BENEVOLENT RETIREMENT HOME FOR THE AGED TASK FORCE

The Not-For-Profit Perspective

JULY 2000

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FINAL REPORT
JULY 28, 2000

Background

Section 9156(2m) of 1997 Wisconsin Act 27 created the Benevolent Retirement Home for the Aged (BRHA) Task Force. The legislative directive to the Task Force was to "investigate the property tax exemption for benevolent retirement homes and all problems that are associated with it." The 10-member Task Force, which consists of four members appointed by the Governor, two members appointed by the speaker of the Assembly, two members appointed by the Senate majority leader and one member each selected by the Assembly minority leader and the Senate minority leader, was directed to "submit its report and proposed legislation to the Legislature on or before June 30, 1999, on which date the Task Force is dissolved."

The Task Force neither was formed nor ever met prior to its June 30, 1999 sunset date. However, leaders from both houses of the Legislature and the Governor agreed to extend the sunset date to June 30, 2000. This final report seeks to comply with the legislative directive contained in 1997 Act 27.

The Task Force met seven times (assuming a scheduled August 15th meeting is held) and it became clear from the very first meeting on 12/15/99 that reaching a consensus would be difficult. Five of the ten Task Force members, representing local government officials, assessors, and for-profit health care providers, felt the current system of extending property tax exemptions to benevolent retirement homes for the aged was unfair, unclear and/or indefensible. The remaining five members, all representing not-for-profit, tax-exempt health care providers, argued the current system may be in need of further clarity but was both justifiable and defensible. Little was said by either side which proved to be persuasive to any member of the other side. Our expectation, therefore, is two final reports will be issued, neither of which will garner majority support from Task Force members.

Although the legislative directive of the BRHA Task Force was to investigate the property tax exemption for benevolent retirement homes for the aged, the focus of much of the discussion during the Task Force's first six meetings was broader in scope than that directive of the Legislature. Those discussions delved into not only the entire long-term care continuum, from nursing home to assisted living to independent senior housing, but into the even broader and more generic realm of who should and who should not be exempt from property taxation. Before this report specifically addresses the three primary statutory modifications discussed by Task Force members, we would like to briefly touch upon the broader policy question of who should be exempt from property taxation in Wisconsin.

Indigent Standard v. Community Benefit Standard

Simply stated, the signatories of this report believe an exemption from property taxation under the s.70.11(4), Wis. Stats., benevolency standard is warranted if the entity seeking a tax exemption provides its local community with some form of a community benefit and the revenues generated by the goods and services provided by that entity are used to further benefit the recipients of those goods and services, not to benefit a private shareholder or individual. That "community benefit" could come in many forms: Care or service to the indigent; the provision of goods or services which otherwise might have to be provided by government; charitable donations to the needy; community health care outreach; subsidized care; opening up the entity for community use; and many others. The key is to allow the flexibility to enable the entity to "give back to its community" in ways that are consistent with that entity's mission and purpose, rather than shoehorning all entities into an inflexible system within which that entity can't operate. Inflexibility ultimately deprives not the entity but the community.

The chief policy difference between the two Task Force "camps" is that those seeking substantive change to the current property tax exemption under s.70.11(4), Wis. Stats., wish to impose a tax-exemption standard primarily based on indigency: If an entity provides no direct financial assistance or relief of poverty to a recipient in need of such assistance or relief, that entity is not deserving of a property tax exemption.

The signatories of this report oppose that point of view. We believe society can be benefited in ways other than providing care and services to the indigent and that those "other ways" are equally deserving of a property tax exemption. The federal government seemingly would concur with this approach since its exemption from federal income taxation under s.501(c) of the Internal Revenue Code (IRC) is predicated on a similar "community benefit" standard.

In the long-term care continuum, which would include benevolent retirement homes for the aged, we believe not-for-profit, tax-exempt entities provide community benefits which warrant their tax exemptions in a number of different ways:

CCRCs and Long Term Care Insurance: A continuing care retirement community (CCRC) is a campus setting which includes a nursing home, an assisted living facility and/or independent senior housing. Through payment of an entrance fee, which statute requires to be at least $10,000, and a monthly service fee, individuals who enter into a continuing care contract are guaranteed that their long-term care needs will be met for the rest of their lives. The entrance fees and monthly service fees are set to attempt to balance life expectancy with service costs over that lifetime. As a form of long-term care insurance, a continuing care contract only can be issued by entities which have received a permit from the Office of the Commissioner of Insurance (OCI). CCRCs are regulated by the OCI under Chapter 647, Wis. Stats. There currently are 21 CCRC permit holders in Wisconsin; all 21 are not-for-profits.

The benefit to the individual of a continuing care contract is the peace of mind that future long-term care needs will be met. Society is benefited through this pre-planning and pre-paying for future long-term care needs because of the significantly minimized likelihood that CCRC residents ever will be enrolled in the federal/state Medicaid program. By limiting the number of people on the Medicaid rolls, CCRCs provide a community benefit to all State taxpayers, whose taxes support the Medicaid program. We believe not-for-profit CCRCs ease the burden of government and State taxpayers and have earned the right to a property tax exemption.

Subsidization of Care/Services: The revenues generated by CCRC residents and those living in independent senior housing or assisted living are used in some instances by not-for-profit providers to subsidize the care of residents who no longer can pay for their care. **Indeed, the Internal Revenue Service (IRS) prohibits not-for-profit "homes for the aged" from discharging residents for inability to pay for the care and services they are provided as a condition of their tax-exempt status.** A recent membership survey conducted by the Wisconsin Association of Homes and Services for the Aging (WAHSA), which represents nearly 200 not-for-profit long-term care providers in Wisconsin, found that 35.3% of the survey respondents are providing subsidized care to their residents ranging from $1,500 to $1.5 million annually. We believe this form of "cross-subsidization" is a community benefit for those who no longer can pay for their long-term care needs and warrants a property tax exemption. For if the not-for-profit did not subsidize those costs, who would?

Operating Losses and Employee Wages: According to the July 1999 Medicaid nursing home rate data base developed by the Wisconsin Department of Health and Family Services, the average Medicaid-certified, not-for-profit nursing home in Wisconsin loses over $10.50 per patient day. In other words, the Medicaid reimbursement the facility receives is $10.50 less per patient day than the costs the facility incurs to care for its Medicaid residents (annual Medicaid losses exceed $225,000 per facility). In many instances, the revenues generated by residents of CCRCs, independent senior housing and/or assisted living facilities are used to subsidize the Medicaid deficits experienced by that entity's nursing home. We believe this cross-subsidization, which enables greater access to nursing home services for Medicaid-eligible individuals and permits facilities to staff higher and pay better (which benefits both Medicaid and private-pay residents alike), is a community benefit to not only the recipients of care but also to State taxpayers, who support the Medicaid program, and warrants a property tax exemption. Many not-for-profit long-term care providers are able to offer somewhat higher wages to direct care staff in part because their resident rate structures do not include a property tax component. In these instances, the financial cross-subsidization occurs between the residents and their care-givers. Higher wages generally can be correlated with higher staff retention rates and continuity of care. For example, the certified nursing assistant (CNA) turnover rate for not-for-profit nursing homes is one-half that of for-profit providers. Some Task Force members have argued that this provides not-for-profit providers with an unfair competitive advantage. Our question is should the "solution" be to impose a property tax on not-for-profits, thereby making it more difficult to pay staff who, by nearly any standard, already are under-compensated for the work they perform?

Community Benefits and Opportunities: The Attic Angel Association owns and operates Attic Angel Place, a CCRC located in Madison. Through prudent investment of community gifts and donations, the Association was able to provide over $234,000 in direct financial support in 1999 to Madison and Dane County organizations ranging from scholarships for 104 needy children to South Madison Day Care Center to a $15,000 donation to Project Bootstraps. In addition, Attic Angel Association last year provided $120,000 in subsidized care to its Attic Angel Place residents who had depleted their funds and approximately 18,000 hours of community outreach services by its own volunteers. Because its CCRC operates on a break-even basis, Attic Angel Association is able to subsidize not only the life care services of some of its CCRC residents but also services that otherwise would be unprovided for or borne by government, i.e., the taxpayer. Once again, we believe the benefit to the community and to the taxpayer provided by the Attic Angel Association warrants a property tax exemption. That benefit, however, could be severely diminished if Attic Angel Place were required to meet a property tax exemption indigency standard. And if Attic Angel Association was forced to shift its charitable contributions away from the community to pay for the full or partial property tax on the Attic Angel Place CCRC, what is the likelihood those 104 kids would have received the day care services they need? And how much better off are the citizens of Madison and Dane County because Attic Angel Association enabled those kids to receive those needed services?

In each of the above instances, organizations are serving a non-indigent population but are providing corresponding benefits to the community. They are, in a way, Robin Hoodesque, although robbing the rich to give to the poor might be a bit harsh a description. However, under the proposal(s) offered by the

Task Force members seeking substantive change to the current system, all of these entities would lose at least a portion of their current property tax exemption; some most likely would pay the full property tax. How will that benefit the kids on scholarship to South Madison Day Care Center or the single mom who works as a certified nursing assistant who lost her job at the nursing home because inadequate Medicaid reimbursement forced staff reductions?

Not-For-Profit Entity v. For-Profit Entity

One of the most difficult tasks this Task Force undertook and policymakers throughout the country wrestle with is how to distinguish a for-profit from a not-for-profit entity. Some believe that that distinction is even more difficult to identify in long-term care because in many instances, not-for-profit and for-profit providers are offering similar services to similar residents.

The signatories of this report believe one of the best responses heard to that question was offered to Task Force members at their March 3, 2000 meeting by Mark Wimmer, President of Caring Communities, a Hales Corners for-profit corporation which provides development, construction, marketing and operations management services to both for-profit and not-for-profit organizations. In that capacity, as the provider of daily operations management, he also serves as Executive Director of Regency Senior Communities, a not-for-profit provider of long-term care services.

Mr. Wimmer told Task Force members that as President of a company which owns and operates for-profit senior housing but develops and manages similar not-for-profit ventures, he believes there is a legitimate place in the market for both for-profit and not-for-profit retirement facilities **but there are differences between them in terms of the missions and goals, community involvement in addressing senior health issues, and financial focus** (emphasis added).

Mr. Wimmer estimates that the property taxes paid by his for-profit facilities represent about $100 per unit per month. He told Task Force members that the financial assistance, the expanded programming and the community benefits provided by not-for-profits well exceed any property tax benefits enjoyed by exempt facilities. Because the not-for-profit focus is not on return on investment, it can focus on financial aid to its needy residents and its community.

Mr. Wimmer also said from his experience, not-for-profit facilities address special needs and create programming for the minority of the market, while for-profit facilities generally address the majority of the market. Not-for-profits are more likely to pioneer and create the model for special needs services such as Alzheimer's or incontinence care because they are more responsive to unfunded or underfunded community needs.

The signatories of this report believe commitment to the community and motivation are the two key distinctions between a for-profit entity and a not-for-profit. While a not-for-profit is tied to its local community by a Board of Directors from that community and takes its direction from that local Board, a for-profit ultimately takes its direction from its stockholders/owners, who may or may not have ties to the community. To state that "when the going gets tough, the for-profit business may be going or gone" probably is a bit harsh and a poor play on words but it makes its point: When a business decision needs to be made, the for-profit takes its lead from its stockholders, not the local community. And if curtailing services, leaving the community or getting out of the business is the best business decision, then all but certainly that's the decision the for-profit will make. What's good for the stockholders, therefore, may not be good for the community.

Possibly of more significance is the distinction between what motivates a for-profit provider from his/her not-for-profit counterpart. Because when all is said and done, regardless of the commitment to quality and compassion, a for-profit ultimately is in the business to make money for its shareholders and owners. For the good, for-profit provider, quality of service is the means to the end of making money. However, if that good, for-profit provider is unable to make money, either quality will suffer or the service will end. One only has to examine the recent Chapter 11 filings for bankruptcy protections on behalf of several national for-profit long-term care providers to fully appreciate this point. (Note: Approximately 10% of all Wisconsin nursing homes currently are operating under Chapter 11; all are for-profit nursing homes).

A not-for-profit ultimately is motivated by the desire to provide quality services. We are not foolish enough to argue against the truism "no margin, no mission," but contrary to the for-profit provider, generation of revenue is a means to the not-for-profit's end of providing quality services, not the end itself.

The ultimate question is this: What motivates an individual to operate as a for-profit rather than a not-for-profit? Somehow, we don't believe receiving or not receiving a property tax exemption enters into that equation.

AN ANLYSIS OF THREE PROPOSALS REVIEWD BY THE BRHA TASK FORCE

The following section of this report will analyze three proposals offered to and discussed by BRHA Task Force members: A proposal offered by WAHSA Executive Director and Task Force member, John Sauer; a proposal offered by Milwaukee City Assessor and Task Force member, Peter Weissenfluh; and a draft proposal prepared by Department of Revenue (DOR) staff.

Background

Section 70.11(4), Wis. Stats., provides a property tax exemption to "property owned and used exclusively by educational institutions offering regular courses 6 months in the year; or by churches or religious, educational or **benevolent associations, including benevolent nursing homes and retirement homes for the aged,**... but not exceeding 10 acres of land necessary for location and convenience of building while such property is not used for profit." (emphasis added). This is the section of statute that creates the property tax exemption for BRHAs and this is the section of statute which is under attack by proponents of change to the current system.

It also is a section of statute which all agree is subject to differing interpretations because there is neither a statutory nor a specific judicial definition of "benevolent." And it is indeed the courts which have provided the interpretations of "benevolent" which govern us today.

The key decision in the interpretation of "benevolent" under s.70.11 (4), Wis. Stats., came in *Milwaukee Protestant Home v. City of Milwaukee* 41 Wis.2d 284,293,164 N.W.2d289 (1969). The facts in that case were as follows: In 1963, Milwaukee Protestant Home added a second facility, Bradford Terrace, to its Lake Drive campus in Milwaukee. Bradford Terrace was constructed entirely from resident endowments; there was no charity or donations used in its construction. Residents were required to pay nonrefundable endowments plus a monthly service fee to live in the facility and were required to qualify both financially and by proof of the ability to live independently as preconditions to admission.

Admission was limited to those who could pay; no charity was provided for applicants who could not afford the endowment and monthly service fee.

The city of Milwaukee sought to deny a property tax exemption to Bradford Terrace based on the following arguments: Entrance to the facility was limited to a segment of society which could afford its endowment and monthly service fees; the facility did not provide on-site medical care; and financial screening excluded the needy while health screening excluded the infirm.

In its 1969 decision in favor of Milwaukee Protestant Home, the Wisconsin Supreme Court issued a three-part general judicial test for "benevolence":

1. The Court stated: "Retirement homes are not primarily nursing homes or hospitals. They are not almshouses, and the residents do not consider themselves objects of public or private charity. They are what the name implies, homes for retired persons, places of congregate living where retirees go to live, expecting to pay the fees charged and to receive the usual incidents of group home living."

2. "Benevolent" does not mean the same thing as "charitable." A retirement home limited to those who can pay can be benevolent, even if it does not provide free services to any one. "[T]he word 'benevolent' has no built-in implication or requirement of almsgiving. To help retired persons of moderate means live out their remaining years is 'benevolent' whether or not it is also considered, as we would consider it, to be 'charitable.'"
3. The facility must be judged as an integral part of the entire Milwaukee Protestant Home, not in a vacuum. " A wing need not be chopped off a chicken to determine its form, or function."

This three-part judicial test of "benevolence" was later reaffirmed by the Wisconsin Supreme Court in *Family Hospital Nursing Home v. City of Milwaukee* 78 Wis.2d 312, 254 N.W. 2d 268 (1977), and by the Court of Appeals in *Friendship Village of Greater Milwaukee v. City of Milwaukee* 181Wis.2d 207, 511 N.W. 2d 345 (Ct.App. 1993), (Rev. denied, 515 N.W. 2d 714).

There also have been a number of attempts over the years by the Legislature to amend s.70.11(4), Wis. Stats. Those legislative proposals included the following;

- ➔ 1991 Assembly Bill 499, a Legislative Council bill developed by the Legislative Council Special Committee on Exemptions from Property Taxation, modified s.70.11(4) by replacing "benevolent," "benevolent institutions" and "benevolent association" with "charitable services," and "charitable association," which were defined in statute. AB 499 was determined to be legal and good public policy by the Joint Survey Committee on Tax Exemption but died without a vote in the Assembly Ways and Means Committee.

- ➔ A motion to amend the 1991-93 state budget bill to include most of the provisions of 1991 AB 499 was adopted by the Joint Committee on Finance. However, that motion specifically exempted from property taxation "benevolent nursing homes and retirement homes for the aged which have qualified for exemption under s.501(c)(3) of the Internal Revenue Code of 1954 as amended." The State Senate further amended the budget bill to define a "charitable association" to mean "an entity that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code." Governor Thompson, however, vetoed the entire "charitable association" provision from 1991 Wisconsin Act 39, stating that the utilization of the federal 501(c)(3) Internal Revenue Code (IRC) standard would expand the number of tax exempt properties in Wisconsin and that there are a number of 501(c)(3) entities which are neither benevolent nor charitable.

➔ 1993 Senate Bill 44, the Governor's biennial budget bill, contained a provision to replace the "benevolent association" standard under s.70.11(4), Wis. Stats., with a defined "charitable association" standard which would have included benevolent nursing homes (allowing them to remain exempt from property taxation) but not benevolent retirement homes for the aged. This provision was one of 110 items stripped from SB 44 as being policy and not fiscal in nature by the co-chairs of the Joint Committee on Finance. The provision, however, was introduced as companion bills, 1993 Senate Bill 256 and Assembly Bill 456. Both bills died in the Joint Survey Committee on Tax Exemptions.

➔ The Joint Committee of Finance (JFC) adopted a motion to amend 1997 Senate Bill 77, the 1997-99 biennial budget bill, with a proposal advanced by the DOR to repeal the property tax exemption for a benevolent retirement home for the aged and create a "charitable retirement home for the aged" standard. That motion was later deleted from the budget bill by the majority caucuses in both houses of the Legislature and replaced with an Assembly Republican Caucus motion to create the 10-member BRHA Task Force. While the budget deliberations were ongoing, the JFC-adopted motion which was deleted from the budget bill by the two majority caucuses was introduced as 1997 Senate Bill 261. SB 261 was determined to be legal and good public policy by the Joint Survey Committee on Tax Exemptions but died without a hearing in the Senate Health, Human Services, Aging, Corrections, Veterans and Military Affairs Committee.

Since 1991, therefore, legislative efforts to modify statutorily the Wisconsin Supreme Court's three-part "benevolency" test have been unsuccessful: No individual bill to create a "charitable" standard ever has been adopted in its house of origin while the only budget provision to arrive on the Governor's desk (although later vetoed) would have exempted from property taxation any "charitable association" exempt from federal income taxation under IRC s.501(c)(3). These facts would seem to belie the argument posed by some Task Force members that the Legislature has spoken with "stark clarity" that the BRHA standard under s.70.11(4) Wis. Stats., is problematic. We would argue if such were true, this Task Force never would have been created.

With that background, we would like to address the three aforementioned proposals.

SAUER PROPOSAL

At the outset, the signatories of this report wish it to be known that the Sauer proposal is the recommended legislation we wish to forward to the Legislature.

Under the Sauer proposal, a "benevolent retirement home for the aged," which is defined as "property owned and operated by a nonprofit organization providing housing for five or more residents, which meets the definition of 'housing for older person' under s.106.04(1m)(m), Wis. Stats., and which may provide care or services that are above the level of room and board," would be exempt from property taxes if the organization has received a determination of exempt status under IRC s.501(c) from the IRS and meets the criteria for "homes for the aged" outlined under IRS Revenue Ruling 72-124.

The signatories of this report took the legislative history of this issue into account when trying to determine just what it was the Legislature wished the BRHA Task Force to accomplish. What became clear to us was the Legislature was unclear what problems, if any, existed with the property tax exemption for BRHAs and asked the BRHA Task Force to investigate and report its findings back to them.

Definitional Issues: The first task we undertook was to define the scope of our investigation because there is no definition of a "benevolent retirement home for the aged." For a BRHA Task Force not to define what a BRHA is struck us as perhaps missing the mark. Our definition of a BRHA basically is what long-term care providers refer to as "independent living facilities": Its residents are able to live independently and receive hotel-type services but receive none of the government-regulated, medically-oriented services provided in a nursing home, a community-based residential facility (CBRF) or a residential care apartment complex (RCAC). Indeed, we specifically excluded benevolent nursing homes, CBRFs and RCACs from our definition of a BRHA (and thus, would allow them to remain exempt from property taxation), not only because those entities are based on a government-regulated medical model but for other reasons as well. Benevolent nursing homes, for instance, were not included in the legislative directive to the BRHA Task Force even though they are specifically exempted from property taxation under s.70.11(4). If the Legislature had concerns with the property tax exemption for benevolent nursing homes, it would have expanded its directive to the Task Force to include benevolent nursing homes as well as BRHAs. One reason the Legislature chose not to do so may have been because Medicaid reimburses for-profit nursing homes for the property taxes they pay based on their Medicaid census. If not-for-profit nursing homes would be required to pay property taxes, the Medicaid appropriation would have to be increased dramatically to reimburse those property taxes paid. Another reason may have been the Legislature is unaware of any problems with the property tax exemption for benevolent nursing homes.

To include a CBRF as a BRHA shows a clear misunderstanding of what is a CBRF. While nearly 60% of the state's over 1,300 CBRFs identify advanced age as their target client group, CBRFs also treat and care for the developmentally and physically disabled, the chronically mentally ill and AODA clients among the 12 client groups they may serve. To include a CBRF in the definition of a benevolent retirement home for the aged clearly indicates those making the suggestion are unaware that CBRFs do not solely serve the elderly.

By the same token, while RCACs are settings solely for the elderly, the acuity of their health care needs cannot be ignored. By statute, a RCAC must be prepared to provide its individual tenants up to 28 hours per week of personal, supportive and nursing care; that amount of care is as much or more than many nursing home residents receive. In fact, based on the acuity levels of its tenants, a RCAC is much closer in nature to a nursing home than it is to a retirement home; indeed, when the Legislature created the RCAC (then called an "assisted living facility") in 1997, the newly-created health care setting was viewed by many as a nursing home replacement model.

The Treatment of CCRCs:

The fourth and last exclusion from our definition of a benevolent retirement home for the aged also appears to the most controversial: The continuing care retirement community, or CCRC. As noted earlier, a CCRC must receive a permit from the OCI to provide a "continuing care contract," which is defined under s.647.01(2), Wis. Stats., to mean "a contract entered into on or after January 1, 1985, to provide nursing services, medical services or personal care 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."

As noted earlier, in terms of physical structure, CCRCs are a campus setting including a nursing home, a CBRF, a RCAC and/or an independent living facility (or BRHA). In a recent WAHSA survey, of the 11 CCRCs responding, all 11 operated nursing homes; 9 operated CBRFs, 4 operated RCACs and 10 operated independent living facilities.

Because of the significant investment a CCRC resident makes in terms of entrance and monthly service fees to secure lifetime health care and service needs, the OCI pays particular attention to the financial solvency of a CCRC. CCRCs are required to provide the OCI with audited financial statements, including an income statement and a balance sheet, on an annual basis. The CCRC also is required to provide the OCI with the actual or projected length of stay of each resident in the facility. In addition, liquidity requirements promulgated by the National Association of Insurance Commissioners are now being used by OCI examiners who review CCRC financials. The OCI also has established a required reserve for CCRCs equal to 12 months of mortgage principal and interest or 18 months of interest alone.

On 3/3/00, BRHA Task Force members heard from Cruz Flores of the OCI Financial Examination Analysis Bureau, the Bureau which is responsible for overseeing the financial viability of the state's 21 CCRCs. Flores explained OCI looks at CCRC costs, interest rates and rates of return in analyzing financial solvency. He cautioned that a CCRC may appear to have a lot of money and it may seem their income exceeds their costs. But, according to Flores, it is the present value of future services as compared to the present value of future revenue that is of concern to the actuary, the accountant and to OCI. They must consider the CCRC's expected ability to raise entrance and monthly service fees as food, labor, maintenance and medical costs rise.

The establishment of entrance and service fees, therefore, is not a willy-nilly exercise by a CCRC nor is it an exercise that is only of concern to a CCRC. Those fees are the product of mission, marketplace and the OCI. And apparently that mission is of no interest to for-profit providers in Wisconsin since there are no for-profit CCRCs in this State.

It is the establishment of entrance and service fees, and CCRCs themselves, that appear to be the primary target of those supporting the Weissenfluh proposal. Their position is summed up in this excerpt from the initial draft executive summary to their final report:

> "CCRCs are typified by screening for health and wealth – only those with assets who can pay the large endowment fee (e.g. often $100,000 or more) and large monthly fees (e.g. often $1,500/month or more) and who don't represent an actuarial risk from a financial or health care perspective are admitted."

The signatories of this report believe this one sentence displays either a misunderstanding or a misrepresentation of the purpose and operation of a CCRC.

OCI's CCRC Requirements: CCRCs do indeed conduct financial screens of prospective residents. Indeed, s.647.02(2)(e), Wis. Stats., requires CCRCs, as a condition to operate as a CCRC, to submit to the Commissioner of Insurance a copy of the CCRC's entrance and other fees. Section 647.02(2)(g) requires the CCRC's submission of the figure to be used as the actual or projected length of a resident's stay in the CCRC. This information is required to ensure that the fee structure and actuarial components of the continuing care contract being offered meet OCI guidelines. To not conduct financial screening probably could be construed as in conflict with statutory requirements under Chapter 647, Wis. Stats., and certainly would place in jeopardy the financial viability of a CCRC and the assurance to its residents that they will be served for the duration of their lives.

CCRC Subsidized Care/Services: If proponents of the Weissenfluh proposal are correct in their assertion that financial screens are conducted solely to screen out the poor, rather than to ensure the financial viability of the CCRC, why does virtually every CCRC provide subsidized care to its residents who no longer are able to pay for the services they are receiving? How do you explain the finding in the WAHSA survey that the CCRC respondents provide an average of $515,000 annually in subsidized care, ranging from $40,854 to $1,545,000, and yet have never discharged a resident for inability to pay? If they are screening out those who will be unable to pay for the services they will need for the remainder of their lives, they apparently aren't doing a very good job of it.

Health and Long-Term Care Continuum: The statement that CCRCs conduct health screens solely to "screen out the infirm" is a statement that can only be made by someone unfamiliar with the regulatory requirements of long-term care. If CCRCs were to admit individuals who were in need of personal, supportive or nursing care to the independent living component of their CCRC, they would be providing regulated services in an unregulated setting and would be doing so in violation of Chapter 50, Wis. Stats. Only people able to live independently and who are not in need of intensive services required by law to be provided by the CBRF, RCAC or nursing home component of the CCRC can be admitted to the independent living component of that CCRC The health screen is conducted to ensure that people entering the CCRC are placed in the setting which best meets their needs. Although the majority of CCRC admissions are to the independent living units, it is not uncommon for a CCRC resident to initially be admitted to the CCRC's CBRF, RCAC and/or nursing home. And even if CCRCs did admit only the healthy (which they don't), the purpose of a CCRC is to provide for the health care needs of those individuals for the duration of their lives. Ultimately, the healthy do become infirm. If they didn't, there would be no need for the CBRF, RCAC and nursing home components of a CCRC.

Endowment Fees/Rental Agreements: Proponents of the Weissenfluh proposal speak of "large" endowment fees "often" in excess of $100,000 and "large" monthly fees "often" in excess of $1,500/month. Indeed, the hypothetical examples they use in the executive summary to their original final report draft refer to endowment fees of $150,000 and $200,000 and monthly service fees of $1,500 and $1,800. They either are unaware or fail to mention that these charges, though they exist, are clearly the exceptions to the norm. They either don't know or fail to mention the high-end charges are primarily a Milwaukee-area phenomenon. They either don't know or fail to mention that virtually all endowment fees are refundable. And they either don't know or fail to mention that virtually all CCRCs offer an array of plans, including pure rental plans with no endowment fees and a sliding scale of endowment/service fees, to meet the financial means of their residents and prospective residents.

Home Equity to Purchase Long-Term Care: Proponents of the Weissenfluh proposal have argued the "benevolent" tax exemption for CCRCs is not warranted because it exempts only those who are "wealthy enough" to afford "expensive CCRC long-term care insurance." This fairly incendiary and potentially divisive depiction has been used repeatedly throughout Task Force discussions by certain Task Force members. But just what is "wealthy" and who are "the wealthy?" And is it the truly "wealthy" who are the primary inhabitants of CCRCs? Let's use the city of Madison as an example. The average assessed value of a home in Madison is $150,000. At the same time, it is the proceeds from the sale of their home that most prospective CCRC residents use to pay the endowment fee charged by the CCRC (if one is charged or if the prospective resident chooses a payment plan which includes an endowment fee). Despite the fact that the vast majority of CCRCs in this state charge an endowment fee significantly less than $150,000, if this prospective CCRC resident in Madison owned her $150,000 home free and clear, sold it for its assessed value, and applied those proceeds to a CCRC endowment fee, does that make this person "wealthy?"

Indeed, at a May 23, 2000 continuing legal education seminar on property tax issues affecting senior housing sponsored by the UW-Madison Law School, the issue was raised that a CCRC is of greatest benefit not to the wealthy, but to the middle income. Attorney Alan Marcuvitz, a partner in the Milwaukee law firm of Weiss, Barzowski, Brady & Donahue LLP who specializes in property tax assessments, condemnation, land use matters, and municipal law, told Milwaukee Assistant City Attorney and BRHA Task Force member Gregg Hagopian, who provided seminar participants with an overview of the activities of the BRHA Task Force, that it was his belief that the Weissenfluh proposal takes care of the wealthy and the poor but it leaves out the middle income. And there is surely justification for that statement: While no one can argue that many inhabitants of CCRCs are wealthy, by anyone's definition of the term, the wealthy are also the only ones able to purchase significant amounts of health care in their own homes and are the primary targets of homecare agencies and the principal users of private homecare services. On the other hand, governmental programs, as they rightly should, provide services to the poor. The signatories of this report believe it is the middle income which most benefits from a CCRC, which rewards those who plan for their future health care needs (do the truly wealthy need to plan?) with the care and services they will need for the duration of their lives.

If a not-for-profit CCRC or any of its CBRF, RCAC, independent living and/or nursing home components, is required to pay property taxes in the future, those taxes clearly will be passed on to the CCRC resident. The signatories of this report believe that CCRC residents do not deserve such a penalty because of the clear community benefit a CCRC provides. Specifically,

- A CCRC provides a form of long-term care insurance for elderly people who decide to pre-plan for their future health care needs, which enables them to self-fund most if not all of their future health care services rather than rely on government funding. The benefit is not only the peace of mind this option gives to the CCRC resident but also to the state taxpayers whose burden to generate government funding is somewhat eased. Contrary to the contention of some, the benefits of a CCRC far exceed the walls of that CCRC.

We suggest that individuals reviewing issues related to the work of the BRHA Task Force examine any proposed changes to s.70.11(4), Wis. Stats., not only from a property tax perspective but also from the potential impact those changes might have on the long-term care system's financing incentives and delivery structure.

IRC 501(c) As a Standard for Property Tax Exemptions

As noted above, the second component of the Sauer proposal is a requirement that the BRHA receive a determination of exempt status under IRC s.501(c) from the IRS. Proponents of the Weissenfluh proposal have argued that the Sauer proposal, "distilled to [its] essence," is an attempt to preserve the status quo.

That statement is essentially correct. However, the signatories of this report believe the suggested addition of the IRS Revenue Ruling 72-124 requirements to property tax law under the Sauer proposal would narrow the "benevolent" standard.

As representatives of not-for-profit organizations which currently enjoy exemptions from property taxation, the signatories of this report obviously entered these Task Force discussions with an eye toward the status quo. Self-preservation alone would dictate that position. So when the time came to identify the "problems" with the BRHA tax-exemption, those problems were going to have to be identified by individuals other than those who believed there were no significant "problems."

Some might argue that nothing could possibly be offered that would sway those currently benefiting from the BRHA tax exemption to accept changes that might modify or even eliminate those exemptions, i.e., that some "problems" do exist. We would contest that assertion if for no other than purely political reasons: We do not intend to go before the Legislature to defend the indefensible. If we were convinced the status quo could not be justified, we would not adhere to it as a position.

We support the Sauer proposal because the advocates of change on the Task Force failed to provide any evidence that substantive problems exist with the current system.

At nearly every Task Force meeting, Mr. Hagopian railed against the "abusers" of the system. Finally, at the April 27th meeting, he was directly asked to specify what these "abuses" were and who were the problem facilities committing these abuses. His response was the Weissenfluh proposal sought to address facilities which charge "high" endowment and service fees, which provide little or no medical, nursing or other care and which screen out the poor and the infirm. **Based on that description, the signatories of this report conclude that no substantive problems exist with the current system because we are aware of no such facility described by Mr. Hagopian that exists in Wisconsin.**

To our knowledge, there are no "abusers" of the current benevolency standard as it applies to retirement homes for the aged. There are no substantive "problems" with the BRHA tax exemption. What is really at issue is whether a property tax exemption should be based on a benevolent standard or a standard of charitability or indigence. The signatories of this report could support either standard, as long as a community benefit component remains and the new standard reflects the public mission and purpose of the tax-exempt entity. But that is an issue much broader in scope than the legislative directive given this Task Force.

We do believe the current BRHA tax exemption suffers from a lack of clarity which, though not a problem substantive in nature, needs to be addressed. That is why the IRC s.501(c) requirement and adherence to IRS Revenue Ruling 72-124 are contained in the Sauer proposal.

Simply stated, as not-for-profits, we believe long-term care recipients are best served when care and service decisions are made based on need, personal preference and cost effectiveness, not on rate of return on investment or stockholder expectations. We believe the IRC s.501(c) mandates to mission-driven service and community involvement/control are in the best interests of not only those receiving those mission-driven services but of the community as a whole. We also believe no one on the Task Force objects to requiring a BRHA to be exempt from federal income taxation under IRC s.501(c) as a condition of being exempt from property taxation.

The signatories of this report also believe that BRHAs should adhere to the provisions of IRS Revenue Ruling 72-124 as an additional property tax exemption test. Indeed, if they are not currently doing so, they could be subject to loss of their IRC s.501(c) tax-exempt status.

Under IRS Revenue Ruling 72-124 (the "72" refers to the year of issuance, 1972), the IRS for the first time allowed a "home for the aged" to be exempt from federal taxation if the "home for the aged" otherwise qualifies for a federal tax exemption under IRC s.501(c) and if the facility 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; 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; 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 a community's elderly persons. The IRS continues to audit Wisconsin not-for-profit facilities to determine their compliance with these provisions.

- The signatories of this report believe a requirement which prohibits facilities from discharging a resident who runs out of funds is a community benefit not only to that individual but also to the local/state government which otherwise might be forced to fund those needed services and justifies a property tax exemption for those facilities.

- We believe the argument that facilities "screen out the poor" ignores both the actuarial requirement for CCRCs and the substantial amount of subsidized care being provided by not-for-profits throughout the long-term care continuum.

- We believe the Sauer proposal provides the clarity that assessors need and claim they don't have under the current system.

- We believe the charge that the IRS fails to enforce either IRC s.501(c) or IRS Revenue Ruling 72-124 is inaccurate based on our own experience and shows some semblance of irresponsibility on the part of those making the charge. Anyone aware of abuses should take the responsibility of bringing those abuses to the attention of the IRS.

- We believe a CCRC, whose residents self-fund their future health care needs and thereby minimize their future reliance on government funding, provides a benefit both to the individual CCRC resident and to the community as a whole by limiting the State's Medicaid appropriation and warrants a property tax exemption.

- We believe the "cross subsidization" of revenues generated by CCRC residents to either subsidize the care and services of residents who have run out of funds or to subsidize the CCRC nursing home's Medicaid deficits is a community benefit to both the needy resident and to State taxpayers and warrants a property tax exemption.

- We believe the Sauer proposal provides a framework which warrants a property tax exemption for the BRHAs which adhere to it.

WEISSENFLUH PROPOSAL

The Weissenfluh proposal has changed form a number of times over the course of the Task Force discussions. Under the most recent proposal, there is a two-part test that must be met in order to be granted a property tax exemption:

1) Non-profit, licensed nursing homes would be exempt; and

2) Non-profit senior housing facilities would be exempt to the same extent they served the aged (65 years of age and older) and society's less-advantaged (those earning at or below the Homestead Tax credit eligibility limit of $20,290 in 2000 and $24,500 in 2001 and thereafter). For example, if 100% of the residents of a CBRF were 65 years of age or older and 50% of the CBRF's residents had annual incomes at or below the Homestead Tax credit limit, the CBRF would be entitled to a 50% property tax exemption.

As Mr. Hagopian noted at the May 31st Task Force meeting, the Weissenfluh proposal would tax a senior housing facility to the extent that it does not serve the elderly in financial need. This proposal would in essence scrap the benevolence standard for retirement homes for the aged and create a charitable standard. It also ignores in totality the long-standing tax-exemption principle of a community benefit. Before getting into the specifics of our opposition to this proposal, the signatories of this report would like to raise the following issue:

> Unlike government, not-for-profits cannot print money. They cannot go to the taxpayer to seek the funds necessary to support their programs. It takes money to build and operate a BRHA or any other not-for-profit facility and that money must be generated either by community donations or fees from the recipients of services. It is the responsibility of government to provide services to the poor. It is the role of the not-for-profit to man the middle ground between government funding of services to the poor and the unfettered free market. The mission of the not-for-profit is to serve those in need but it must do so within the constraints of its revenue stream.
>
> Unlike its for-profit counterpart, however, every dollar generated through that revenue stream is channeled back into the not-for-profit facility and the care and services it provides. Those dollars are used to support those residents who generated the revenue as well as those who are no longer able to do so. Those revenues also will keep that facility operational and available for future generations. They do not inure to the benefit of any private individual or stockholder. So while the not-for-profit cannot eliminate the burden of the taxpayer to fund the care and services provided to those who cannot pay for those services, it eases that burden. The combination of easing the taxpayers' burden and using generated funds to advance the purpose of the facility rather than to inure to the benefit of an individual or stockholder historically has warranted a tax exemption. We believe that should continue under Chapter 70, Wis. Stats.

Our opposition to the Weissenfluh proposal is principally predicated on its failure to include a community benefit standard as justification for a property tax exemption. We have a number of other concerns, however.

1) The directive of the Legislature was for the Task Force to investigate the property tax exemption for benevolent retirement homes for the aged and all problems that are associated with it. As stated earlier, we believe the proponents of the Weissenfluh proposal failed to provide sufficient evidence that substantive problems exist with the BRHA tax exemption. In fact, when certain not-for-profit organizations were held out by some as "abusing" the current system, these providers were invited to make a presentation to the BRHA Task Force. In these specific instances, Mr. Wimmer and Mr. Dennis Sampson, Executive Director of Tudor Oaks Retirement Community, a CCRC in Hales Corners, were able to correct some misinformation and present a sound case for maintaining the property tax exempt status of their organizations.

Further, the suggested resolution to the "problem" offered under the Weissenfluh proposal, the creation of a charitable standard and elimination of the benevolent standard for retirement homes for the aged, goes far beyond the scope of the Legislature's directive.

2) If the proponents of the Weissenfluh proposal felt comfortable enough to significantly expand the scope of the Legislature's directive to the BRHA Task Force by recommending a charitable standard for retirement homes for the aged, why not recommend a charitable standard for all benevolent associations? Granted, the Legislature only expressed an interest in benevolent retirement homes for the aged but that didn't stop proponents of the Weissenfluh proposal from ignoring benevolent and supporting charitable. Why should benevolent retirement homes for the aged be treated any differently than any other benevolent association exempted from property taxation under s.70.11(4), Wis. Stats?

3) The Weissenfluh proposal fails to achieve or include what we assumed would be the first goal of the BRHA Task Force: To define a "benevolent retirement home for the aged." Its last draft simply referred to "senior housing facilities." But "senior housing facilities" neither were defined nor enumerated. For instance, do "senior housing facilities" include CBRFs, even though a significant segment of CBRF care is provided to non-seniors?

4) When asked to specifically cite what is the "problem" the Task Force should be addressing, some Task Force members have said it is facilities which charge high entrance and service fees, provide little or no health-related services and screen out the poor and the infirm. But the solution they recommend bears no relation to the problem(s) they identified and the "problem" facilities they cite simply don't exist in Wisconsin.

5) Section 70.11(4), Wis. Stats., exempts benevolent nursing homes from property taxation. In separate language, it also exempts BRHAs. The Legislature directed the BRHA Task Force to investigate the BRHA tax exemption, not the benevolent nursing home tax exemption. Yet, under the Weissenfluh proposal, it would appear some nursing homes would be required to pay property taxes. We would suggest that this was not the intent of the Legislature and is beyond the scope of the Task Force's legislative directive.

6) The proponents of the Weissenfluh proposal who do not have a background in long-term care did a solid job of picking up the sometimes confusing nuances and terminology of the long-term care system. However, some misunderstanding still prevails. A perfect example is the Weissenfluh proposal's stated goal of exempting from property taxation non-profit, "licensed". nursing homes. **Regardless of whether benevolent nursing homes were an appropriate topic of discussion for the BRHA Task Force, there is a significant difference between what the Weissenfluh proposal proposed for nursing homes and what its proponents said it did.** The proposal itself would exempt all non-profit, licensed nursing homes. The minutes of the May 31, 2000 BRHA Task Force meeting, however, quote Mr. Hagopian as explaining the revised Weissenfluh proposal would exempt a "licensed" nursing home if it is nonprofit, has an IRS 501(c)(3) designation, "and accepts Medicaid patients." Approximately 8-12 licensed nursing homes in Wisconsin are not Medicaid-certified and do not provide care to Medicaid nursing home residents; about half of those facilities are nonprofit. If the Weissenfluh proposal went into effect, those nonprofit nursing homes would be exempt from property taxation because they also are licensed, despite the fact they do not accept Medicaid residents. But if the intent of the proposal is that stated in the 5/31/00 Task Force minutes, those facilities which are nonprofit but are not Medicaid-certified and therefore do not accept Medicaid residents would

be required to pay property taxes. It would appear the proponents of the Weissenfluh proposal (at least the non-long-term care providers) do not understand the distinction between a licensed facility and a certified facility. Their proposal should be modified if its language does not conform to their intent.

7) As stated several times earlier, the Weissenfluh proposal incorrectly treats CBRFs as senior retirement housing when it clearly is not an elderly-only service component.

8) The Weissenfluh proposal imposes an age limit that provides a tax exemption only for those age 65 or older. The proposal, however, provides no recognition of the fairly common occurrence where a caregiving sibling, spouse, son or daughter resides in a CBRF or RCAC with an elderly relative and may indeed be under the age of 65. Indeed, under HFS 89.29(1), Wis. Adm. Code, an incapacitated or incompetent prospective RCAC tenant can only be admitted to a RCAC if they share the apartment with "a competent spouse or other person who has legal responsibility for the individual." That reality needs to be addressed in the Weissenfluh proposal.

9) The use of the Homestead Tax credit limit as a required standard for granting a property tax exemption poses a myriad of problems. The first of those is the principle articulated to justify its use: Proponents argue that using the Homestead Tax credit limit to grant or deny a tax exemption is consistent with the requirement under IRS Revenue Ruling 72-124 that tax-exempt homes for the aged must set charges at a level within the financial reach of a significant segment of the community's elderly persons. Homestead is a uniform, statewide income limit that applies to all individuals, not solely the elderly. In addition, the Homestead income tax credit is $20,290 in Milwaukee as well as Mequon. Is the financial reach of a significant segment of the elderly in Mequon the same as it is in Milwaukee? If the intent of the income limit is to recognize IRS Revenue Ruling 72-124, the use of the Homestead Tax credit as that income limit fails to meet that intent.

10) Based on our understanding of the Weissenfluh proposal, each resident of a "senior housing facility" (still undefined) shall, on or before January 15th of each year, provide to the facility an affidavit, in a form prescribed by the Department of Revenue, on which the resident shall indicate whether, as of January 1 of that year, the resident was 65 years of age or older, and whether, for the preceding year, the household income for that household was at or below the Homestead Tax credit limit.

This provision raises a series of questions:

A) Since nearly 60% of the respondents to the WAHSA survey indicated they neither collect nor have available to them the income statements of their residents, they have several questions: Can a resident be required to fill out such an affidavit? What if they refuse? Who is responsible if the information is false or inaccurate? Is the facility responsible for the validity of the information? What penalties can be imposed for failure to report or reporting false or inaccurate information? Does the facility have the legal authority to require a resident to comply with this requirement?

B) Will the resident/taxpayer have the tax information available to meet a January 15th deadline?

C) An affidavit is a legal document that is a sworn, signed statement and indicates the individual has the capacity to understand and attest to the information in the affidavit. Many individuals, specifically Alzheimer's residents in CBRFs, do not possess that capacity. What effect would that have on the ability to legally enforce this provision?

D) The Weissenfluh proposal requires the senior housing facility to swear it has reviewed the resident's affidavits and that the affidavits are true and accurate to the best of its knowledge. But the purpose of an affidavit is it is signed by persons with personal knowledge of the information contained in the affidavit. Most organizations do not have that personal information and therefore would not be able to attest to its accuracy.

E) The Weissenfluh proposal, in establishing its income limit test, refers to both federal adjusted gross income as a standard for determining qualification of residents and to the Homestead income base. The calculation of income for federal adjusted gross income and Homestead are different and include different types of receipts. For example, federal adjusted gross income does not include Social Security at lower income levels but Homestead income does include Social Security benefits at all income levels. Which standard applies?

F) Residents of benevolent retirement homes for the aged are not eligible for the Homestead Tax credit because they live in tax-exempt housing. If that housing no longer is tax-exempt and eligible residents file for the Homestead Tax credit, how much will this change cost State taxpayers?

11) The average cost to provide services in an assisted living facility (CBRF or RCAC) is estimated at $2,100/month. The Weissenfluh proposal, therefore, would wipe out the property tax exemption of virtually every assisted living facility in this state.

12) The Weissenfluh proposal certainly will have a "yo-yo" effect on facility operations. Because of the fluctuating incomes of its residents, a facility that is tax exempt one year could very easily be paying property taxes the next year with absolutely no forewarning of that impending change. How can an operation effectively budget under such circumstances? It also provides a facility with virtually no ability to adjust its operations to meet the new property tax exemption criteria.

13) Mr. Hagopian has provided Task Force members with a series of case law decisions on property tax exemptions from throughout the country. While we appreciate the information, we question its relevance since none of these decisions were based on Wisconsin statute. If desired, we would be happy to provide an equally long list of case law rulings in favor of property tax exemptions.

14) Some members of the Task Force have asserted the Weissenfluh proposal will provide clarity which will avoid further litigation in this area. With a draft that defines neither a BRHA nor a senior housing facility, that's an assertion we believe will be awfully difficult to defend. By contrast, current law is supported by 50 years of case law and many federal law interpretations which have defined and given shape to the current exemption. For example, modern Wisconsin case law has addressed most of the issues associated with the current law exemption. In addition, a recent search of the Westlaw federal tax database for precedent citing the seminal revenue rulings related to housing for retired persons (IRS Revenue Ruling 72-124, 1972-1 IRB 145) identified 93 rulings, notices, general counsel memoranda and other precedent which identified and applied the criteria for qualification as a tax-exempt, not-for-profit retirement home. Those rulings have been issued and published over a period of almost 30 years, with the

latest rulings issued in 1999. Thus, there is ample authority to give clarity to the existing exemption statute. The reality is the proponents of the Weissenfluh proposal are seeking this statutory change because the courts have ruled against them time and time again.

15) Proponents of the Weissenfluh proposal have argued that the use of money is not a consideration in determining exemption for property tax purposes. In fact, the use of money is critical to that determination since the funds generated by the organization must be used for nonprofit purposes. And remember, not-for-profits must follow the absolutes that there be no pecuniary gain to any private party and the facility must be operated entirely free from a private profit motive.

16) The for-profit providers who support the Weissenfluh proposal argue the current system provides not-for-profit providers with an unfair competitive advantage, that they basically provide the same services to the same kind of people and that the Legislature should level the playing field. Our response to that argument is a simple question: What is the motivation of a for-profit provider to provide long-term care services as a for-profit entity rather than a not-for-profit? For-profit providers had every opportunity to provide not-for-profit long-term care services and avail themselves of the same property tax exemption but chose not to. Why? Do for-profit providers truly believe the only difference between a not-for-profit and a for-profit provider is the property tax exemption? If a person runs out of funds in a for-profit facility, is that resident discharged or does the facility subsidize their care? How many for-profit providers entered a marketplace that had been served for years by a not-for-profit operator? How many of those for-profit operators entered that competitive marketplace knowledgeable of the competitive advantages and disadvantages of being a for-profit provider? How many for-profit providers entered the aging services field after the implementation of the Medicaid and Medicare programs? How many before? And how does that compare to the not-for-profit sector? How many for-profit facilities have gone bankrupt over the past 2 years? Not-for-profit? What impact has that had on the residents and the communities they serve? Who is here for the long haul and who is here as long as profitability can be maintained? Is the only real difference between a for-profit provider and a not-for-profit provider truly that one pays property taxes and the other doesn't?

17) If a facility loses its tax-exempt status, it is the resident who ultimately will "pay" the property tax through rate increases. We anticipate that if the Weissenfluh proposal were enacted into law, many facilities which currently are tax-exempt would be required to pay some level of property taxation. While we assume the vast majority of those facilities would maintain their IRC s.501(c) tax exempt status and therefore would continue to serve residents who no longer can pay for those services, passage of the Weissenfluh proposal could provide its proponents with a self-fulfilling prophecy. Because cross-subsidization no longer would be permitted, many facilities indeed could begin to intentionally screen out all but the most wealthy and deny access to anyone but the wealthy. Who will serve those denied this access and how are either local property taxpayers or state taxpayers in Wisconsin benefited by this change?

18) While we have expressed numerous concerns with the Weissenfluh proposal, the signatories of this report remain principally opposed to that proposal because it eliminates the community benefit standard as a justification for a property tax exemption.

DOR PROPOSAL

At the May 31, 2000 BRHA Task Force meeting, Ron Rosner of DOR staff explained the DOR developed a proposal that recognized that current law and case law rulings favor the continued exemption of nonprofit retirement homes under the benevolent exemption. The DOR proposal would exempt nursing homes, CBRFs and RCACs which: 1) Maintain a policy of not discharging residents due to inability to pay; 2) Operate free from profit motive; and 3) As of January 1 of the exemption year, serve a population of residents at least 60% of whom are 65 years of age or older. An independent living unit of a CCRC or that is part of a continuing care campus (undefined) would have to meet two additional exemption tests: 1) The units could be no greater that 1,000 square feet for single occupancy or 1,200 square feet for double occupancy; and 2) The units could not exceed a "luxury" fee factor of $400,000, which would be the sum of the entrance fee and an annuitized value of monthly service fees. According to Mr. Rosner, the purpose of this approach is to target those units that go beyond the standard needs of a retirement home or provide "excess comfort."

Because the Department of Revenue staff who drafted this proposal indicated it would not be forwarded to the Legislature as part of the BRHA Task Force final report -- unless it is adopted by the Task Force and that is highly unlikely -- we will not spend much time on the DOR proposal. We will say, however, that despite the fact we cannot support the DOR proposal, at least as drafted, it did seek to address a perceived problem. We simply don't hold the same perception.

The signatories of this report commend the DOR for developing a proposal which is reasonably close to the legislative directive given the Task Force and for targeting a perceived problem area. However, for the following reasons, we can not support the DOR proposal:

1) While the DOR proposal offers a potentially saleable political solution and would impact relatively few facilities, philosophically we cannot support a proposal which does not provide a community benefit option.

2) The luxury fee factor does not acknowledge that most entrance fees are 90% refundable. Refundability must be factored into any "fee factor" approach.

3) The square footage test makes no sense if the target is luxurious units unaffordable to most. If the unit is 2,000 square fee but the entrance fee and monthly service fee is affordable to a significant segment of a community's elderly population, why penalize that facility for providing a spacious, yet affordable, accommodation? Of the 18 respondents to the WAHSA survey who indicated this proposal would apply to them, 13 indicated it would generate a tax liability. But for 7 of those 13, that tax liability would be eliminated if the square footage requirement were dropped.

4) Once again, many CBRFs would be required to pay property taxes simply because they don't serve a predominately elderly population.

5) The proposal excludes nursing homes, CBRFs and RCACs from the definition of a BRHA but still requires them to meet the 3-pronged test. Since the legislative directive applied only to BRHAs and since the DOR proposal specifically excludes nursing homes, CBRFs and RCACs from the definition of a BRHA, nursing homes, CBRFs and RCACs should remain exempt under the current statute. In addition, s.50.09(1)(j), Wis. Stats., permits nursing homes to discharge

residents for nonpayment of charges under certain circumstances (e.g., divestment and illegal sheltering of funds in an attempt to achieve Medicaid eligibility).

SUMMARY

The signatories of this report support the current benevolent standard for purposes of granting a property tax exemption to retirement homes for the aged. No compelling evidence was provided by Task Force members to justify dismantling this standard. We do seek further clarification of the standard by defining a BRHA and by specifying that BRHAs must receive a determination of exempt status under IRC s.501(c) from the IRS and must adhere to the provisions in IRS Revenue Ruling 72-124. We oppose any modification to current statute to impose a purely indigent/charitable standard because it ignores the benefits to the entire community of a community benefit standard. To allow an entity to meet its tax exempt responsibilities through tangible means other than solely providing services to the indigent should not be dissuaded because government most likely would have to step in where that entity was forced to opt out.

In closing, we wish to urge policy-makers to consider any changes to the property tax-exempt status of benevolent retirement homes within the context of the current long-term care crisis. By all accounts, long-term care providers are engaged in daily battles to overcome staffing shortages, reimbursement shortfalls and quality concerns. While imposing property tax payments on solid, mission-driven, not-for-profit organizations may prove helpful to some financially-strapped local units of government looking to fill budget holes, this policy shift could prove disastrous to a long-term care system that is expected to serve the largest elderly population in our State's history. And finally, although our report clearly speaks of the differences between the not-for-profit community and its for-profit counterparts, this is necessary to clearly educate the readers on why an organization chooses to operate as a not-for-profit; it is not our goal to minimize the important role for-profits play in the provision of long-term care housing and services.

Acknowledgements:

We would like to thank those members of the Task Force with whom we ultimately could not agree. We respect your opinions, we admire your commitment, we appreciate the sharing of your expertise and we applaud your willingness to disagree without being disagreeable.

We especially would like to extend our thanks and appreciation to Tom Ourada, Rebecca Boldt and Ron Rosner of the Department of Revenue for their efforts in what might at times have struck them as a thankless task. Although they ultimately were unable to surmount the insurmountable, their expertise and objectivity enabled us all to at least frame the issue.

Respectfully Submitted,

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Jim Olson, Administrator, Schmitt Woodland Hills, Richland Center
Dennis Sampson, Administrator, Tudor Oaks Retirement Community, Hales Corners (Alternate/Proxy)
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