BENEVOLENT RETIREMENT HOME FOR THE AGED LEGISLATIVE TASK FORCE

GOVERNMENT-5 REPORT

Dated as of July, 15, 2000

HAGOPIAN, HUEBSCH, MURPHY, WEISS, WEISSENFLUH

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I. INTRODUCTION

This is the report drafted by Gregg C. Hagopian[1], and adopted by the following members of the Benevolent Retirement Home for the Aged Legislative Task Force: (1) Gregg C. Hagopian, Assistant City Attorney, City of Milwaukee; (2) David R. Huebsch, retired Assessor for City of Onalaska; (3) Patrick Murphy, owner-operator of for-profit senior living center, Hales Corners Care Center; (4) Larry Weiss, Chairman of the Board of for-profit parent corporation of various senior living centers, Laureate Investments; and (5) Peter C. Weissenfluh, Chief Assessor, City of Milwaukee.[2]

While we had hoped to obtain unanimous approval from all task force members with respect to our report and our proposal for new legislation, despite our efforts to reach compromise, the task force remained generally even split on a 5 to 5 basis, with task force members Hagopian, Huebsch, Murphy, Weiss, and Weissenfluh on one side (the "Government-5"), and task force members Schaefer, Sauer, Olson, Zielski, and Kittleson on the other (the "Nonprofit-5").

In our report, besides explaining our proposal (Hagopian, Huebsch, Murphy, Weiss, and Weissenfluh) for new legislation, we also explain why the Sauer proposal and Kittleson-Zielski proposals must be rejected.

In this report, the phrase "benevolent retirement homes for the aged" is often referred to as "**BRHA**."

Our report: (i) relates to the current property tax exemption in Wisconsin under Wis. Stat. §70.11(4) for "benevolent retirement homes for the aged" ("**BRHA**"); (ii) discusses the judicial history of that exemption, which reveals that there are two, co-existing and contradictory lines of court cases defining the word "benevolent" in §70.11(4), the St. Joe's Line that defines "benevolent" as requiring charity (the admission and servicing of people without regard to ability to pay), and the Milw. Protestant Line that defines "benevolent" as not requiring charity (only taking care of those who can afford to pay) ; (iii) explains why the line of cases that does not require "charity" (i.e. the Milw. Protestant Line) is wrong and illegal; (iv) explains why the legislature must act – and act now – to straighten out the law and eliminate all the problems that currently exist due to the two conflicting lines of cases; and (v) makes a recommendation for new legislation to do away with the BRHA exemption and to create a new one that straightens out the law, reflects good public policy, is clear, and is in step with the senior-housing industry.

In a nutshell, the problems with the current 70.11(4) BRHA exemption are: (1) the two contradictory lines of cases defining "benevolent"; (2) that, under the Milw. Protestant Line definition, BRHA exemptions may be granted to senior housing facilities that don't admit, and don't serve, the poor or those in need of care, and that only serve

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[1] Gregg C. Hagopian ©, July, 2000.

[2] The task force met on the following dates in Madison, Wisconsin: 12/15/99; 1/28/00; 3/3/00; 3/23/00; 4/27/00; 5/31/00. .

wealthy, healthy, able-bodied young; (3) that, under the Milw. Protestant Line definition, BRHA exemptions run afoul of the public patronage principle of property tax exemption; (4) that, under the Milw. Protestant Line definition, a BRHA exemption for wealthy, healthy, able-bodied young, or for an organization that screens out the poor and those in need of care, hurts the very people the legislature intended to help under 70.11(4) (i.e. the elderly amongst us in need of care who don't have money to pay for that care); (5) that, under the Milw. Protestant Line definition, the BRHA exemption runs contrary to legislative intent, public policy, and the state's "Family Care" Program; (6) BRHA exemptions under the Milw. Protestant Line result in unfair competition between for-profit operators and non-profit operators; (7) given the conflict in judicial definitions of "benevolent", assessors lack the guidance they need to make good exemption decisions; (8) some assessors avoid current law and allow improper exemptions to avoid litigation and to collect "payments-in-lieu-of-taxes"; (9) the BRHA exemption is currently used as a loophole for the wealthy to get a property-tax exemption for long-term care insurance; and (10) the BRHA exemption, coupled with the evolution of the senior-housing industry, opens the door to more and more parcels improperly coming off the tax rolls.

II. CURRENT LAW: §70.11(4) EXEMPTION FOR "BENEVOLENT RETIREMENT HOMES FOR THE AGED"

To properly devise an acceptable solution to the problems associated with the BRHA standard under current law, one must first understand what the current law is.

A. Thumbnail Sketch of Current Law

Under current law (as of 6/30/00): (i) per Wis. Stat. §70.01, all property is taxed except that which is exempt; (ii) per Wis. Stat. § 70.109, exemptions are strictly construed with the presumption that the property at issue is taxable, and with the burden of proof being on the person claiming exemption; and (iii) per Wis. Stat. §70.11(4), property owned and used exclusively by educational or benevolent associations, "including benevolent nursing homes and retirement homes for the aged" is exempt from property taxes, "but not exceeding 10 acres of land necessary for the location and convenience of buildings while such property is not used for profit."

B. Uniformity Clause; Legislature's Power Versus the Court's Power

Per Article VIII, Section 1 of the Wisconsin Constitution, "[t]he rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods."

For purposes of the uniformity clause, there is only one class of property—property that is taxable—and the burden of taxation must be borne as nearly as practicable among all taxable property, based on value. Noah's Ark Family Park v. Village of Lake Delton, 210 Wis. 2d 302, 565 N.W.2d 230 (Ct. App. 1997), aff'd 216 Wis. 2d 386, 573 N.W.2d 852 (1998).

Taxation is within the sole province of the legislature—not the judiciary. Wisconsin Constitution, Article VIII, Section 5. Conversely, exemption is also within the sole province of the legislature—not the judiciary. Wisconsin Central R. Co. v. Taylor Co., 52 Wis. 37, 8 N.W. 833 (1881).

Power to prescribe what property to tax (see §70.01: all property taxed except that which is exempt) necessarily implies power to prescribe what property is exempt. Wisconsin Central R. Co.; Atty Gen. v. Winnebago Lake & F.R. Frank Road Co., 11 Wis. 35 (1860). Manual p. 22-1. Legislature has broad discretion in classifying property for taxation. Nash Sales v. City of Milw, 198 Wis. 281, 224 N.W. 126 (1929). Legislature can exempt an entire class of property from tax and make such class very narrow. State ex rel. Wisconsin Allied Trust Owners Assn. v. Public Service Commn of WI, 207 Wis. 664, 242 N.W. 668 (1932).

Courts cannot grant an exemption if the legislature has not provided one. Greenwald Estates, 17 Wis. 2d 533, 117 N.W.2d 609. What property is exempt from taxation is a question for the legislature. Nash Sales v. City of Milwaukee, 198 Wis. 281, 224 N.W. 126 (1929). Legislature, not courts, grant exemption. Kickers; Katzer, 104 Wis. 16, 21 (1899).

Court should not substitute its social and economic belief for the judgment of the legislative body. State v. Amoco Oil Company, 97 Wis. 2d 226, 293 N.W.2d 487 (1980). The court has no power to legislate. Fredericks v. Kohler Company, 4 Wis. 2d 519, 91 N.W.2d 93 (1958). Modification of a statute, if it works badly or in an unexpected and undesirable way, must be obtained through legislation. State ex rel. Badtke v. School Board of Joint Common School District No. 1, City of Ripon, 1 Wis. 2d 208, 83 N.W.2d 724 (1957).

Thus, clearly, it is the legislature – and *only the legislature* – that has the power to create property tax exemptions. Courts should respect what the legislature legislates and should not "judicially legislate" by twisting or stretching state exemption laws or by creating new exemptions. Courts should respect our democracy's separation of powers and construe statutes – not legislate. Milw Co Republican Comm v. Ames, 227 Wis. 643, 278 N.W. 273 (1938).

Unfortunately, however, as this report explains below, beginning in 1969 with its Milw. Protestant Home decision, courts in Wisconsin wholly ignored Wisconsin's law, and improperly stretched the §70.11(4) BRHA exemption to leave the law in chaos. It is now up to the legislature to correct that chaos.

C. The Strict Construction Rules: Taxation is the Rule and Exemption is the Exception

As explained, under Wis. Stat. § 70.01, "[t]axes shall be levied, under this chapter, upon all general property in this state except property that is exempt from

taxation . . . ." Accordingly, all property is taxed except that which the *legislature* specifically exempts.

Under Wis. Stat. §70.109, the legislature clarified long-standing common-law that exemptions under Wis. Stat. Chapter 70 shall be strictly construed in every instance with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption. 1998 Act 237 (1997 AB 290) § 278s and § 9342(5f) (eff. 1/1/99).[3] Those rules of construction are referred to in this report as the "**Strict Construction Rules**." The legislature codified them in §70.109 at the urging of the Wisconsin Association of Assessing Officers, and others, because, too often, courts (like the majority in the 1969 Milw. Protestant Home case) were paying mere lip-service to the rules and then ignoring them.

Below are examples of cases where the court did respect the Strict Construction Rules.

According to the Supreme Court in Deutsches Land (S.Ct. 1999), 225 Wis. 2d at 80-81, ¶13: "[i]n Wisconsin, the taxation of property is the rule and exemption is the exception. . . . In general, we apply a 'strict but reasonable construction' to tax exemption statutes . . . . Since exemption from the payment of taxes is an act of legislative grace, the party seeking the exemption bears the burden of proving that it falls within a statutory exemption . . . . Consequently, any doubt under the 'strict but reasonable' construction rule must be resolved against the party seeking exemption" (internal cites omitted). Also per Deutsches, ¶26, owner must prove it is an exempt owner that actually uses the property for exempt use. Proof must be adequately detailed and be beyond mere unsupported opinion testimony.

Per Kickers of Wisconsin, Inc. v. City of Milwaukee, 197 Wis. 2d 675, 679-680, 541 N.W.2d 193 (Ct. App. 1995): (i) taxation is the rule and exemption is the exception; (ii) tax exemption statutes are matters of legislative grace and are to be strictly construed against the granting of an exemption; (iii) the party claiming exemption has the burden to show the property is clearly within the terms of the exemption statute and any doubts are resolved in favor of taxation; (iv) all presumptions are against exemption, and exemption should not be extended by implication.

Per Kickers at 197 Wis. 2d 675, 686, citing Katzer case (decided in 1899), "'[Exemption] statutes conferring special privileges and in derogation of the sovereignty exercised over other property are to be strictly construed. If the meaning of such statute is fairly ambiguous or uncertain as to a specific piece of property or owner, it is the duty of the courts to resolve the doubt in favor of the taxability of the property. It is for the legislature to grant these special privileges, and it has always been held that courts will proceed upon the assumption that

[3] See, e.g., State ex rel. Bell v. Harshaw, 76 Wis. 230, 45 N.W. 308 (1890). The Strict Construction Rules have been the law in Wisconsin since at least the late 1800's.

whatever the legislature intends to exempt will be expressed in such clear language as to leave no doubt, and that what has been left doubtful is not intended to be exempted."' See, also, Manual p. 22-1, 22-2: "party seeking exemption must present evidence that clearly and beyond a reasonable doubt shows that the property is exempt. If the assessor has a reasonable doubt, the assessor should deny the exemption."

The basic policy behind property tax exemptions and the Strict Construction Rules is that, in certain cases (i.e. where the owner clearly proves entitlement to exemption by bringing himself precisely within the terms of an exemption category under 70.11), it makes sense for government to "subsidize" that owner's operation in the form of the tax-forgiveness (expenditure of public funds) because there is a corresponding public benefit. See, e.g. Wis. Stat. §§16.425, 16.45, and 16.46 scheme: (i) legislature recognizes that state (public) policy objectives are sought and achieved by tax exemption; (ii) legislature recognizes that exemptions impact government budget process; (iii) legislature requires regular review of exemptions – including information on lost revenues. That is, the legislature wants to know how much public money, or tax base, it is essentially "giving away" when it allows an exemption. The whole notion of property tax exemption is based on public versus private purposes. Fulton Foundation v. WI Dept of Transport., 13 Wis. 2d 1, 108 N.W.2d 312, rev denied, 13 Wis. 2d 1, 109 N.W.2d 285 (1961).

"Exemption from taxation of property devoted to charity or benevolent purposes is made on the ground that such institutions perform services for the public, and, to some extent at least, relieve the state from expense." Methodist Episcopal Church Baraca Club v. City of Madison, 167 Wis. 207, 167 N.W. 258, 259 (WI S.Ct. 1918). Legislature's exemption for benevolent associations is to promote public purpose. State ex rel. YMCA v. Richardson, 197 Wis. 390, 222 N.W. 222 (WI S.Ct. 1928). Type activity that is property-tax exempt: (a) benefits the general public directly (i.e. the public is the primary beneficiary as opposed to the organization's own members being the primary beneficiaries with the public only getting incidental benefit); and (b) would ordinarily be provided by the government or otherwise lessen government burdens. International Foundation of Emp. Ben. Plans, Inc. v. City of Brookfield, 95 Wis. 2d 444, 290 N.W.2d 720 (Ct. App. 1980), aff'd 100 Wis. 2d 66, 301 N.W. 2d 75. Where organization's main purpose or activity is really to serve the personal interests of the organization's members themselves (as opposed to an indefinite class of people (i.e. benefits to public are merely incidental)), an exemption will not be granted. Trustees of Indiana University v. Town of Rhine, 170 Wis. 2d, 488 N.W.2d 128 (Ct. App. 1992), rev. denied, 491 N.W.2d 768.

Beyond the "public purpose" policy behind property tax exemptions and the Strict Construction Rules, another fundamental policy supports the Strict Construction Rules. See Kickers, 197 Wis. 2d 675 at 684, fn. 4: if exemption is granted,

property gets removed from the tax rolls, thereby eroding the tax base of the local municipality and school district.

Exemption of property lowers the municipal tax base and transfers its burden of taxation to others. Milw. Protestant Home for the Aged v. City of Milw., 41 Wis. 2d 294, 303 (dissent), 164 N.W.2d 289 (S.Ct. 1969). The dissent, in recognizing that burden-shift, compared the affluent resident of MPHA's Bradford Terrace, rich enough to pay a hefty endowment fee and continuing monthly payments, and able to escape property tax due to the majority's decision, with the elderly owner of a modest home and assets hardly sufficient to sustain himself and who – not only had to continue to pay his own tax bill on his own home – but who also, due to the majority's decision, had to pick up wealthy Bradford Terrace's share of taxes. 41 Wis. 2d 284, 309 (dissent). Property tax exemptions thus should rightfully only be "given" when they are appropriate because every time an exemption is granted, that parcel comes off the tax rolls, and all owners of taxable property then must pay more to cover the resulting shortfall and the exempt owner's unpaid share of government expense.

As we will explain, notwithstanding that the Strict Construction Rules are a hallmark of Wisconsin law, the court in certain Wisconsin decisions (e.g. Milw. Protestant Line of cases) failed to apply those Rules.

D. **January 1**. Under Wis. Stat. §70.01 and §70.32, the taxation or exemption of property, and its assessed value, is determined with respect to each January 1. Freedom Village II: Friendship Village v. City of Milwaukee, 194 Wis. 2d 787, 535 N.W.2d 111 (Ct. App. 1995).

E. **The Words in Current §70.11(4)**

As we've explained, only the legislature can create exemptions; and, the courts must follow the Strict Construction Rules in favor of taxation and against exemption.

As indicated, under current Wis. Stat. §70.11(4), property owned and used by benevolent associations — including benevolent nursing homes and benevolent retirement homes for the aged — is exempt from general property taxes – subject, however, to: (i) the limitations in Wis. Stat. §70.11's preamble (i.e. 3/1 application for new exemptions, and leasing restrictions); (ii) the acreage limitation in §70.11(4) (". . . but not exceeding 10 acres of land necessary for location and convenience of buildings'); (iii) the nonprofit requirement in §70.11(4) (". . . while such property is not used for profit."); and (iv) a non-discrimination provision for leasing in §70.11(4).

The material words at issue in §70.11(4) are as follows:

- Property

- Owned
- Used
- Exclusively
- Benevolent
- Association
- Retirement
- Home
- Aged
- "Necessary for location and convenience of buildings"
- "Not used for profit"
- Building

F. **Current Law Concerning the BRHA Words** Below, we give a word-by-word analysis of the BRHA language in §70.11(4); and, when we get to the word "benevolent", we show how the courts have gotten us in a state of chaos because there are two co-existing, conflicting lines of cases defining "benevolent." One line (the **St. Joe's Line**) requires charity.[4] The other line (i.e. the **Milw. Protestant Line**) says no charity is needed.

1. **"Property" Means General Property**. See Wis. Stat. §70.02. "General property" means real property and personal property. "Real property" is defined in §70.03. "Personal property" is defined in §70.04

2. **"Owned" Means "Beneficial Ownership"**. Wisconsin Tel. Co. v. City of Milw., 85 Wis. 2d 447, 271 N.W.2d 362 (1978) (practical ownership rather than naked legal title). State ex rel. Wis. University Bldg. Corp. v. Bareis, 257 Wis. 497, 44 N.W.2d 259 (1950). (Who is real beneficial owner? Look to substance rather than form). Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee, 181 Wis. 2d 207, 511 N.W.2d 345 (Ct. App. 1993), rev denied, 515 N.W.2d 714. City of Franklin v. Crystal Ridge, Inc., 174 Wis. 2d 358, 497 N.W.2d 747, review granted, 505 N.W.2d 137, reversed, 180 Wis. 2d 561, 509 N.W.2d 730. See Manual pp. 21.7-2 and 21.7-3 and cases cited therein.

3. **"Used Exclusively" Means Actual Physical Use Predominantly for Not-for-Profit Exempt Purposes**. Deutsches Land, Inc. v. City of Glendale, 225 Wis. 2d 70, 591 N.W.2d 583, 589 at ¶18 (WI S.Ct. 1999) ("used exclusively" means vast, predominant, pervasive, actual, physical use for exempt purpose. Occasional use for nonexempt purpose will not destroy 100% exemption. E.g. exempt religious association occasionally engages in commercial publishing when publishing is less than 1% of association's business, as in Northwestern Publishing House case, 177 Wis. 401 (1922). "Used exclusively" doesn't "preclude 'inconsequential

[4] To be "benevolent" under §70.11(4), besides providing "charity", the St. Joe's Line also weighs heavily the provision of services by organization members on a "without-pay", volunteer basis.

or incidental uses of the property for gain'", citing Cardinal Publishing I case, 205 Wis. 344 (1931). Exception, however, must not swallow the rule. E.g. Gymnastic Assn. case, 129 Wis. 429 (1906), association didn't exclusively use entire property for exempt purpose when they leased out portions of building to operators of public saloon and barbershop. There is a legitimate distinction between use that is "'incidental to and promotive of the main purpose for which a building is primarily devoted and the permanent leasing of parts of the building for uses having no relation to the owner's principal purpose.'" Deutsches, ¶19. Cardinal Publishing II case, 208 Wis. 517 (1932): commercial publishing income of roughly 10% of an exempt organization's total income is not incidental, negligible or inconsequential – so, property not used exclusively for exempt purpose. Benevolent association has burden to show how property is actually, physically used, and particularly, it must show its actual exempt use. Must then examine and compare "actual nonexempt use as against actual exempt use." Deutsches ¶21. "It is therefore necessary for a benevolent association to detail its use of the property so that tax assessors know what types of activities , if any, are occurring on the property." Deutsches ¶22. Exempt use must be pervasive. Deutsches ¶23. See, Deutsches, fn. 7, use of property for for-profit activity for 6% of days of year may not be inconsequential or incidental. See, also, Frank Lloyd Wright Foundation v. Town of Wyoming, 267 Wis. 599, 66 N.W.2d 642 (1954) (where charitable or exempt use is not substantial or is merely incidental to a principal use of another character, exemption will be denied). Concerning "use", the "assessor should be more concerned with what the organization actually does rather than what it says it does . . . " Manual, p. 22-2. See, also, item 9 below (no exemption for vacant parcel or parcel not actually being used for exempt purpose) and item 10 below (no exemption unless there is a building on the parcel and the building is actually and physically being used for exempt purposes).

4. **"Association" Means**. Green Scapular Crusade, Inc. v. Town of Palmyra, 118 Wis. 2d 135, 345 N.W.2d 523 (Ct. App. 1984) (2 or more persons may associate and be an "association" for 70.11(4) purposes. Also, a corporation can be an "association"). Waushara Co. v. Graf, 166 Wis. 2d 442, 480 N.W.2d 16 (WI S.Ct. 1992) (incorporation is not a prerequisite for exemption under §70.11(4)). See, also, Hahn V. Walworth Co., 14 Wis. 2d 147, 109 N.W.2d 653 (WI S.Ct. 1961) (corporation can be "association" under §70.11(4); possible for property held in trust or by foreign corporation to get exemption under 70.11(4)).

5. **"Retirement" Means**. Per Friendship Village I (Ct. App. 1993) and its definition of aged at "55", even though the legislature used the word "retirement" in §70.11(4), and even though the attorney general in 66 OAG 232 (8/10/77) opined that there has to be some limit to 70.11(4) to ensure that exempt housing isn't occupied by those that aren't retired, the

courts ignored that and evidently, at least under the Friendship I case, do not require "retirement" as a prerequisite to exemption as a "benevolent RETIREMENT home for the aged." That, however, remains subject to challenge, and violates basic statutory construction principles and basic common sense. Associated Hosp. Service, Inc. v. City of Milw., 13 Wis. 2d 447, 109 N.W.2d 271 (WI S.Ct. 1961) (statutes must be construed, if possible, to avoid inconsistency and conflict and give effect to every part. Should not be presumed that any part of a statute is superfluous). St. Clare Hospital of Monroe Wisconsin, Inc. v. City of Monroe, 209 Wis. 2d 364, 563 N.W.2d 170 (Ct. App. 1997) (in interpreting Wisconsin statutes, all words and phrases shall be construed according to common and approved usage. Wis. Stat. 990.01(1).)

The Government-5 proposal for new legislation to replace the BRHA standard eliminates need for using the word "retirement."

6. **"Home" Means**. No definitive ruling. However, see each of St. Joe's Line and Milw. Protestant Line of cases.

7. **"Aged" Means**. While the exemption in §70.11(4) is for benevolent nursing homes and benevolent retirement homes "***for the aged***", the legislature, in §70.11(4), never provided an express definition of "aged." Friendship Village I, 181 Wis. 2d 207, 225. However, the court in Friendship I overlooked that, in other parts of the statutes, *the legislature did give guidance*. For example, in Wis. Stat. §49.47(4), to be eligible for medical assistance, the state imposed income restrictions, and an age limit of 65 or older. In Wis. Stat. §59.07(56) regarding housing authorities, the state allowed favorable treatment for low-income persons 62 or older. In Wis. Stat. §343.20(2m) and §343.14(8), concerning expiration of operators' licenses, the Department of Transportation has special mailing requirements for licensees 65 or older. In Wis. Stat. §46.85, concerning social service programs for "older" (as opposed to "aged") individuals, the legislature addressed supportive assistance programs for those 60 or older. In Wis. Stat. §49.171(3)(a), the legislature defined "an aged infirm person" as a person over 65 that is either mentally or physically incapacitated. And, per IRS rulings concerning 501(c)(3) requirements for nonprofit retirement homes, the benchmark for age is 65.[5] Moreover, in 66 OAG 232 (8/10/77), the Wisconsin Attorney General opined that there must be some limitation to ensure that elderly housing exempt under 70.11(4) is not occupied by those who aren't elderly. The attorney general suggested age 65 (or perhaps 62) as a limit.

The court in Friendship I, however, ignored all of the foregoing and legislative intent, and adopted as a definition of "aged" for purposes of

[5] See minutes of 1/29/99 task force meeting. Age 65 is used as general benchmark by IRS when it examines a 501(c)(3) retirement home's target population.

Wis. Stat. §70.11(4), "occupancy by at least one person fifty-five years of age or older . . . ." Friendship Village I, 181 Wis. 2d at 226. Again, that violates basic common sense.

The Government-5 proposal for new legislation to replace the BRHA standard recognizes that age 55 is too young. We suggest that the legislature adopt a statutory definition of "elderly" for property tax exemption purposes at age 65 or older.

8. **"Necessary for Location and Convenience of Buildings" Means**. Friendship II: Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee, 194 Wis. 2d 787, 535 N.W.2d 111 (Ct. App. 1995) (calculate acreage limit via "simultaneous approach." That is, as of each January 1, take land under first building along with its "convenience" land before moving on to next building). St. John's Lutheran Church v. City of Bloomer, 118 Wis. 2d 398, 403, 347 N.W.2d 619 (Ct. App. 1984) (lands used for landscape and parking are "convenience" lands considering they're owned and used along with exempt building). Deutsches ¶52; need building used for exempt purpose as a prerequisite to getting land exempt as "convenience" land. And, land must be necessary for location and convenience of exempt building as opposed to building being necessary for the convenience of the land. Deutsches ¶¶50-55. See, also, Manual pp. 21.7-8, 21.7-9, and item 10 below "Building Means."

9. **"Not used for profit" Means Nonprofit Owner and Nonprofit, Exempt Use**. See, also, "used exclusively" above. There must be a nonprofit owner that actually and physically makes predominant, pervasive use of the property for a nonprofit exempt purpose. See: Deutsches Land (S.Ct. 1999) 225 Wis. 2d at 82, ¶16: to qualify for a benevolent exemption under 70.11(4), organization must show: (1) that it's a benevolent organization; (2) that it owns and exclusively uses the property; and (3) that it uses the property for exempt purposes. "Benevolent ownership of property is not enough to satisfy the dictates of Wis. Stat. § 70.11(4); benevolent use of that property is also required." Deutsches, 225 Wis. 2d 70, 85 at ¶22. Thus, in order to be entitled to exemption, there must be a nonprofit, exempt owner who actually, physically uses the property "exclusively" (vast predominance) for a nonprofit, exempt purpose. If a benevolent association owns property without actually using it for benevolent purposes (or without actually using it at all), the benevolent association is not entitled to exemption. Deutsches, 225 Wis. 2d 70, 85 at ¶22. Need more than mere "control" of property by a benevolent association. "We have repeatedly stressed that a benevolent association must do more than own or control property to claim an exemption; it must also use that property for benevolent purposes." Deutsches ¶28. "The application of the exemption statute depends upon who 'owned and used'" . . . the property on the respective January 1 date. Friendship I, 181 Wis.

2d 207, 220. No exemption for vacant, or unoccupied, or buildingless, land of benevolent assn. State ex rel. YMCA v. Richardson, 197 Wis. 390, 222 N.W. 222 (WI S.Ct. 1928). Group Health Cooperative of Eau Claire v. WI Dept. of Revenue, 229 Wis. 2d 846, 601 N.W.2d 1 (Ct. App. 1999) (No. 98-1264), rev. denied: discussion of "readying itself for exemption" in Family Hospital Nursing Home, Inc. v. City of Milwaukee, 78 Wis. 2d 312, 254 N.W.2d 268 (1977) versus no exemption for parcel not used for exempt purpose in Dominican Nuns v. City of LaCrosse, 142 Wis. 2d 577, 419 N.W.2d 270 (Ct. App. 1987). See, also, Waltz v. Tax Commission, 397 U.S. 664, 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970) (under applicable state statute, to get tax exemption, there must be a qualifying owner and a qualifying use. 397 U.S. at 672. And the qualifying use does not mean use for producing income. 397 U.S. at 679-680) C.B. McLean, Jr., Counsel, North Carolina Property Tax Commission, 1992, "The Impact of Exemptions on the Fairness of Property Tax Systems and the Special Problem of Residential Retirement Systems," International Association of Assessing Officers ("'Non-profit' status for federal and state income tax purposes is virtually irrelevant when the question is what property, used for what purpose, should be exempt. While the non-profit status of a qualifying owner is a threshold consideration in the application of many exemption statutes, the real focus should be on specific uses of property that will entitle that property to exemption." (Emphasis in original).

(a) Nonprofit Owner.

In a nutshell, the nonprofit-owner requirement means that there can be no "private inurement" to those behind or affiliated with the organization that owns the property. And, the organization that owns must actually carry on activities that are exempt. That is, those behind the organization can't be using the organization as a means to gain personal wealth or gain (i.e. no private inurement), and the organization's actual purposes must be exempt. Just because the organization may be a 501(c)(3) corporation or organized as a nonstock, nonprofit corporation under state incorporation laws does not mean that that corporation is necessarily an exempt, nonprofit owner.

St. John's Lutheran Church v. City of Bloomer, 118 Wis. 2d 398, 347 N.W.2d 619 (Ct. App. 1984) and Family Hospital Nursing Home, Inc. v. City of Milw., 178 Wis. 2d 312, 254 N.W.2d 268 (WI S.Ct. 1977). (Nonprofit requirement doesn't mean that property has to be operated at a loss. It means, that profit can't go to anyone other than the association itself. For example, dividends and profits can't go to officers, directors, members, or shareholders). Frank Lloyd Wright (to be exempt, organization

must be dedicated to exempt purpose and divorced from gain to those who control ownership). Friendship Village I (Ct. App. 1993) (remuneration for services is still possible. Corporation can still pay *reasonable* (not excessive) salaries and reimburse reasonable expenses without resulting in the inurement of net earnings to the benefit of private individuals, and without making the corporation jeopardize its tax-exempt status). Janesville Community Day Care Center, Inc. v. Spoden, 126 Wis. 2d 231, 376 N.W.2d 78 (Ct. App. 1985) (to determine whether organization is an exempt one, what it actually does is what matters – not what it says it does). St. John's Lutheran Church v. City of Bloomer, 118 Wis. 2d 398, 347 N.W.2d 619 (Ct. App. 1984) (corporation's mission statement or purpose statement in articles of incorporation is not controlling). Family Hospital Nursing Home, Inc. v. City of Milw., 78 Wis. 2d 312, 254 N.W.2d 268 (1977).

(b) Nonprofit Exempt Use.

Remember, we are dealing here with "property tax" exemption, and not with "income tax" exemption. And, "property tax" exemption involves property-specific analysis of how the property at issue is used. In a nutshell, "nonprofit use" means that the property at issue (rather than the income therefrom) must be actually, physically used for exempt use. See "used exclusively", § 9 preamble, and § 9(a) discussions above.

A "nonprofit exempt use" does not mean that the property must be operated at a loss. So long as the actual, physical use of the property is exempt use, and so long as the owner of the property is an exempt owner, existence of profit becomes immaterial (but see leasing restrictions in §70.11 preamble and U.B.I.T. provisions in §70.1105).

To state the obvious, we expect a non-profit to use its income toward non-profit purposes. So, how the owner uses money/earnings can lose an exemption (e.g. if there is private inurement), but it can't win a property-tax exemption. Obviously, a non-profit's money should be used for the non-profit's purpose!

We devote expanded discussion to the "nonprofit use" requirement because certain of the other task force members (i.e. the Nonprofit-5: Schaefer, Sauer, Olson, Zielski, and Kittleson) are under the mistaken impression that use of income from property for an exempt purpose equates to actual, physical, exempt use of the

property. That very issue has been correctly negated by Wisconsin courts.

For-profit activity of property is not exempt use. Deutsches, e.g., ¶23, fn. 7, ¶29. Men's Hall Stores v. Dane Co., 269 Wis. 84, 69 N.W.2d 213 (1955) (it is the use of the property, and not the purpose or use of the income therefrom, that determines taxability of property).

(1) **Turner Society: Gymnastic Assn of S. Side of Milwaukee v. City of Milwaukee**, 129 Wis. 429, 109 N.W. 109 (WI S.Ct. 1906) (cited by Deutsches 591 N.W.2d at 589) (devotion of income of property to exempt purpose is NOT SUFFICIENT. There must be primary physical use of the property for the exempt purpose for which exemption is claimed).

Gymnastic Assn. of the South Side of Milwaukee, a.k.a. Der Turn Verein der Sudseite von Milwaukee, a.k.a. Turner Society, is a nonstock, nonprofit corporation that owns building with a gymnasium, dining room, saloon, and barbershop. Saloon and barbershop are each rented to third-parties, are open to the public, and are operated for commercial purposes. Gym is used for gymnastics M-Sat., 11 months per year. Many children and adults receive gymnastic instruction from a salaried gymnastics instructor. Turner members pay nothing for gymnastics instruction beyond their annual dues of $4.20 per its 500 members. Nonmembers pay 25¢ per month for gymnastics. There is no private inurement. No officers get salary except finance secretary gets $75 and gymnastic instructor gets $1,200 per year. Gym hall is also rented out for outside parties for dances and political meetings, concerts, and lectures.

The specific Turner corporation at issue had been incorporated by special legislative act in 1869, which act exempted the Turner's real and personal property. But, in 1883, the legislature passed a general law applicable to all Turner societies in the state, exempting their property to the extent "used exclusively for educational purposes." 109 N.W.

109, 109. That 1883 law was, in turn, also part of a general revision of the statutes in 1898.

The Supreme Court ruled that the 1883 and 1898 legislative acts repealed the 1869 general exemption such that, for tax year 1904, if the Turners Society was to be entitled to exemption, it would have to show exclusive use of the property for "educational purposes." In that context, the Supreme Court dealt directly with whether exempt use, as required by exemption statutes, means (i) actual, physical use of the property for exempt purposes, or (ii) use of income from the property for exempt purpose. The court ruled that it is actual, physical use of the property (not money therefrom) that controls because:

(a) that is in line with "the natural and exact meaning of the words" the legislature used (109 N.W. 109, 110);

(b) Strict Construction Rules require the natural and narrower construction of "use" (id.);

(c) examining the specific exemption statute at issue, as well as other categories of property that the legislature exempted, revealed that the intent of the legislature is that it is the physical use that matters. (Id. at 110-111);

(d) absurd results would occur if the court ruled otherwise ("it would be absurd to exempt property not itself used for" the exempt purpose named in the exemption statute because the income of the property is used for that purpose. Id. at 111).

The Supreme Court, elaborating, said:

"If appellant's construction of such words be adopted, the kinds of property and, in many cases, the amount which may be exempted, is without limit. Commercial blocks, office buildings, vessels, and farms, as also bonds and mortgages, not distinguishable in their physical use or employment

> from other like property, may be held exempt from the usual burdens of taxation provided only that their net profits or earnings be devoted to the favored purposes, some of which, as already shown, are ultimately purely mercenary. Such results would, we think, greatly surprise the framers of these various exemption provisions in our statutes. From such consideration, we are convinced that all reason is against appellant's construction." 109 N.W. 109, 111.
>
> . . .
>
> "Elsewhere throughout the country an array of authorities far too numerous for complete citation sustain the view that under a statute limiting exemptions to property 'used for', 'devoted to' or 'used exclusively for' a specific purpose, a devotion of the income of such property to such favored purpose is not sufficient, but that the statutes require the primary physical use therefor of the very property for which exemption is claimed." Id.
>
> ". . . we find nothing in Wisconsin to conflict with this volume of authority elsewhere." Id.

The Supreme Court, in the Turner case, even distinguished the pecuniary-profit cases (id. at 111) to make crystal clear that, what matters is ***physical use of the property – not the money therefrom***.

Thus, regardless of whether rents from the leasing of the saloon and barbershop were applied toward educational purposes of the Turners, that leasing constituted physical use of the property for nonexempt, commercial business activities. Hence, the property was not actually, physically used exclusively for exempt educational purposes, and it was not exempt. Id. at 111-112.

The Supreme Court rejected the possibility of "taxed-in-part" analysis since (i) the property is a single, nonseverable building not exclusively used for educational purposes (i.e. parts of it are permanently occupied for nonexempt purposes), (ii) the legislature, ***at that time***, hadn't authorized any procedure for taxing-in-part, (iii) ***at that time***, there did not exist such things as condominiums

that would allow legal conveyance of parts of a single building or property, (iv) ***at that time***, there existed no law, and "no rule or process for either valuing or selling any fractional interest or any, other than vertical, section of land with a single building upon it" (id. at 112), and "[u]ntil some such provision is made, we must hold that the whole of an indivisible building, and the ground on which it stands, is subject to taxation unless the whole is rendered exempt by being used exclusively for educational purposes in the natural and exact significance of those words." Id. at 112.

The Supreme Court, by virtue of its decision, expressly acknowledged that it did not have to consider whether teaching gymnastics is an exempt educational use/purpose. Id. at 112. (See, however, Kickers: soccer is not an exempt educational use/purpose).

(2) **Northwestern Pub. House v. City of Milwaukee**, 177 Wis. 401, 188 N.W. 636 (WI S.Ct. 1922). Nonprofit benevolent and educational association that uses property for exempt purpose and derives only .00277% of its income from printing letterheads and envelopes for the convenience of its patrons, and where only a small part of its square footage is used for nonexempt purpose is still exempt due to there only being slight departure, and inconsequential amount of nonexempt, physical use.

Unlike the Turner Society in the Gymnastic Assn. case, there was no rental of any portion of the property. Instead, the exempt owner occupied all the property. And, here, any commercial or nonexempt physical use of the property is extremely incidental to the owner's exempt use, such that:

> "The property has not thereby been diverted from its primary use. Quite a different situation would be presented if half of the plant were rented to third parties who conducted therein a general publishing business, even though the proceeds of the rent were devoted to the corporate purposes. Even if it were otherwise, the departure in this case is so slight as to be negligible and therefore to be disregarded. The occupation

of 15 or 20 square feet of floor space by sample benches and the derivation of ¼ of 1 per cent. of its income from commercial printing done as a matter of convenience for its regular customers, does not amount to a sufficient departure to warrant us in saying that the property is not used exclusively for educational and benevolent purposes, particularly where such work is done as incidental to its main purpose." 188 N.W. 636, 639.

(3) **Cardinal I: Cardinal Publ. Co. v. City of Madison**, 205 Wis. 344, 237 N.W. 265 (WI S.Ct. 1931). Where portion of premises of exempt owner is devoted to profit-making is comparatively inconsequential, it might still be possible for property to be substantially in actual physical exclusive use for exempt purpose. But, if substantial part of property of exempt association is devoted to nonexempt purposes, property is not exempt – even though profits from property are devoted for exempt purposes. In Cardinal I, the court cited, with approval, the Turners case and Northwestern Publ. case, and said:

> "If the portion of the premises so separated and devoted to useful profit is so inconsequential in extent in comparison with the whole property, it may lead to the conclusion that the devotion of the whole property to the exempt uses is in a substantial sense an exclusive use for such purposes . . . If there is no segregation of property and devotion of a portion of it to purposes outside of the corporate objects, but if the whole property ***in a physical sense*** is primarily devoted to the purposes of the organization, then the fact that there are occasional or incidental uses of the property for gain, which is devoted to the purposes of the society claiming the exemption, will not destroy the exemption." 205 Wis. 344, 347-348. (Emphasis added).

(4) **Cardinal II: Cardinal Pub. Co. v. City of Madison, 208 Wis. 517, 243 N.W. 325 (WI S.Ct. 1932).**

While college publishing company is a nonprofit, exempt owner, its physical use of property for nonexempt purpose (i.e. doing printing work for two, for-profit commercial, and privately-owned, newspapers in Madison) from which it derived 20% of its income in 1928 and 10.7% of its income in 1929 does not amount to incidental or negligible physical use. "It is evident that the use made by the plaintiff of its property for nonexempt purposes cannot be claimed incidental, negligible, or inconsequential. It is clearly substantial." 243 N.W. 325, 326. The Supreme Court expressly noted that the non-negligible, non-exempt, physical "use placed the plaintiff's property in competition with commercial printers and their taxable property", 243 N.W. 325, 326, and the court denied exemption. The Supreme Court rejected the Cardinal's argument that, since printing by it for the university and its students is exempt, printing by it for non-students should not destroy exemption (i.e. the physical use in either event is really the same). The court implicitly noted, however, that there is no §70.11 exemption category for "printing" and that the Cardinal's:

> "construction would create an entirely new exemption statute. If the plaintiff wishes to claim the benefit of the exemption, it should keep itself within the field prescribed by the Legislature. Whether it goes out of that field or not is a matter of choice. It may stay in and receive the exemption. It may depart from it and pay its taxes. It has chosen to depart; therefore its property is subject to taxation." 243 N.W. 325, 326.

(5) **Order of Sisters of St. Joseph v. Town of Plover**, 239 Wis. 278, 1 N.W.2d 173 (WI S.Ct. 1941). Where there is a nonprofit, exempt owner, operating (actually using) property for exempt purpose (operation of TB hospital on largely volunteer basis, where patients are admitted and serviced without regard to ability to pay, and where vast majority (i.e. 97½%) of patients are, in fact, subjects of charity and unable to pay, is "benevolent"), and where there is no private inurement, then property tax exemption is allowed – even though owner may make profit. All benevolent institutions endeavor to operate at a profit. But,

the profit becomes immaterial where: the exempt owner actually and physically uses for exempt purpose; and there is no private inurement (i.e. profit is turned back into improving facilities or extending benevolence – rather than getting shareholders rich).

(6) **Men's Hall Stores, Inc. v. Dane County**, 269 Wis. 84, 69 N.W.2d 213 (WI S.Ct. 1955). Nonprofit corporation, operated by UW dorm students, that sold merchandise in-store in UW dorm to UW dorm residents not exempt as an educational association even though: (1) student-members got experience and training with educational value, (2) no private inurement (profits, and, upon dissolution, assets, go to educational purposes). For §70.11(4) purposes, "[i]t is the use of the property and not the purpose of the income therefrom that determines taxability." 269 Wis. 84, 89. A close reading of the Men's Halls case reinforces that, where the actual purpose of the owner, and actual use of the property, are nonexempt, no exemption can be granted – even though the income from that activity may get applied toward an exempt purpose. Here, the actual use of the property was selling merchandise to UW dorm students like toothpaste and cigarettes. That's the same type activity that for-profit retail stores engage in. It's not exempt.

(7) **Alonzo Cudworth Post No. 23, Am. Legion v. City of Milwaukee**, 42 Wis. 2d 1, 165 N.W.2d 397 (WI S.Ct. 1969) (public patronage of separable facility within tax-exempt facility renders publicly patronized portion of building taxable. Public patronage of club facilities where money is exchanged for services on regular basis takes such publicly patronized facilities out of tax exempt status. 42 Wis. 2d 1, 9. So even though American Legion is clearly an exempt organization (42 Wis. 2d 1, 6 (fn. 1)) with an exempt purpose, that does lots of good (e.g. helps hundreds of high school students each year; sponsors 200,000 youth baseball players each year; awards 22,000 medals each year to elementary, junior, and senior high school students for character, scholarship, and citizenship; spends $8,000,000 each year for child welfare programs and youth programs; and assists and aids with college scholarships), when that organization begins using its property for non-exempt business activities like running a bar and restaurant, that use gets taxed.[6] Hence, like the

[6] See 42 Wis. 2d 1, 13: Supreme Court agreed with trial court that, nonexempt/taxable use is use of facilities where money is exchanged for services on a regular business basis.

Eagles Club in Fraternal Order of Eagles Aerie, where the Eagles Club's dining room, bar, and bowling alley were taxed, the American Legion post here must also be taxed-in-part. In Alonzo, the court, in discussing the then taxed-in-part statute (§70.11(8)), said that under that statute, two things could defeat exemption, ***either*** (1) the use of any part of a building by non-members for which compensation is received, ***or*** (2) use of any part of a building by members for purposes outside of the object of such organization. And, one must keep in mind that, for *fraternal organizations*[7] like the Eagles Club or the American Legion war memorial posts, socializing and recreating and eating and drinking by members is an exempt use and exempt purpose. Clubroom facilities maintained for fraternal club members only don't affect otherwise tax-exempt status of association's property, but club facilities to which public is invited, on a pay-basis, become nonexempt taxable public facilities during times they are so used).

10. **"Building" Means**.

Even if a benevolent association exclusively uses its property for benevolent purposes, "[t]he exemption of land is tied to and follows from, the exemption of buildings. This means that land devoid of buildings cannot qualify for an exemption under Wis. Stat. §70.11(4) . . . . Similarly, if no part of a building qualifies for an exemption, then no part of the land 'necessary for [the] location and convenience' of that building will qualify for an exemption." Deutsches ¶52. Accordingly, to get an exemption, one also needs a building that is actually used for exempt purposes, and that land must be necessary for the location and convenience of that building – as opposed to the building being necessary for the location and convenience of the land. Deutsches ¶¶50-55. See, also, Group Health Cooperative of Eau Claire v. WI Dept. of Revenue, 229 Wis. 846, 856-859, 601 N.W.2d 1 (Ct. App. 1999): under Strict Construction Rules, the "readying itself doctrine" from Family Hospital Nursing Home, Inc. v. City of Milwaukee, 78 Wis. 2d 312, 254 N.W.2d 268 (1977) shouldn't be stretched. Family Hospital got the exemption because the hospital, on the assessment date, was fully constructed and equipped.

[7] Fraternal organizations are different from "benevolent associations", so, what is an exempt use/purpose for a fraternal organization is different from what is an exempt use/purpose for a benevolent organization.

11. **"Benevolent" Means Two Opposite Things: Charity and No-Charity**

The biggest problem with the BRHA language in §70.11(4) is that: (i) the legislature used the general word "benevolent"[8]; and (ii) in the Milw. Protestant Line of cases, the courts ignored (a) legislative intent; (b) the St. Joe's Line of cases that defined "benevolent" to require charity, and (c) the Strict Construction Rules.

The following explains the two lines of cases interpreting the word "benevolent." One line of cases is the "**St. Joe's Line**" where the courts respected the Strict Construction Rules and legislative intent by narrowly defining "benevolent" to require charity.[9] The other line of cases is the **Milw. Protestant Line** where the courts paid lip-service to the Strict Construction Rules, and then failed to apply those rules so they could adopt a broad definition of "benevolent" that does not require charity. Under the court's Milw. Protestant Line of cases, the rich get richer, and the poor get poorer because the courts stretched the word "benevolent" to simply mean "doing good." As a result, "using one's wealth to care for oneself" is "benevolent." Given that definition, an unfair paradox results, to wit: a poor elderly person who cannot afford to move into a luxury senior housing complex is stuck in her own home and left struggling to pay her property tax bill – which bill is even larger because it includes the share not paid by the rich in the luxury complexes.

The two lines of cases currently coexist in Wisconsin law – even though they contradict each other. The legislature must now act to: (i) eliminate the contradiction; (ii) correct the Milw. Protestant Line; and (iii) keep the courts in check and balance.

(a) The St. Joe's Line of Cases

The St. Joe's Line of cases is comprised of eleven Wisconsin Supreme Court cases that span the period from 1897 to 1961. All of those cases are still good law. None has ever been overruled. In fact, two of the eleven were even cited by the Wisconsin Supreme Court to support its 1999 landmark property tax exemption

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[8] Per Manual p. 22-5, the DOR said that the "main problem" with the §70.11(4) exemption "is determining if the organization operates for a ***benevolent*** purpose." (Emphasis added). The DOR, in the Manual then gives a dictionary definition of "benevolent" to try to "help the assessor." (See Manual pp. 21.7-3 to 21.7-10 and pp. 22-1 to 22-12). See Milw. Protestant Home v. City of Milwaukee, 41 Wis. 2d 284, 164 N.W.2d 289, 293 (fn. 5) (WI S.Ct. 1969) and Family Hospital Nursing Home, Inc. v. City of Milwaukee, 78 Wis. 2d 312, 254 N.W.2d 268, 272 (fn. 3) (WI S.Ct. 1977) where Supreme Court recognized that the "benevolent nursing home and retirement home for the aged" language was added to §70.11(4) by the legislature to clarify that the exemption for "benevolent associations" covers benevolent nursing homes and benevolent retirement homes for the aged. **Accordingly, case law regarding "benevolent associations" applies to BRHA's.**

[9] To be "benevolent" under §70.11(4), besides providing "charity", the St. Joe's Line also weighs heavily the provision of services by organization members on a "without-pay", volunteer basis.

decision, Deutsches Land (i.e. Baraca Club; and Catholic Woman's Club). The St. Joe's Line is correct. In this line of cases, the court respected the Strict Construction Rules and legislative intent.

(1) **St. Joseph's Hospital Assn. v. Ashland Co.**, 96 Wis. 636, 72 N.W. 43 (WI S.Ct. 1897). Per the St. Joe's court, "'Benevolent' means, literally, 'well-wishing.' It is a word of larger meaning than 'charitable.' It has been well said that, 'though many charitable institutions are very properly called 'benevolent', it is impossible to say that every object of a man's benevolence is also an object of his charity.''' (See, § II.F.11(b)(1) below, discussion of majority opinion in Milw. Protestant Home case and of how the majority in Milw. Protestant Home mis-used the above quote from the St. Joe's case).

Nonprofit hospital operated by religious order by sisters who receive no compensation, and that provides medical and nursing care to the sick (and sometimes gives them clothes or mends clothes) on a non-discriminatory "pay-only-if-you can" basis (and even where there is a charge, it's at a very modest amount), and where any profit goes toward operating the hospital or to aid other like-hospitals of the religious order "is really the work of the Good Samaritan" and benevolent. Fact that hospital uses occasional surplus for other like-hospitals does not amount to use for "pecuniary profit."

Fact that some patients pay moderate charge doesn't destroy benevolence.

> "Doubtless, if the hospital were absolutely free to all, it could not be operated. It is the very fact that pay is collected from those who can pay which enables the sisters to operate the hospital, and care for those who are too poor to pay. If this work be not benevolent work, especially in the great cities and in the newly-settled districts, then there will have to be a new meaning attached to the word 'benevolent.' It is impossible to know how many men without home and friends owe their very lives to the care received in this and similar hospitals, when no other place opened its doors to them. We entertain no doubt that the work of this association is a benevolent work. The care of the sick and wounded of all races and religions indiscriminately, with or without pay, according to the ability of the patient, must ever be one of the most genuine

forms of benevolence. It breathes the truest love for unfortunate mankind."

We thus can see that the Supreme Court in St. Joe's defined "benevolence" according to an altruistic principle, the work of the good Samaritan, providing care and service, based purely on love for mankind, on a voluntary basis, without regard to ability to pay, to those who are too poor to pay and who have nowhere else to go. That definition: **(a) supports basic policy behind property tax exemption law and the Strict Construction Rules** (see § II.A-C supra.) (only legislature, not courts, can grant exemptions; only give exemptions where public is benefited directly as opposed to organization's own members and where government itself would be expected to spend public money to perform the service if the organization itself weren't dong so); effectuate legislative intent in construing statute and its plain language, Doe v. American Ntl. Red Cross, 176 Wis. 2d 610, 500 N.W.2d 264, recon. denied, 508 N.W.2d 425 (1993); legislative intent can be ascertained by looking to reasons for statute's enactment, Scanlon v. City of Menasha, 16 Wis. 2d 437, 114 N.W.2d 791 (1962); **(b) is grounded in Wis. Stat. § 990.01(1)** (construe words in statutes according to common usage); Friendship Village II case, 194 Wis. 2d 787 at 796, fn. 8 (court can look to dictionary to ascertain common meaning of non-technical word); Webster's Third New International Dictionary of the English Language, Unabridged (1993) ("benevolence" and "benevolent" mean: kindly disposition to do good and promote welfare of others; act of kindness; generous gift; marked by good will; arising from or prompted by motives of charity; philanthropic) – note that the dictionary definitions contemplate no payment for services rendered; **(c) does not distort the language of 70.11(4)** as the Milw. Protestant Home majority did by stretching the definition, International Harvestor Co. v. Industrial Comm. of Wisconsin, 157 Wis. 167, 147 N.W. 53 (1914) (in construing statute, court must not distort language of statute); **(d) does not open the floodgates to improper exemptions** being claimed by organizations who serve only wealthy members and who do not provide service to the poor, Boardman v. State, 203 Wis. 173, 233 N.W. 556 (1930) (consequences resulting from court's construction of statute must be considered in determining legislature's intent); and **(e) is in line with basic common sense** – no exemption for facility that admits only those who can pay and excludes the poor. See, also, "The Bells of St. Mary's", a Bing Crosby and Ingrid Bergman film in which Horace Bogartus (a rich businessman played by Henry Travers), through heavenly intervention, discovers his heart, its importance, and the virtues of giving, and who then donates his

new building to a church. Sister Benedict (Ingrid Bergman) tells Mr. Bogartus: "It isn't what we acquire in life, is it – it's what we give . . . and this, this is a monument to you. I can see the cornerstone reading – 'donated through the generosity and benevolence of Horace P. Bogartus.' Oh you're a very fortunate man Mr. Bogartus."

(2) **The Elks: Trustees of Green Bay Lodge v. City of Green Bay**, 122 Wis. 452, 100 N.W. 837 (WI S.Ct. 1904). It is critical to know that this case involves an attempt to get exemption as a "benevolent association" as opposed to a "fraternal organization." Clubhouse of the Green Bay Lodge of the Benevolent and Protective Order of Elks, with lodge rooms, bowling alleys, a reception area, card rooms, a billiards area, a kitchen buffet and dining room, and halls for Elks' members, and used by them and their families and guests "for fraternal and social intercourse and as a place of entertainment and amusement", and for refreshments and to eat, and charged for at prices to maintain club (initiation fees, annual membership dues, and payments for use of bowling alleys, billiard and pool tables, and for food and drink) (i.e. no freebies) is not benevolent – even though (1) one of club's purposes was to protect and aid Elks' members and their families and to promote friendship and social intercourse; (2) income was all used for Elks' purposes; (3) part of club revenue was paid toward maintenance of a home for aged and indigent Elks located in Virginia; (4) the Elks members are taught to observe benevolence and charity, and to practice that by helping the deserving and needy within and without Elks membership; (5) club once contributed a considerable sum to bury one of its members (it was later reimbursed by others, and, unlike other Elks clubs, this Green Bay one doesn't donate to other charitable purposes). Persons apply for membership and must be selected by lodge.

The Supreme Court said that to determine if an organization is a benevolent one entitled to a benevolent exemption, "we must ascertain from an examination of its purposes and the activities employed to fulfill its objects." That is, you need a benevolent owner that actually uses the property for benevolent use. And, look to actual physical use to determine "benevolent use." The court found that:

> "the property is mainly used for the purpose of a clubhouse, providing accommodations for entertainment, amusement, and refreshment at the buffet and dining room. . . The benevolent purposes of such an [property-tax-exempt] organization as

> the statute contemplates are, in a measure, akin to charitable purposes, in that they bestow benefits through their efforts and means on either its members or the public by assisting the needy or promoting some [property-tax-exempt] benefaction by advancing and supporting agencies of a beneficial public nature. While some of the aims of the order are the promotion of benevolence and charity, it is the avowed and obvious purpose of the order to maintain this clubhouse as a suitable place for the members and their families to congregate for entertainment, amusement, and to provide refreshments. The bestowal of these privileges and benefits is not of a benevolent or charitable character. These privileges and benefits which every person may secure for himself and family for a consideration, according to his tastes, wishes, and means, and which the members of this lodge thus provide by co-operation as a body for their mutual advantage, are not of a benevolent character, and serve no such purpose. The learned trial judge pertinently suggests that, if the furnishing of club rooms, facilities for enjoying games, or cards, billiards, pool, and tenpins, and providing the necessaries for a buffet and dining and bath rooms are benevolent purposes within the meaning of the statutes, then any number of men may organize themselves into a cooperate body to provide these privileges and benefits for themselves and their guests, and claim the exemption of the statutes. We do not find that the maintenance of the clubhouse is a benevolent purpose within the meaning of the statutes. . . ." 100 N.W. 837, 839.

Regarding the statutory requirement that exempt property not be used for pecuniary profit, the court found that: (i) no member received money or dividends from the club, and (ii) that members paid for the services and privileges they got. The court said:

> "The charges are regulated with a view to covering all necessary expense incident to conducting these clubhouse features, and, if a slight profit results, it is paid into the treasury of the lodge. Though this arrangement may not result in paying profits to members by distributing a surplus, yet the transaction may be a pecuniary profit to the lodge, in receiving any surplus over expense, and in a

commercial sense the whole scheme may be of considerable pecuniary benefit to the members who are patrons and customers of the clubhouse enterprises, in that they receive the benefit of the reduced cost of these privileges so provided them as patrons and supporters of the clubhouse as a business enterprise. Upon these grounds we are led to the conclusion that the purposes of the organization in maintaining the clubhouse do not come within the term of benevolent organizations, as contemplated by the statute, and that the uses made of the property in carrying these purposes into effect may and do result in using the property for pecuniary profit. The circuit court ruled correctly in holding that the property was not exempt from taxation." 100 N.W. 837, 839-840.

Thus, where the actual use of the property is for self-benevolence (i.e. where members create benefits for themselves using their own money), where the organization is claiming exemption as a "benevolent" and not as a "fraternal", and where the organization only engages in limited acts of charity, such is not "benevolent."

(3) **Baraca Bible Club: Methodist Episcopal Church Baraca Club v. City of Madison**, 167 Wis. 207, 167 N.W. 258 (WI S.Ct. 1918) (cited by the Wisconsin Supreme Court in its 1999 Deutsches decision at 591, N.W.2d 583, 589). Manual p. 21.7-6. It is critical to know that this case, like the Elks case, also involves an attempt to get an exemption as a "benevolent association" as opposed to a "fraternal organization." Methodist Episcopal Church Baraca Club is a nonprofit corporation where no pecuniary profits go to any member (i.e. no private inurement). Only members of the Baraca Bible Club of the church are eligible for membership in the club. Members are elected in by 4/5 vote of the club's board of directors and pay $5/year dues. There are 30-40 members. The club's purposes are to provide bible study and a religious, social, moral culture, and to run its home. The home is used for the club's itinerant members who otherwise have no home. When rooms aren't rented to members, they're rented to nonmembers. The home also contains a restaurant "which the public is invited to patronize." "There is no evidence that either rooms or meals are furnished at reduced rates, or that such service is confined to the poor and needy, or that any one benefits by these activities." Every Monday, there is a bible study class in the home. And every Tuesday, there's another religious study class. In winter, lectures take place on a biweekly basis. The home is also used for socializing with potential members. But, the bible studies and religious observances are merely "such as usually prevail in

religious homes, and simply mark the natural and to be expected inclinations of the members of a religious club, and constitute an attraction for new members of similar tastes." The club: secured jobs "for perhaps half a dozen young men"; sent flowers "to one young man sick in the hospital"; and "[a] few scattering meals were furnished free." The court found that, almost all the club's income was spent to operate the club and for club purposes.

The court ruled that:

> "The activities of the club that may be characterized as benevolent seem to have consisted in securing positions for a few young men, and in the furnishing of an inconsequential number of free meals. This is wholly insufficient to give it the cast of a benevolent society. The pervading and dominant purpose of the club was to furnish a home and a meeting place for the members of the Sunday school class, to maintain interest in the work of the class and to facilitate the acquiring of new members thereof. That the purposes of the club are laudable and its influence wholesome there can be no doubt. But statutes exempting property from taxation are not to be enlarged by construction. Taxation is the rule, not the exception. He who claims exemption must bring himself within the terms of the exception. We do not regard this as a doubtful or border line case, and deem it unnecessary to refine upon the character of a benevolent association within the meaning of this statute."

The court further noted that there was a big difference between the club and decisions from other states granting YMCA's exemptions under the statutes of those other states.

The court, citing the Elks case (i.e. Trustees of Green Bay Lodge v. City of Green Bay, 122 Wis. 452), further explained that, property tax exemption based on benevolent purpose is made on the ground that such institutions perform services for the public, and, to some extent at least, relieve the state from expense." In the Green Bay case, as explained above, an exemption was denied for an Elks' Clubhouse, because, while the Elks did do some charity and benevolence, the main purpose of the Elks' clubhouse was the providing of entertainment, amusement, and refreshments for Elks' members and their families – and, those purposes aren't benevolent.

(4) **Catholic Woman's Club v. City of Green Bay**, 180 Wis. 102, 192 N.W. 479 (WI S.Ct. 1923). Manual p. 21.7-7. This is really more of a "fraternal" case than a "benevolent" one. Nonprofit woman's club clubhouse, auditorium and day nursery, all exempt. Property used for: club meetings, dance instruction, leased to other clubs, daycare, sheltering homeless women and strangers, and education. Members pay dues, and services are provided on a charge basis sufficient to cover expenses. But, club makes no profit, and all its property was acquired by charitable gifts. No private inurement. Based on "actual use", property is exempt under then-existing §70.11(4) that exempted property of educational or benevolent associations or fraternal associations and allowing occasional leasing for schools, public lectures or concerts.

(5) **Knights of Pythias: Trustees of Clinton Lodge No. 152 v. Rock County**, 224 Wis. 168, 272 N.W. 5 (WI S.Ct. 1937). This is not a case involving a "benevolent organization." Instead, it involves a "fraternal corporation." Under §70.11(4), Clinton Lodge No. 152, Knights of Pythias of Wisconsin's use of its first-floor space in its building for recreational purposes by lodge members and their guests (baseball dart game, beanbag game, indoor horseshoes) didn't render first-floor of lodge building taxed-in-part under the 1931 statute's (§70.11(4a)) "pecuniary-profit, taxed-in-part" provisions because: (1) recreation is one of the objects of fraternal association (c.f. benevolent associations) (i.e. that use by members was within the purposes of the fraternal assn.), and (2) the first-floor wasn't used by nonmembers for compensation. While the court cited the Elks case (i.e. Green Bay Lodge), and the Baraca Bible Club cases, those two cases were "benevolent" decisions – not "fraternal" decisions – and they certainly weren't overruled. Instead, the Elks case and Baraca case were cited for the proposition that, under §70.11(4), "it was held that any use of the property other than for benevolent or charitable purposes or any substantial part of it made the property subject to taxation." That is, use of property for other than exempt use makes it taxable. (See, also, Kickers of Wisconsin, Inc., v. City of Milwaukee, 197 Wis. 2d 675, 541 N.W.2d 193 (Ct. App. 1995): use of property for recreational soccer is not exempt under §70.11(4)).

(6) **Rogers Memorial Sanitarium v. Town of Summit, 228 Wis. 507, 279 N.W. 623 (WI S.Ct. 1938)**. Rogers Memorial Sanitarium, a nonprofit corporation, is not entitled to exemption under 70.11(4) as a "benevolent" association since most of the service it provides is to those who pay (i.e. 10,215 days of service provided at above cost; 4,080 days of service provided below cost;

and only 23 days of service rendered without pay). That is, patients are expected to pay for the service they receive (the superintendent could and did choose whom he would accept as patients; 239 Wis. 281); and, no physician, nurse or administrator donates their services to the sanitarium. While the word "benevolent" is more comprehensive than the word "charitable", as noted by the court in St. Joseph's Hospital v. Ashland Co., 96 Wis. 636, 72 N.W. 43 (WI S.Ct. 1897), the level of "benevolence" needed for a §70.11(4) exemption is: receiving and treating persons unable to pay or regardless of inability to pay (i.e. receive and treat persons who are unable to pay the same as those who are able: 279 N.W. 625; and St. Joseph's v. Ashland Co.). Because the Sanitarium here expects patients to pay for services rendered (and the doctors and nurses don't donate their services), the Sanitarium, albeit a nonprofit one, is not "benevolent" and not exempt.

(7) **Order of Sisters of St. Joseph v. Town of Plover, 239 Wis. 278, 1 N.W.2d 172 (WI S.Ct. 1941)**. Nonprofit corporation operated by Roman Catholic sisterhood on a without pay, volunteer basis (except for medical services and two nurse positions) that operated a sanatorium as a hospital for TB patients. No private inurement. Non-paying patients accepted without pay. No one is rejected for inability to pay. 97½% of hospital's patients here are unable to pay and are subjects of charity. Corporation and use are "benevolent." Exemption allowed.

(8) **Prairie du Chien Sanitarium Co. v. City of Prairie du Chien, 242 Wis. 262, 7 N.W.2d 832 (WI S.Ct. 1943)**. Manual p. 21.7-7. Fact that articles of incorporation say organization is benevolent doesn't control. If organization makes substantial profit, that tends to negate benevolence. Private inurement will destroy exemption. Tending toward benevolence, however, are: if organization receives and is dependent on donations; if organization takes those who apply regardless of ability to pay (or at least a fair number of charity cases); if organization members render services without compensation; and no private inurement. Because doctors in hospital at issue here used hospital as an adjunct to their private business, and hospital was used as much to advance the individual fortunes of the doctors as it was for charitable purposes – no exemption. Hospital isn't "benevolent."

(9) **St. Vincent de Paul: Madison Particular Council of St. Vincent de Paul Society v. Dane County, 246 Wis. 208, 16 N.W.2d 811 (WI S.Ct. 1944).** Non-profit, religious and charitable organization, with parish affiliation, and with oversight by the Milw. Archdiocese of the Roman Catholic Church, and whose members are all members of Roman Catholic Church – none of whom receive any compensation for services rendered to organization (except president who acts as full-time manager gets a monthly salary). No private inurement. Organization's purpose "is to furnish without cost necessities to poor persons who are unable to pay for them . . . ." (16 N.W.2d 811, 812). Organization is a non-profit, exempt owner that engages in "charity and religion" (16 N.W.2d 811, 813). Property used as "salvage bureau" where donated clothing and goods are received and "are distributed to the poor so far as there is demand therefor" (id. at 812). What isn't distributed to poor is sold, with sale proceeds going to poor. But, unlike a run-of-the-mill "second-hand store", in the case of St. Vincent de Paul, "[n]o person is required to pay for articles unless able, but if able to pay in part he is required to pay so far as able." Id. at 811. Exempt, non-profit use. Organization doubly entitled to exemption under §70.11(4) as charitable (benevolent) and religious.

(10) **The Eagles: Madison Aerie No. 623 Fraternal Order of Eagles, Inc. v. Madison, 275 Wis. 472, 82 N.W.2d 207 (WI S.Ct. 1957).** Nonprofit Eagles Club (fraternal society operating under the lodge system). Clubhouse facility has dining room, bar, bowling alley, meeting rooms, and halls. The dining area, bar, and bowling alley, and even the meeting rooms and halls, are, at times, used exclusively by only Eagles members and their guests, and at other times open to (and use is shared with) the public. When the public has rights to the shared use, and does so use the property for pay, that's nonexempt use by the public (as opposed to exempt fraternal society) for pay (pecuniary profit). Court upheld taxing clubhouse on 50% basis under 1953 version of §70.11(8) (the taxed-in-part statute) so that the 50% shared use of the facility for pay by Eagles members and the public was taxed, while the 50% *exclusive* use by Eagles members for fraternal purposes (i.e. exempt purposes) was exempt. Under then-existing §70.11(8), use for "pecuniary profit" meant *nonexempt, taxable* use for purposes not directly included within the objects of the exempt organization for which use compensation was received or applied. See 275 Wis. 472, 473-474. Thus, to the extent the Eagles' club started operating like a for-profit bar, restaurant, bowling alley and competed with those type businesses, it was taxed because ,

regardless of how the Eagles actually used the money from that activity, that activity itself wasn't exempt. The court noted that this case can be distinguished from the Knights of Pythias (i.e. Clinton Lodge) case where the court sustained 100% exemption since, in that case, the actual use of the first floor space in question remained exempt use by the fraternal for its members. Thus, in Clinton Lodge, even though that first-floor space was available for nonexempt use, the fact of the matter is that, actual use remained exempt use.

(11) **Bethel Convalescent Home, Inc. v. Town of Richfield, 15 Wis. 2d 1, 111 N.W.2d 913 (WI S.Ct. 1961).** Nonstock corporation claimed property tax exemption under 70.11(4m) (not 70.11(4)) as a hospital for its facility used to accommodate chronically ill and aged patients. Supreme Court denied exemption based on Strict Construction Rules, expressly stating that the "fundamental rule of tax law", was "as stated in Madison Aerie No. 623": "'Statutes exempting property from taxation are to be strictly construed and all doubts are resolved in favor of its taxability. To be entitled to tax exemption the taxpayer must bring himself within the exact terms of the exemption statute.'"

(b) The Milw. Protestant Line of Cases

In 1969, the Wisconsin Supreme Court essentially ignored the entire St. Joe's Line of cases. That is, with the exception of plucking, and then misusing, a quote from the St. Joe's case, the Court ignored eleven of its prior decisions, and in doing so, it ignored the clear law that has existed in our state since 1897 that requires "charity" (provision of service without regard to ability to pay) to be "benevolent.[10]" And, since the Supreme Court never overruled any of the cases in the St. Joe's Line, we are now stuck with chaos because there are two, co-existing lines of cases which directly contradict one another. On the one hand (St. Joe's Line), there must be charity. But, on the other hand (Milw. Protestant Line), no charity is needed.

(1) **Milw. Protestant Home for the Aged v. City of Milwaukee, 41 Wis. 2d 284, 164 N.W.2d 289 (WI S.Ct. 1969)**. Manual p. 21.7-17.

a. THE MILW. PROTESTANT MAJORITY

The following is a synopsis of the findings of the majority in the Wisconsin Supreme Court's 4 to 3 decision in Milw. Protestant Home. Before reading the synopsis, however, we encourage you to

[10] Charity, as well as the provision of services on a "without-pay", volunteer basis.

reread Section II A-C of this Report. We assert, and § II A-C supports, that the majority usurped its power and wrote a legally improper decision.

The majority found that, with the advent of social security benefits, combined with private annuities and pension plans, most older persons have an assured income for retirement. Many Americans often retire earlier and with at least modest incomes available for retirement living. They are **not** sick, senile, or penniless. But, they face a variety of personal and inter-personal problems *not necessarily economic in nature*. An increasing number of retired persons seek the type of congregate living in retirement homes that will provide companionship, maintain self-respect and offer protection against all the ravages that declining years may bring (with financial stress being but one of the "ravages").[11] To meet the needs, wants and expectations of such retired persons, retirement homes for the aged have developed, either as independent institutions or as wings or additions to existing homes for the aged.[12] *Such retirement homes are not primarily nursing homes or hospitals. They aren't almshouses, and the residents don't consider themselves objects of public or private charity.* Instead, the homes are simply 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. Milw. Protestant Home for the Aged v. City of Milwaukee, 41 Wis. 2d 284, 290-293, 164 N.W.2d 289 (WI S.Ct. 1969).

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[11] Per the minutes of the 1/29/99 task force meeting concerning IRS 501(c)(3) requirements for federal income tax exemption (as opposed to state property tax exemption), retirement homes for the aged must relieve the distress of the aged. And, per the IRS, a person with significant financial assets may nonetheless be distressed due to advanced age or health needs. Under IRS revenue rulings, a retirement home that provides the following will meet requirements for federal income tax exemption: suitable housing (e.g. grab bars, etc.); civic, cultural and recreational activities so that the elderly can remain active; access to (as opposed to the provision of) health care (i.e. the entity itself doesn't have to provide health care but can simply provide access through a related or unrelated entity); and an overall environment conducive to dignity and independence for the elderly. The organization must also be within the financial reach of a significant segment of the community's elderly and operate at the lowest possible feasible cost. Giant problems, however, with the IRS' tests are: very lax IRS oversight and enforcement; and very little to non-existent attention to the "financial reach" and "lowest feasible cost" requirements. Thus, the IRS tests essentially factor out financial need. Indeed, per Rev. Rul. 72-124 and Rev. Rul. 79-18, the IRS does not require financial assistance or relief of poverty. Consequently, an elderly person stuck in his own home, unable to pay the entrance fee to get into a 501(c)(3) "nonprofit" retirement home that provides its residents with grab bars and lighted tennis courts and trips to the opera will, ironically, have to subsidize the very activities he can't afford because his tax bill will include that exempt, affluent facility's share of taxes. The Wisconsin legislature should not adopt the IRS' income-tax-exemption tests for its state property tax exemption tests. The Wisconsin legislature must recognize that wealth matters and that helping those in financial need must be a prerequisite to "benevolent" exemption.

[12] See, St. Clare Hospital of Monroe Wisconsin, Inc. v. City of Monroe, 209 Wis. 2d 364, 563 N.W.2d 170 (Ct. App. 1997); when an industry changes, it's up to the legislature – not the courts – to make public policy decisions. Courts must follow Strict Construction Rules and must not extend property tax exemptions by implication.

Those same findings made in 1969 essentially reflect the same state of affairs that exists in the year 2000 and that the task force discussed.

The majority further found that, some states adopt a **broad definition** of "charitable" and say that providing *paid-for* services to aged persons of modest resources and income is benevolent or charitable – even though nothing is given away for free. Id. at 291. Other states, however, adopt a **narrow definition** of "benevolence" or "charity", and require some alms-giving or unpaid service to the destitute to be a benevolent or charitable organization entitled to property tax exemption. Id. at 292. ***The majority failed to recognize, however, that, due to the Strict Construction Rules, Wisconsin falls within the "narrow definition" camp.***[13] Indeed, the entire St. Joe's Line of cases puts Wisconsin solidly in that narrow camp.

Milw. Protestant Home for the Aged ("**MPHA**"), is a nonprofit benevolent association that operates at a loss, where no officer, member or individual gets private inurement. While the combination of founders fees and monthly occupancy charges required of residents in the MPHA addition do exceed operating costs for the MPHA addition, those excess revenues (the profits) from MPHA go back into MPHA's endowment fund and are used toward operating MPHA. Id. at 293-296.

The majority ruled that nonprofit organizations don't have to operate at a loss, and can, indeed, operate at a profit without destroying its property-tax exempt status. Id. at 296. In determining that, however, the majority analyzed how the profit was used in terms of the then-existing taxed-in-part statute, Wis. Stat. §70.11(8). That statute – which is no longer on the books – provided that, where property is used in part for exempt purposes and in part for "**pecuniary profit**", the property gets taxed at the % of the property's full market value that represents the extent of use for pecuniary profit. Id. at fn. 10. Sec. 70.11(8) defined

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[13] See, also, Wis. Stat. §70.109, expressing clear legislative intent that Wisconsin courts adopt a **narrow definition** of "benevolence" Per §70.109, "[e]xemptions under this chapter shall be strictly construed in every instance with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption." Notwithstanding that, and without ever mentioning Wisconsin's common law to the same effect (i.e. the Strict Construction Rules), it is clear that the majority in Milw. Protestant Home ignored the legislature's intent and the entire St. Joe's Line of cases when it adopted a broad definition of "benevolence." See e.g. 41 Wis. 2d at 297-298 and, especially, the majority's footnote's 14-17, and 19-21: (i) majority hangs its hat on absence of "private inurement" and absence of "pecuniary profit"; (ii) majority cites approvingly to each of Montana, California, Massachusetts and Virginia courts' very broad definitions of "charity"; and (iii) majority makes comparison to exemptions for churches, hospitals and colleges – which exemptions in today's statutes are **not** preceded by the adjective "benevolent" in Wis. Stat. §70.11.

"pecuniary profit" as "the use of any portion of said premises or facilities for purposes not directly included within the objects of such organization for which use compensation is received. . . ." After looking at §70.11(8), and finding that the profit that MPHA made was used to operate MPHA, the majority found that there was no "pecuniary profit." Id. at 296. ***Thus, first the majority implicitly, and incorrectly, found that the use of MPHA as a retirement home for able-bodied, affluent persons was an exempt use/purpose.*** Then, having determined that, it was immaterial that MPHA made profit from that use or purpose because that use/purpose was exempt, and the profit therefrom was not "pecuniary profit" under §70.11(8). The profit was derived from, and applied to, the very purpose and objects of MPHA to operate as a retirement home and promote that objective. Thus, the profit of MPHA was immaterial for property-tax exemption purposes. Id. at 296-297.

The majority went further by saying, "***[t]he gain or profit which takes away the benevolent nature and character of the institution is profit to someone other than the benevolent association itself.***" Id. at 297. "***Where there is no element of gain to anyone [i.e. no private inurement] and where all of the net income is devoted exclusively to carrying on the benevolent purposes of the institution, there is not an operating 'for pecuniary profit.' The requirement of a founder's fee and occupancy charges does not change the basic benevolent purpose and character of the [MPHA]. . . . Charging pew rent does not make a church not a church. This is particularly true where the occupancy charges are reasonably required by the necessities of the situation and reasonably related to the maintenance of the institution and the extension of services." Id. at 297-298.***

The majority, obviously adopting the broad and not the narrow approach to interpreting tax-exemption statutes, went on to say that "benevolent" in §70.11(4) does not mean "charitable." Instead, "benevolence" simply means "well wishing" and does not require alms-giving or concern for the penniless or for the plight of the entirely destitute. The majority said, "[t]o help retired persons of moderate means live out their remaining years is 'benevolent' . . ." Id. at 299-300. The majority, however, obviously overlooked the entire St. Joe's Line of cases.

While the majority overlooked the St. Joe's Line of cases, and the holdings therein, it did, at 41 Wis. 2d 284, 299, fn. 18, pluck from the St. Joe's case itself the following quote:

> "'The word 'benevolent' means, literally, 'well wishing.' It is a word of larger meaning than 'charitable.' It has been well said that 'though many charitable institutions are very properly called benevolent, it is impossible to say that every object of man's benevolence is also an object of his charity,'" citing St. Joe's case at 96 Wis. 636, 639.

The majority, however, should have read the rest of the St. Joe's case because, immediately following the above quote, the St. Joe's court ruled that, the subject entity in that case was exempt as a "benevolent organization" because: (a) its work was that "of the good Samaritan"; (b) while those who were able to pay did pay a moderate charge, "those who are unable to pay receive the same care for nothing"; (c) the organization provided "care for those who are too poor to pay" to "men without home and friends [who] owe their very lives to the care received in this and similar hospitals, when no other place opened its doors to them"' and (d) the organization provided "care of the sick and wounded of all races and religions indiscriminately, with or without pay, according to the ability of the patient" and such is "one of the most genuine forms of benevolence. It breathes the truest love for unfortunate mankind." Thus, it is clear that the majority, in reality, completely ignored St. Joe's holding so it could instead pluck from that case a quote to mis-use out of context, to support a principle contrary to the very essence of the language from which the quote was plucked.

The majority again, at fn. 19, and contrary to Wisconsin's Strict Construction Rules, cited approvingly of the *California* court's broad definition approach:

> "'aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a . . . benevolent purpose as the relief of their financial wants.' So the charge of fees by such an institution as a home for the aged will not necessarily prevent its classification as charitable if such sums 'go to pay the expenses of operators and not to the profit of the founders or shareholders,' for all persons may 'under certain conditions be proper objects of charity.' In short, as the word 'charity' is commonly understood in modern usage, it does not refer only to aid to the poor and destitute and exclude all humanitarian activities, though rendered at cost or less, which are maintained to care for the physical and mental

> wellbeing of the recipients, and which make it less likely that such recipients will become burdens on society.' Fredericka Home for the Aged v. San Diego County (1950) , quoting Estate of Henderson (1941), 17 Cal.2d 853, 112 P.2d 605, also holding 'Relief of poverty is not a condition of charitable assistance. If the benefit conferred has a sufficiently widespread social value, a charitable purpose exists * * * aged people require care and attention apart from financial * * * wants.'"

The majority then, still citing with approval to courts in *other states* that broadly interpret exemption statutes, and still ignoring Wisconsin common law's Strict Construction Rules[14] and the St. Joe's Line, issued a challenge to the legislature. It said, at 41 Wis. 2d 284, 300, that "the legislature has not required that a benevolent association maintaining a retirement home for the aged and operating it not for profit is required to extend free services to at least some of its residents. . . . If the legislature had intended that a benevolent association must provide free admission or free services to all or some of the residents in its retirement home, it is to be expected that it would have [so] provided . . . ." Id. at 300. After issuing that challenge, the majority did finally pay brief lip service to Wisconsin's "Strict Construction Rules" at 41 Wis. 2d 284, 301, but only to emphasize the "but reasonable" aspect of the "strict but reasonable" standard. And, in any event, the majority's decision clearly shows that the majority did ignore the St. Joe's Line and did side with those states that broadly and liberally construe exemption.

Concerning possible taxed-in-part analysis and the issue of cross-subsidization (i.e. using profit from one part of facility to fund other part of facility), the majority, under this Milw. Protestant Line of cases anyway, also incorrectly slammed the door on the possibility of taxing-in-part under then 70.11(8) (recall that the court had already ruled out the applicability of 70.11(8) by finding no "pecuniary profit") by ruling that – since all income from every part of the facility goes to operate the facility, and that functionally, all phases of the operation have one common, and exempt denominator: serving aged and retired persons (regardless

[14] See, e.g. Supreme Court's recognition in 1967 that, it is true that the general rule applicable to the construction of the §70.11 tax exemption statute is strict construction and that, any doubt must be resolved against exemption. Columbia Hospital Assn. v. City of Milw., 35 Wis. 2d 660, 668, 151 N.W.2d 750 (S.Ct. 1967). Moreover, when the Milw. Protestant Home majority (1969) recognized and analyzed two different views in other states (broad and narrow), that revealed that the majority thought there was a choice to be made. *Ipso facto*, and given the Strict Construction Rules in Wisconsin and its "if-in-doubt-tax" requirement, the majority, faced with any choice, should have construed narrowly and in favor of taxation.

of their financial means or health) – the entire facility is exempt. The majority cited, at fn. 24, a Pennsylvania case that allowed cross-subsidization because, as a whole, the facility's purpose, under Pennsylvania law, was "charitable."

b. THE MILW. PROTESTANT DISSENT

The dissent in Milw. Protestant Home would have applied the "taxed-in-part" rules to tax the MPHA's Bradford Terrace Addition (less the physical therapy rooms). Id. at 303. The dissent, much *unlike* the majority, respected the "Strict Construction Rules" under Wisconsin law (due to the shift in the burden of tax from exempt property to nonexempt property, tax exemption statutes must be strictly construed against exemption. Taxation is the rule, exemption is the exception. If in doubt, no exemption). Id. at 303-304.

And, the dissent (like the courts in the St. Joe's Line that analyzed fraternal groups claiming a "benevolent" exemption) also properly recognized that the residents of the addition where the recipients of their own benevolence because they were paying for the accommodations and services they received, and they, and no one else (no nonpayer) was enjoying those accommodations and services. Id. at 305.

The dissent further properly pointed out that cornerstone cases that the majority relied on (Duncan v. Steeper, 17 Wis. 2d 226, 116 N.W.2d 154 (WI S.Ct. 1962) and Associated Hospital Service v. Milwaukee, 13 Wis. 2d 447, 109 N.W.2d 271 (WI S.Ct. 1961)) simply don't apply in that Duncan was a tort case and not a property tax exemption one, and Associated Hospital involved property tax exemption for hospital service corporations under the Blue Cross Plan and a special exemption statute (§182.032(2)(a)) rather than §70.11(4). Id. at 305-306. Indeed, the Wisconsin Supreme Court in Associated Hospital *itself* ruled that the §70.11 tests for exemption didn't apply to the §182.032(2)(a) hospital exemption at issue in that case. Id. at 306. See, also, Family Hospital Nursing Home, Inc. v. City of Milwaukee, 78 Wis. 2d 312, 319-320, 254 N.W.2d 268 (S.Ct. 1977) where the Wisconsin Supreme Court recognized, precisely as the dissent did in Milw. Protestant Home, that neither the Duncan case nor the Associated Hospital case applied to §70.11(4) property tax analysis.

Thus, for a variety of reasons (***above and beyond failing to respect the St. Joe's Line of cases***) the majority was simply wrong. And, the dissent properly pointed that out.

In analyzing §70.11(4) and the requirement that there be exclusive use of the property for benevolent purpose and not for profit, the dissent held that "**[t]he word 'benevolent' in sub. (4), sec. 70.11 is no doubt synonymous with 'charitable.**'" Id. at 301 (emphasis added).

In explaining why those parts of the facility (the "Home") other than the MPHA Addition should remain exempt, the dissent listed the following:

(1) The Home is used to care for the aged with varying degrees of physical infirmity and senility, without insistence upon compensation equal to or greater than the cost of the services rendered:

(2) That type of care is charitable – it is humane consideration of others and relieves the public of a burden;

(3) The Home did not turn people out nor deny admittance to those unable to pay.

(4) Even though there was an entrance fee and an assignment of all one's property in return for life care, the financial contributions made by a substantial number of residents of the Home didn't equal the cost of the service that was rendered;

(5) There was no private inurement of the Home's profit to any officer or director – indeed, the Home consistently operated at a loss. Id. at 307-308.

The dissent then contrasted the Home to the MPHA Bradford Terrace Addition. And, while there was still no private inurement to any officer or director of the Addition, and while the Home and the Addition provided the same type services to the elderly – albeit the Addition's facilities and services were much more lavish, the dissent would've accorded the Addition different treatment (i.e. they would've taxed it) because:

(1) Applicants to the Addition aren't accepted unless they pay, in full, a sizeable founder's fee and give assurance of their ability to continue to pay monthly service charges (i.e. prescreening for wealth and to weed out the less fortunate);

(2) Even if the Addition were to adopt a "no-kick-out" policy

for those who, after being screened for wealth, and after having paid the founder's fee, were later unable to pay a monthly fee, (i) no resident had ever been unable to pay; and (ii) the contract contained eviction as a remedy (as opposed to articulating a "no-kick-out" policy);

(3) The size of a resident's apartment and facilities included aren't determined primarily by the resident's needs but by the amount of the founder's fee he paid;

(4) Monthly service charges and fees, likewise, aren't primarily determined by a resident's needs but rather the services rendered;

(5) Residents in the Addition who need medical or special nursing care must pay for that on their own;

(6) If a resident in the Addition leaves before 3 years, he'll only get part of his founder's fee back;

(7) If a resident doesn't pay monthly service charges, he can be evicted and liable for costs – including $1,000 in liquidated damages;

(8) The Addition residents are not elderly or objects of charity but are instead, very like those residents in private, for profit, nonexempt retirement homes where the residents pay for the service they get;

(9) Financially-strapped elderly who can't afford to live in MPHA's Bradford Terrace Addition and who are stuck in their own homes have to pay each of the tax bill on their own home plus Bradford Terrace's share of taxes. Id. at 308-310.

The dissent expressly found that the per se existence of profit (so long as profits aren't sizeable and they're used for charitable purposes) doesn't render exemption impossible. Id. at 308. But, considering all the above factors, and how the property was actually used, the dissent properly found that the Addition was not being used for exempt purposes "as contemplated by the legislature in sec. 70.11(4), Stats." Id. at 311. And, while the Bradford Terrace Addition was surely part of the MPHA Home, the dissent would have applied taxed-in-part principles to exempt the Home but tax the Addition. And, while the dissent cited the then-taxed-in-part statute, §70.11(8), in reality, their taxed-in-part

analysis and decision (like the Supreme Court's recent analysis in Deutsches Land) were based on exempt, benevolent use of space versus nonexempt, nonbenevolent use of space – as opposed to being based on §70.11(8) or "pecuniary profit."

(2) **Family Hospital Nursing Home, Inc. v. City of Milwaukee, 78 Wis. 2d 312, 254 N.W.2d 268 (WI S.Ct. 1977)**. State-licensed, nonprofit nursing home. Patients not screened for ability to pay. Most are eligible for pubic assistance or Social Security (42% Title 19, 14% Title 18, 34 % private pay). Home consistently operated at a deficit. All of home's income is devoted to carrying out its purpose of providing nursing care. No private inurement. Court referred to majority decision in Milw. Protestant Home and its adoption of broad-meaning for "benevolent": i.e. well-wishing with no built-in implication or requirement of alms giving; and, court found no private inurement issue existed; and, it also adopted majority position in Milw. Protestant Home that viewed impermissible "pecuniary profit" as being only profit that went to someone other than the benevolent organization itself. Hospital nursing home is exempt. Articles of incorporation aren't controlling. "An institution's status depends on how it operates and the fact that it is nonprofit rather the source of its operating funds. An institution need not be mendicant[15] to have its work quality as benevolent." 79 Wis. 2d 312 at 322-323.

Nursing home built, equipped, and in process of hiring staff to operate on assessment date, and where patients arrived 3 months later, is "readying itself" for exempt use and is thus exempt.

The Supreme Court in Family Hospital, however, never even recognized that there were two lines of cases ((1) St. Joe's Line, and (2) Milw. Protestant Line). Instead, they blindly followed the Milw. Protestant Line without fully analyzing the law and without fully appreciating all the legal problems with the majority's decision in Milw. Protestant Home.

(3) **Parkview Apt's: St. John's Lutheran Church v. City of Bloomer, 118 Wis. 2d 398 (Ct. App. 1984)**. Manual p. 21.7-8. Parkview Apartments for those 62 or older. Residents must deposit $39,000 and pay utilities and a fixed maintenance fee. They receive no medical or nursing services. If they leave apartment, they get $39,000 back less $160 per month of occupancy. 118 Wis. 2d 398, 399, 347 N.W.2d 619. Court, citing Milw. Protestant Home, reiterated that "'benevolent' has a broad meaning and does not imply or require alms-giving . . . 'To help

[15] "Mendicant" means needy or begging.

retired persons of moderate means live out their remaining years is 'benevolent' . . . Founder's fees and occupancy charges do not change the basic benevolent purpose and character of an institution . . . ." The court found that Parkview Apartments' sole purpose was to operate a home for the aged, that there was no private inurement concerning any profit, and no "pecuniary profit", and that, given the majority's decision in Milw. Protestant Home, the apartments were exempt under 70.11(4), and it didn't matter (a) that no benevolent aid was provided to residents; (b) that residents got service only because they paid for it; or (c) that Parkview wasn't connected to any nursing facility, or didn't provide any medical or nursing services.

Again, the court in this case never even recognized that there were two lines of cases. Instead, they blindly followed the Milw. Protestant Line without fully analyzing the law.

(4) **Friendship Village I: Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee, 181 Wis. 2d 207, 511 N.W.2d 345 (Ct. App. 1993), rev denied**.[16] No free services need be provided and the facility need not be readily affordable by all in the community. Friendship Village I (Ct. App. 1993), 181 Wis. 2d at 226, citing Milw. Protestant Home v. City of Milwaukee, 41 Wis. 2d 284, 164 N.W.2d 289 (1969). According to the court, facility can be out of financial reach of people of moderate means and still be "benevolent." Id.

Thus, the court in Friendship Village I, also blindly followed the Milw. Protestant Line of cases without even recognizing that the St. Joe's Line exists. And, the Friendship Village I court further exasperated the problem created by the majority in Milw. Protestant Home (i) by stretching the definition of "benevolent" even further to (a) make it immaterial that persons of moderate means can't even afford the facility, and (b) allowing contract-provision of services by third parties instead of by the organization claiming exemption; and (ii) by ignoring 66 OAG 232 (8/10/77) and adopting the ridiculously young age of "55" for "aged."

Concerning the "third-party" issue, the Friendship Village I court ruled that, facility seeking exemption itself need not provide

[16] The court in Friendship Village I also overlooked legislative intent in another respect. Despite § 74.35's legislative history (i.e declaratory relief is not acceptable as a procedural means to avoid the 74.35 procedure to challenge property tax exemption matters), the Friendship Village I court did allow declaratory relief as an end-round. The legislature recently corrected the Court by creating 74.35(2m) to solidify that 74.35 is the exclusive procedure. Now, the legislature must go further to correct the Court with respect to it's wrong, and broad "benevolent" definition.

residents with opportunity to live out remaining years. Instead, facility can simply contract with an outside third party to provide care at a completely different facility, and, for §70.11(4) purposes, court treats that as the facility providing its members with the means to live out their remaining years. Friendship Village (Ct. App. 1993), 181 Wis. 2d at 226-227. That, however, is at odds with Men's Halls Stores, Inc. v. Dane County, 269 Wis. 84, 86-88, 69 N.W.2d 213 (WI S.Ct. 1955), where the court said: "(1) "that a corporation is an entity distinct and apart from its members and that a court may not disregard corporate entity for the purpose of enabling the property owned by one corporation to have the benefit of an exemption from taxation provided by statute for a separate and distinct corporation." (Emphasis added); and (2) "[t]hus, we must analyze the activities of the plaintiff [corporation] as a separate entity and not one that is an integral part of some other organization." In light of that, the Friendship I court should not have let Freedom Village's exemption be cemented in place due to Freedom's relationship to its sister corporation and that sister corporation's exemption.

G. Deutsches Supports St. Joe's Line

We have explained above the two co-existing, and very contradictory, lines of Wisconsin Supreme Court cases defining the 70.11(4) word "benevolent." The St. Joe's Line, spanning the period from 1897-1961, regarding the date of decision, respects the Strict Construction Rules and legislative intent by giving a narrow definition requiring charity – the provision of service without regard to ability to pay. The Milw. Protestant Line, however, spanning the period from 1969-1993, regarding the date of decision, fails to respect the Strict Construction Rules, legislative intent, the St. Joe's Line, and common sense, and broadly defines "benevolent" as expressly not requiring charity.

Recently, the Wisconsin Supreme Court, in Deutsches Land, Inc. v. City of Glendale, 225 Wis. 2d 70, 591 N.W.2d 583 (WI S.Ct. 1999), made very clear that the Strict Construction Rules are alive and well, and must be respected. See, also, Kickers of Wisconsin, Inc. v. City of Milwaukee, 197 Wis. 2d 675, 541 N.W.2d 193 (Ct. App. 1995). The Court thus signaled a critical recognition that a broad definition of "benevolent" for §70.11(4) and the BRHA exemption is not appropriate. The Deutsches Land decision, however, did not overrule the Milw. Protestant Line. Consequently, while the court did recognize that broad interpretation of 70.11(4) is not proper, we are still left with the two contradictory lines of cases. And, that is unacceptable.

We urge the legislature to keep the courts in check and to legislatively overrule the Milw. Protestant Line definition of "benevolent."

H. Certain Other Words in 70.11(4)

The express exceptions within 70.11(4) to 70.11(4) exemption are also instructive. In 70.11(4), under the "but not including phrase", the legislature expressly carved-out from exemption, the following:

> "an organization that is organized under s. 185.981 or ch. 611, 613 or 614 and that offers a health maintenance organization as defined in s. 609.01(2) or a limited service health organization as defined in s. 609.01(3) or an organization that is issued a certificate of authority under ch. 618 and that offers a health maintenance organization or a limited service health organization . . . ."

Sec. 185.981 is cooperative sickness care. Ch. 611 is domestic stock and mutual insurance corporations. Ch. 613 is service insurance corporations. Ch. 614 is insurance – fraternals. Ch. 618 is non-domestic insurers. Sec. 609.01(2) is HMO's. And, §609.01(3) is limited service health organizations.

Thus, the carve out from §70.11(4) exemption, very generally, relates to special entities that provide health care with an insurance component. That is instructive in that many of today's senior housing options involve health care with an insurance component. For example, continuing care retirement communities (CCRC's) amount to health care with an insurance component, and CCRC's even come under Wis. Stat. Ch. 647 (continuing care contracts) and OCI (Office of Commissioner of Insurance) review due to the insurance aspect of those type facilities. Accordingly, in light of the §70.11(4) carve-out, additional legislative intent is manifested that the St. Joe's Line of cases is correct while the Milw. Protestant Line is not. The Milw. Protestant Line, in rejecting "charity", allows for "self-benevolence" and "self-insurance." It allows the wealthy to buy CCRC "long-term case insurance" to secure property-tax exempt housing that only the wealthy can afford.

III. WHAT ARE THE PROBLEMS WITH CURRENT LAW?

The problems with current §70.11(4) and its BRHA-standard are:

1. Two Contradictory Lines of Cases Defining "Benevolent"

The St. Joe's Line says that to be "benevolent", there must be charity, and volunteer services. Under the St. Joe's Line, the organization must actually admit and serve without regard to ability to pay: e.g. Prairie du Chien; St. Joseph's Hospital; Rogers Memorial Sanitarium; Order of Sisters. The court in Baraca Club even said that, to be "benevolent", the organization has to do more than merely providing a few freebies.

Indeed, in the Rogers Memorial and Order of Sisters cases, the Supreme Court said that, where the organization doesn't operate on a "pay-only-if-you-can" basis, and does screen to ensure that only those that can pay are admitted, that's not "benevolent."

The St. Joe's Line reflects good public policy and recognizes legislative intent and the Strict Construction Rules. It's also in line with the "insurance" carve-out to 70.11(4). That is, no 70.11(4) BRHA exemption for those who pay for the care/insurance they get.

On the other hand, the Milw. Protestant Line says that, to be "benevolent", no alms-giving or charity is required. And, that point was even stretched further by the court in Friendship Village I such that an organization can be far out of financial reach of many, not provide any free service, not provide any medical or nursing service, screen out those who need care or don't have money, and still be "benevolent." That Milwaukee Protestant Line is wrong. It ignores legislative intent and the Strict Construction Rules.

It is wholly unacceptable – especially when one considers the demographics of our society (we are growing old, fast) and the growth in the senior housing industry (see below) – for there to coexist two contradictory lines of cases. And, it is also unconstitutional for there to exist the two contradictory lines of cases. It violates the uniformity clause of the state constitution.

The court, most notably with its Milw. Protestant Home decision, took a 180 degree turn away from its previous decisions where charity was required to be "benevolent." As we explained above, to reach its 4-3 decision in Milw. Protestant Home, the court paid nothing but patronizing lip service to the Strict Construction Rules, and then, after looking to court decisions in other states, it adopted a very broad definition of "benevolent." Courts that followed stretched further so that: (i) there are now two separate lines of "benevolent" cases; and (ii) "benevolence", under the Milw. Protestant Home line, means those with money looking after themselves.

2. Under the Milw. Protestant Line Definition of "Benevolent", BRHA Exemptions Go to the Wealthy and Promote Self-Benevolence

Under the Milw. Protestant Line definition of "benevolent", 70.11(4) BRHA exemptions are available to "nonprofit" organizations that only serve wealthy, healthy, able-bodied young, and also to those that screen out the poor and those in need of care. It's possible for an organization to get a BRHA exemption even though: (a) the organization screens applicants for health and wealth such that only those with wealth who are able to care for themselves are admitted (i.e. the poor and those in need of care need not apply and won't be admitted); (b) the organization serves those who are neither retired nor elderly (age 55, with spouses much younger than 55); (c) the organization provides no medical or nursing care, and no assistance with daily living; and (d) the organization charges large endowment fees and monthly fees that are out of the financial reach of low and middle income persons.

The above violates basic public policy behind property tax exemption. Tax exemptions are not supposed to go to facilities where the members are the primary beneficiaries of the organization's activities and where the public only receives indirect benefit. International Foundation of Emp. Ben. Plans, Inc. v. City of Brookfield, 95 Wis. 2d 444, 290 N.W.2d 720 (Ct. App. 1980), aff'd 100 Wis. 2d 66, 301 N.W.2d 75; Trustees of Indiana University v. Town of Rhine, 170 Wis. 2d 293, 488 N.W.2d 128 (Ct. App. 1992), rev. denied, 491 N.W.2d 768. Self-benevolence (i.e., looking out first and foremost for members only) isn't what tax exemptions are about. Where members, or residents, pay for their own care, they're benefiting themselves, not society. And, that organization shouldn't be exempt.

3. Under the Milwaukee Protestant Line Definition of "Benevolent", BRHA Exemptions Run Afoul of the Public Patronage Principle.

Granting a property tax exemption to an organization that admits and serves only those who pay for service also runs afoul of the "public patronage" principle of property tax exemption. Compare Alonzo Cudworth Post No. 23, Am. Legion v. City of Milwaukee, 42 Wis. 2d 1, 165 N.W.2d 397 (WI S.Ct. 1969) (public patronage of facilities where money is exchanged for service on regular basis takes publicly patronized facilities out of tax exempt status) to Milwaukee Protestant Line (charging of endowment fees and monthly fees and only providing service to those who pay doesn't destroy exemption), and note that the Milwaukee Protestant Line creates yet another internal conflict in Wisconsin law.

4. Under the Milw. Protestant Line Definition of "Benevolent", the BRHA Exemption Hurts the Very People the Legislature Intended to Help Under 70.11(4)

The legislature created a property tax exemption in 70.11(4) for "benevolent" associations and clarified that that exemption includes "benevolent" retirement homes for the aged. (See fn. 8). Property tax exemptions are matters of legislative grace whereby, as a matter of public policy, the legislature allows forgiveness of the debt of property tax in recognition of the beneficial work that the exempt organization provides to the public. A non-profit organization that serves the needy does public good. But, a non-profit organization that serves only those with cash, does not do public good. When exemptions are granted, that parcel comes off the tax rolls, thereby shifting the tax burden to non-exempt parcels. So, owners of taxable property have to pay the extra share of expense not paid by the exempt owner. When, as under the Milw. Protestant Line definition of "benevolent", exemptions go to organizations that screen out, and do not serve, the poor or those in need of care, that means that elderly persons without cash and in need of care who are stuck in their own homes become forced to shoulder the exempt facility's share of taxes on top of their normal tax burden – even though that elderly person was screened out of the exempt facility as being too poor to admit. That's not right. The 70.11(4) BRHA exemption is hurting the very people that the legislature wants to help.

5. **Under the Milw. Protestant Line Definition of "Benevolent", the BRHA Exemption Runs Contrary to Legislative Intent, Public Policy, and State's "Family Care" Program.**

Because the Milw. Protestant Line definition of "benevolent" hurts the very people the legislature intended to help (see item 5 above), that is contrary to legislative intent and public policy. It also is contrary to the state's "Family Care" Program that is intended to help the elderly stay in their own homes longer because the elderly (mostly on fixed incomes) are, under the Milw. Protestant Line definition, forced to pay extra property taxes. See item 5 above. That, in turn, makes it more difficult for the elderly to stay in their own homes.

6. **Under the Milw. Protestant Line Definition of "Benevolent", the BRHA Exemption Results in Unfair Competition Between For-Profit Operators and Nonprofit Operators**

Under the Milw. Protestant Line definition of "benevolent", as explained, non-profit senior housing operators that screen applicants for health and wealth, only admitting those who can pay, are exempt. In turn, non-profit operators and for-profit operators who are operating the same type facilities, each serving only those who can pay, are directly competing. But, the "nonprofit" has the unfair competitive advantage of not having to pay property tax – even though the for-profit and non-profit "use" of the property is the same. See §XII (Unfair Competition) below.

7. **Given the Conflict in Judicial Definitions of "Benevolent", Assessors Lack the Guidance They Need to Make Good Exemption Decisions**

A statement by the Wisconsin Association of Assessing Officers ("WAAO") to the Special Committee on Exemptions from Property Taxation that was created by the Legislative Council in 1990 concerning property tax exemptions under 70.11(4) provided:

> "Assessors (and courts) need clear statutory language which articulates legislative intent. To apply law uniformly, precise and objective standards must be applied.
>
> No better example of the lack of clarity can be found than in section 70.11(4), the umbrella statute for benevolent . . . organizations. No clear definition of [benevolent is] found in the statutes.
>
> Case law in this are has likewise not helped the assessor."

WAAO urged the legislature to provide guidance and clarity so that assessors could make better and more uniform exemption decisions. The same need for clarity and guidance exists today – especially in light of the two co-existing, contradictory court definitions of the word "benevolent" in 70.11(4).

By statute (§73.03) the DOR's manual is supposed to give guidance to assessors throughout the state on accepted techniques for making exemption decisions. Manual Chapter 22, entitled "Guide to Property Exempt from General Property Tax", is part of the DOR's effort to help assessors; but, given the current chaotic state of the law and the problems with the 70.11(4) BRHA standard, the manual isn't much help. At Manual p. 22-5, the DOR explains that, per court cases, to be exempt as a benevolent, the organization must be benevolent. Defining a word by the word itself is inadequate. But, until either the legislature clears up the confusion or the courts overrule one of the lines of cases defining "benevolent", the DOR, seemingly, has its hands tied.

Assessors need guidance and clarity. The legislature should provide it.

8. Given the Conflict in Judicial Definitions of "Benevolent", Some Assessors Avoid Current Law and Allow Improper Exemptions to Avoid Litigation and to Collect PILOT's ("Payments-in-Lieu-of-Taxes")

Given the lack of guidance under current 70.11(4) for the BRHA exemption, and the two contradictory lines of cases, some assessors avoid the law and allow what others might call improper exemptions as a way (i) to avoid litigation between the owner of the subject parcel and the local government, and (ii) to collect "payments-in-lieu-of taxes" (PILOT) payments for just the local portion of taxes. That means that the law is either overlooked or stretched, and that the state and other taxing bodies get short-changed.

9. The BRHA Exemption is Currently Used as a Loophole for the Wealthy to get a Property-Tax Exemption for Long-Term Care Insurance

Section XI.C. below ("Nonprofit-5's Desire to Maintain Status Quo: "The Insurance Angle") explains the "long-term care insurance" aspect of CCRC's and why the CCRC "continuum of care" model involving "cross-subsidization" (i.e. profit from "independent living" units is used to subsidize the expense of assisted-living and nursing-home units) is really akin to long-term care insurance for the wealthy, and a loophole in the property tax law for the wealthy.[17] It's also akin to allowing a property-tax exemption to a wealthy, elderly person: (a) who uses his own money to set up a trust for his own care; or, (b) as the Oregon court in Oregon Methodist Homes, infra., observed, who uses his own money, in non-profit cooperative concert with others, to benefit himself. See, also, the Elks case, supra.: ". . . privileges and benefits which every person may secure for himself and family for a consideration, according to his tastes, wishes and mean, and which the members of this lodge thus provide by co-operation as a body for their mutual advantage, are not of a benevolent character, and serve no such purpose." 100 N.W. 837, 839.

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[17] See: badger.state.wi.us/agencies/oci/srissues/ltabout.htm. for OCI's description of long-term care insurance. See, also, "Old Talk, New Conversations: A Planning Guide for Seniors and Their Families," by Steven Koppel, et al. – a book described by the Milwaukee Business Journal (6/2/00) as being directed toward wealthier senior citizens concerning financial and estate planning.