluding "non-benevolent" nursing homes from property tax exemption – an assertion disputed in section V below – that construction simply does not impose a "benevolence" requirement on other Chapter 50 facilities. Moreover, no party to this appeal can cite a rule of construction that would support this strained reading of Act 28.

C. THE TERM BENEVOLENT IS NOT EQUIVALENT TO OR INTERCHANGEABLE WITH THE TERM EXEMPT

It is erroneous to equate the term benevolent with the term exempt. While all property owned and used by a benevolent association may be exempt, not all exempt property must be benevolent.

The Legislature is experienced in creating specific exemptions with specific criteria which are separate and distinct from more general exemptions, such as the exemption for

benevolent associations. Wis. Stat. § 70.11 has numerous exemptions with no separate requirement of benevolence or charity. For example, property exemptions exist for property owned and used exclusively by of educational institutions, and religious or educational associations (§ 70.11(4)(a)); nonprofit hospitals (§ 70.11(4m)); agricultural fairs (§ 70.11(5)); fire companies (§ 70.11(6)); labor temples (§ 70.11(16)); camps for persons with certain disabilities (§ 70.11(22) and (33)); nonprofit radio stations (§ 70.11(29)); nonprofit theaters (§ 70.11(29m)); nonprofit outdoor theaters (§ 70.11(29p)); to name a few. All of these properties are exempt but they are not necessarily benevolent. Each of those specific exemptions have ownership and property use requirements and have no separate requirement for benevolent use of the property. By enacting these exemptions, the Legislature has determined that it is in the public's interest to exempt property owned by these organizations because they provide a public benefit and no separate showing of benevolence is needed. The same statutory pattern applies to property owned by a nonprofit entity licensed, certified or registered under Chapter 50 in Wis. Stat. § 70.11(4)(a).

III. EXEMPTION OF NONPROFIT CHAPTER 50 FACILITIES WITHOUT A SEPARATE SHOWING OF BENEVOLENT USE IS NOT CONTRARY TO PUBLIC POLICY

The Legislature's intent is expressed in the statutory language that it enacts. *Columbus Park Housing Corporation v. City of Kenosha*, 2003 WI 143, ¶ 34, 267 Wis. 2d 59, 671 N.W.2d 633. The Legislature settles and declares public policy and it is the court's duty to apply the policy the Legislature has codified in the statutes. To do otherwise would render the court little more than a super-legislature. *Id.* ¶ 34. Discussions of public policy are considered by the court only if the statute is considered to be ambiguous. *Id.*

The exemption for Chapter 50 assisted living facilities is clear and unambiguous. The property is exempt if it meets the nonprofit ownership requirement and if it meets the use requirements that the property be used as a facility licensed, certified or registered under Chapter 50 and not be used for profit.

Even if public policy were to be considered in interpreting the statute, this exemption is consistent with established public policy objectives. The use of the property is not just any use by a nonprofit organization. It must be used as a facility that is

licensed, registered or certified under Chapter 50 and must not be used for profit. These facilities are highly regulated as to the physical features of the buildings, staffing and the services that must and can be provided to residents. *See e.g.*, Wis. Stat. Ch. 50 and Wis. Admin. Code Chapters DHS, 82, 83, 88, 89, 131 and 132, among others.

Further, nonprofit organizations operate under different constraints and have different objectives than for-profit organizations. Nonprofit organizations operate to achieve their exempt missions. Although nonprofit organizations are allowed to generate revenues over expenses and retain their tax exemptions, nonprofit organizations cannot generate profits for private benefit. *See Milwaukee Protestant Home v. City of Milwaukee*, 41 Wis. 2d 284, 296, 164 N.W.2d 289 (1969). On the other hand, for-profit organizations operate to provide a return on investment to their shareholders and investors and are largely driven by a private profit motive. As a result of the differences between nonprofit and for-profit organizations, it is not a violation of good public policy to encourage nonprofit organizations to achieve their missions by aiding them with public benefits such as property tax exemptions. As discussed previously, numerous examples can be found in Wis. Stat.

§ 70.11 of providing property tax exemptions to nonprofit organizations, while taxing property of for-profit organizations that are providing similar types of services.

Reliance on *Eichenseer v. Madison-Dane County Tavern League*, 2008 WI 38, 308 Wis. 2d 684, 748 N.W.2d 154 (2008), to suggest that Wisconsin has an overriding policy of competition and free enterprise is misplaced. *Eichenseer* was an antitrust case under Chapter 133 which was created to implement a free enterprise policy. Wis. Stat. § 133.01. However, the general free enterprise policy will yield when it contravenes the specific policy of another statute. See *Reese v. Associated Hospital Service*, 45 Wis. 2d 526, 173 N.W.2d 661 (1970). Furthermore, the grant of benefits to nonprofits is not dependent on whether the nonprofit is considered to be charitable because nonprofit status is also granted for other policy reasons. See discussion at pages 7-8 of this Brief.

Contrary views of what constitutes good public policy do not make the Legislature's public policy choices a legal absurdity. The Legislature has chosen to exempt property used as a Chapter 50 facility to aid these nonprofit organizations in furthering their missions. The Legislature has expressed its policy determination that these organizations and facilities

provide a public benefit and will be exempt if they meet the specific criteria identified in the statute. Since the Legislature has identified specific use criteria for these properties and has eliminated the benevolent use test (setting aside nursing homes), its policy choice should not be disturbed.

IV. TO THE EXTENT THAT LEGISLATIVE HISTORY IS CONSIDERED, IT SUPPORTS THE CLEAR AND UNAMBIGUOUS READING OF THE STATUTE

The statute at issue here is clear and unambiguous.

However, to the extent that legislative history is considered, the argument that the absence of legislative history undercuts the clear reading of § 70.11(4) is incorrect in two respects. First, even if there were an absence of legislative history, it would not prove that no change was intended. Second, § 70.11(4) as it relates to benevolent associations has ample legislative history.

Far from being a sleepy part of the statutes, § 70.11(4) has been the subject of numerous legislative proposals, Legislative Council and Department of Revenue studies and litigation over the last two decades. Legislative activities surrounding benevolent associations, including nursing homes and retirement homes for the aged, reach back at least to 1990. In May 1990, the Wisconsin Legislative Council created a Special Committee on Exemptions for Property Taxation. Out of that Legislative

Council Committee came 1991 Assembly Bill 499 relating, in part, to exemptions for benevolent associations. The Assembly Bill 499 was introduced but not enacted by the Legislature. The biennial budget bill, 1991 Assembly Bill 91, incorporated many of the provisions relating to benevolent associations that were contained in 1991 AB 499. The provisions in 1991 AB 91 were passed by the Legislature but were vetoed by the Governor. Other bills with provisions relating to benevolent associations were proposed in 1993 (1993 Senate Bill 44, 1993 Senate Bill 256 and 1993 Assembly Bill 456), in 1995 (1995 Assembly Bill 150), and in 1997 (1997 Senate Bill 77 and 1997 Senate Bill 261). A Department of Revenue Task Force on Benevolent Retirement Homes for the Aged was created in 1999, as mandated under 1997 Wis. Act 27.

The deliberations related to § 70.11(4) continued into the next decade. In 2003 Wis. Act. 195, the Legislature acted to reverse the effects of *Columbus Park Housing Corp. v. City of Kenosha*, 2003 WI 143, relating to the use of leasehold income generated by nonprofit residential housing. In 2005, the Joint Legislative Council introduced a comprehensive revision of § 70.11(4) in 2005 Assembly Bill 573. The bill was not enacted. Added to this legislative activity was litigation involving

Wis. Stat. § 70.11(4), some of which has been cited by the parties to this case.

Despite all of this activity, there continued to be uncertainty and need for clarification of the exemptions for assisted living facilities, nursing homes, retirement homes for the aged, and low income housing. Finally, in 2009 Wisconsin Act 28, the Legislature clarified exemption criteria, at least as to those facilities.

V. THE WISCONSIN PROPERTY ASSESSMENT MANUAL AND TITLE OF WIS. STAT. § 70.11(4) ARE NOT INSTRUCTIVE

The Wisconsin Property Assessment Manual ("WPAM") promulgated by the Department of Revenue is not at odds with and actually supports the unambiguous reading of the Wis. Stat. § 70.11 as it relates to Chapter 50 licensed facilities. The table in the WPAM provided by the Appellant in this case simply compares retirement homes for the aged, exempt under Wis. Stat. § 70.11(4d), with benevolent nursing homes. As to Chapter 50 facilities, the WPAM repeats the language of the statute, stating that § 70.11(4)(a) "provides an exemption for property owned and used exclusively by a nonprofit entity licensed, certified or registered under Chapter 50." It does not state that those properties must be used for a benevolent purpose because the

statute contains no such criterion. Just like a statute cannot be rewritten to add the term "benevolent" to modify the phrase "facilities licensed, registered or certified under Chapter 50," the WPAM cannot be rewritten to say that the Department of Revenue meant to say that nursing homes and all other Chapter 50 facilities must be benevolent.

The title of Wis. Stat. § 70.11(4) is not instructive. The language used in titles but are not limiting. For example, Wis. Stat. § 70.11(12) is entitled Certain Charitable Organizations. It does not identify each and every organization in that subsection.

CONCLUSION

The Legislature acted deliberately in 2009 Wis. Act 28 when it amended Wis. Stat. § 70.11(4). Its changes were comprehensive and involved Chapter 50 facilities, low income housing, certain WHEDA-financed properties, retirement homes for the aged and the consequences of the leasehold income derived by those organizations. When the Legislature identified specific criteria for each of those exemptions, it chose whether or not to include the modifier "benevolent" as it applies to the use of the property. The Legislature made the public policy choice of exempting Chapter 50 facilities without a separate showing of benevolence. It specifically did not include the word benevolent and adding a benevolent requirement for Chapter 50 facilities would impermissibly amend the language adopted by the Legislature. Further, concluding that a separate showing of benevolence is required would also reinstate the uncertainty inherent in the subjective benevolence test and eliminate the clarity that the Legislature was seeking to achieve by the objective criteria that it chose.

Respectfully submitted this _____ day of October, 2011.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font – minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

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I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all the parties.

Dated this 25th day of October, 2011.

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CERTIFICATE OF SERVICE

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