10. The BRHA Exemption and Floodgates.

The BRHA-standard under current 70.11(4), coupled with the evolution of the senior housing industry, also opens the door to more and more parcels improperly coming off the tax rolls as "exempt" simply because income from those parcels is used to advance a 501(c)3/non-profit purpose – regardless of whether the parcels themselves are actually being used for charitable or benevolent causes. As the Supreme Court in the Turner Society case (supra.) recognized, that, in turn, could produce absurd results (e.g. parcel owned by "nonprofit" and actually used in competition with McDonald's to produce and sell malts and cheeseburgers exempt simply because "profits" go toward world hunger organization).

IV. BECAUSE THERE ARE PROBLEMS UNDER CURRENT LAW, LEGISLATURE CREATED TASK FORCE

1997 Act 27 created the "benevolent retirement home for the aged task force" to "investigate the property tax exemption for benevolent retirement homes **and all problems that are associated with it**." (Emphasis added). That language reveals with stark clarity that the legislature feels that the current "benevolent retirement home for the aged" ("BRHA") standard in §70.11(4) is problematic – especially when one considers how that standard has been interpreted and stretched by the courts.[18]

1997 Act 27 requires the task force to submit to the legislature a report and proposed legislation to address the problems associated with the BRHA standard.

As was explained above, there are 10 members of the task force, and those 10 members are split on a 5 to 5 basis into two groups, to wit:

1. The "Nonprofit-5"
   a. Bob Schaefer, LindenGrove, Inc., New Berlin
   b. John Sauer, Executive Director, WI Association of Homes & Services for the Aging
   c. Jim Olson, Schmitt Woodland Hills Retirement Community, Richland Center
   d. Glenda Zielski, The Lutheran Home, River Falls
   e. Mike Kittleson, Grand View Care Center Nursing Home, Blair

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[18] See 1987 State Legislative Audit Bureau Report ("L.A.B.") "A Review of Property Tax Exemptions", pg. 3, ". . . there is a need to amend the statutes to more clearly define the scope of the exemptions which have been granted. Court decisions .... have broadly applied the exemptions granted to educational and benevolent organizations." See, also, p. 15 of report, "courts appear to have defined benevolent as nonprofit and simply 'doing good'."

2. The "Government-5"

   a. Gregg Hagopian, Assistant City Attorney, Milwaukee

   b. Dave Huebsch, Retired Assessor, City of Onalaska, contract-assessor for others

   c. Pat Murphy, Hales Corners Care Center, Hales Corners

   d. Larry Weiss, The Laureate Group, various locations

   e. Peter Weissenfluh, Chief Assessor, Milwaukee

This is the report of the Government-5.

Of the 10 members of the task force, there have been 3 proposals for new legislation: (a) one proposal from the Govenrment-5; (b) one proposal from John Sauer; and (c) one proposal from Mike Kittleson and Glenda Zielski.

Below, we discuss each of the three proposals and explain why the legislature should adopt that of the Government-5. But, before we explain the proposals, we explain why the legislature needs to act now; and, we explain past legislative efforts to deal with the BRHA problem.

V. <u>DEMOGRAPHICS SHOW THAT A SOLUTION IS NEEDED NOW</u>

A. **<u>WHEDA</u>**. WHEDA (Siobain Beddow) made a presentation to the task force on 1/28/00 regarding the stark reality of how our society is quickly aging. For example, in 1940 only 9% of the U.S. population survived to age 90. But, by 2050, 42% of the population will survive to age 90. Wisconsin has a higher than average population over 65 than the nation as a whole (nation = 12.7%; WI = 13.2%); and, the projected growth rate for those over 65 in Wisconsin from 1990-2010 is 20.55% (i.e. 1.03% per year). By the year 2025, per U.S. census figures, Wisconsin's overall population will grow by 1,000,000. The state's population of those over 65 will grow by 500,000 by 2025. <u>See</u> Professor Green statistics ("Green") from UW Law School's 5/23/00 seminar entitled, and in the UW Law School's May, 2000 publication also entitled, "<u>Second Annual Property Tax Issues for the New Millenium: Senior Housing</u>." During the 1990's alone the number of centenarians in the U.S. doubled from about 37,000 to 70,000; and, by 2050, there will be more than 834,000 people in the U.S.A. age 100 or over. Thursday, 6/1/00, <u>Milwaukee Journal Sentinel</u> article.

Our society is aging quickly.

Most seniors in Wisconsin live in their own homes, most are able to care for themselves, and most have incomes above $20,290. <u>See</u> WHEDA statistics presented to task force. Additional highlights are as follows:

1. WI Household Income.

   a. Age 55-64

      (1) under 15k = 9.64%
      (2) 15-24,999 = 10.62%
      (3) 25-34,999 = 14.85%
      (4) 35-49,999 = 21.84%
      (5) 50-74,999 = 22.61%
      (6) 75-99,999 = 10.02%
      (7) 100,000 + = 10.41%

   b. Age 65-74

      (1) under 15k = 23.61%
      (2) 15-24,999 = 24.22%
      (3) 25-34,999 = 20.91%
      (4) 35-49,999 = 17.03%
      (5) 50-74,999 = 8.89%
      (6) 75-99,999 = 2.65%
      (7) 100,000 + = 2.68%

   c. Age 75+

      (1) under 15k = 43%
      (2) 15-24,999 = 24%
      (3) 25-34,999 = 15%
      (4) 35-49,999 = 10%
      (5) 50-74,999 = 5%
      (6) 75-99,999 = 1%
      (7) 100,000 + = 2%

2. Where people live.

   a. High home ownership rates for 65-69, 70-74, 75+ (well over 50%).

   b. Most own rather than rent.

   c. Nearly 80% of those age 65 live in a house they moved into before they were 65. Green.

   d. Only 10% of those over 70 live in assisted or independent living communities (i.e. most stay at home). Green.

e. About 3% of those over 70 live in nursing homes. Harvard.

f. More than 70% of those over 70 live in single-family, detached housing. Green.

g. Northern and rural Wisconsin have disproportionately large elderly populations. Green.

3. Why most elderly live at home.

a. Cost of assisted living is high. Typical rent is $1,500. Green. <u>See</u>, however, § D.6. below showing that the $1,500 is a 1993 figure, with 1998's figure being $2,000 per month.

b. Average net worth of retirees is about $130,000 and most of that ($80,00-$85,000) is home equity. Green.

c. Senior housing is thus too expensive for most. Green. Per WHEDA, 96% of those over 65 don't want to leave their house; and they typically don't until they get too sick or otherwise become unable. That usually happens around age 75. However, most then are in a double-bind. They can't afford to stay in their own house and they can't afford assisted living. So, if they don't , for example, have family who will care for them, they go to the only place left – a nursing home. As a result, between 30 to 50% of those in nursing homes get over-supplied with care because they don't need 24 hour per day care, but they go to nursing homes anyway because they can't afford assisted living. WHEDA.

d. Elderly have a precautionary savings motive so, for those over 65, financial risks involved in staying in one's owner-occupied home are perceived to be small. Green.

e. But, with a large increase in the number of elderly, with many workers now having some sort of ERISA, pension, 401K or other savings plan, and with inheritances that tomorrow's elderly will receive, we should be able to expect an increase in 501(c) senior housing facilities. Green.

4. Health

a. Less than 50% concerning (i) mobility limitation, and (ii) self-care limitations.

B. Harvard Study.

Harvard University's Joint Center for Housing Studies, after a two-year study, recently released a final report entitled, "Housing America's Seniors." Significant findings include:

1. A soaring seniors' population (America's senior population will double in the next 30 years to almost 70 million), who will live longer and healthier lives, will put pressure on the housing market for home modifications and the creation of more housing choices.

2. Nine out of 10 seniors prefer to remain in their own homes.

3. Support services for those who do stay in their own homes are in strong and growing demand.

4. Only about 10% of seniors live in age-restricted communities and only 1/3 of those live in settings that provide services.

5. Many age-restricted communities are tailored to healthy seniors with active lifestyles.

6. Assisted communities are a costly alternative with out-of-pocket monthly costs averaging, in 1993, $1,500, and with a large number of poor and near-poor seniors needing in-home care being unable to afford that. See, J. Doctrow, G. Mueller, L. Craig, "Survival of the Fittest: Competition, Consolidation and Growth in the Assisted Living Industry", Journal of Real Estate Portfolio Management, Vol. 5, No. 3, 1999, p. 225, 226, "[t]he average monthly rent for an assisted living unit is over $2,000 per month (NIC/ALFA, 1998)" in 1998.

7. Tomorrow's seniors will have greater wealth and better health. But, there will continue to be income and wealth disparities among seniors that will seriously restrict the housing choices of many seniors – especially as longevity increases.

   - Housing choices of seniors of color will be especially limited due to wealth and income disparities.

   - Many seniors who stay in their homes will be severely burdened financially and have difficulty maintaining their homes in a safe and proper condition – let alone being able to afford modifications and in-home services.

8. About 10% of seniors move in with someone or have someone move in with them to get help with frailties.

9. Only ½ of disabled seniors today have the home modifications they need.

10. Most seniors make their housing choice before they reach age 60.

C. Other "Graying of America" issues.

Other issues that have come to national attention recently pound home the point that the legislature cannot ignore issues involving seniors (e.g. high cost of prescription drugs; social security earning limits, investment, and availability; health care; etc).

VI. GROWTH IN SENIOR HOUSING INDUSTRY SHOWS THAT A SOLUTION IS NEEDED NOW

A. Overview.

Beyond the startling demographic statistics, growth and change in the senior housing industry also dictates that the legislature can no longer ignore the 70.11(4) BRHA problem.

Years ago, when families stayed together, when divorce was rare, when religion was popular, the family took care of its elderly. The church helped. Today, things are different. A. Gimmy, S. Brecht, C. Dowd, Senior Housing: Looking Toward the Third Millenium, 1998, the Appraisal Institute, pg. 7.

With technological and medical advances, people live longer and healthier lives. People often retire early. Many (but not all) invest for old age. And, at least for those elderly who are fortunate to have money, families are relied upon less to care for the aged. Indeed, senior housing has arisen as a distinct "industry" with a myriad of options, e.g. stay at home; naturally occurring retirement communities; adult day care; independent living; RCAC's (aka assisted living) (aka residential care apartment complexes); adult family homes; nursing homes; CCRC's (aka life-care communities) (aka continuing care retirement communities); hospices; etc.

Today's senior housing operators are:

> "an increasingly savvy group of operators, who now know what seniors want and how to provide it. The availability of capital for senior housing in the mid-1990s has spurred significant growth in the industry. . . . Finally, evidence of the continued expansion of assisted-living can be seen in the high number of initial public offerings to raise equity and in the significant number of new developments and

> conversion projects in this category. . . . Health care real estate investment trusts (REITs) have also become major players in senior housing by expanding into the market."

Id., Senior Housing: Looking Toward the Third Millenium, pages 2 and 3.

> Growth in the senior housing industry "in the 1990s has propelled the industry to size, revenue generations and market capitalization levels that warrant the attention of even large institutional investors and lenders." S. Lapoza and H. Singer, "Size, Scope and Performance of the Seniors Housing and Care Industry: A Comparison With the Multifamily and Lodging Sectors", p. 211, Journal of Real Estate Portfolio Management, Vol. 5, No. 3, 1999. The senior housing and care industry "is getting significantly larger each year." Id. at page 223. Per the Harvard Study, p. 6, ". . . new market opportunities are already opening up as the baby boomers attempt to find suitable care for their aging parents."

The legislature must keep up with the times and amend 70.11(4) to address the senior housing market. 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).

B. Some Definitions.

To better understand certain types of senior housing options, we provide some definitions. See, also, badger.state.wi.us/agencies/oci/srissues/ltwhatis.htm, for various OCI descriptions of long-term care options; and, Senior Housing: Looking Toward the Third Millenium, Ch. 3, "Retirement Project Types."

1. **Adult Day Care**. Non-residential, community-based group program designed to meet the needs of functionally impaired adults. It is a structured, comprehensive program that may provide a variety of health, social, and related support services during any part of a day. Elderly do not stay overnight. They don't reside at facility.

2. **Independent living**.

a. "Can't touch" rule.

b. Government-5 proposal: a residential facility of 5 or more units for the dwelling of elderly persons and their spouses who are able to care for themselves and live independently, and to which residents the facility-owner does not currently provide on-site medical services as defined in s. 647.01(6), on-site nursing services as defined in s. 647.01(7), or assistance with the activities of daily living. An independent living facility may also make available food service or common dining areas. Some have a rec-room or other common space for social gatherings. There may be a manager to make referrals, organize events, or assist with independent living. Tenants may individually arrange for supportive services from outside providers like in-home care. No license or special regulation applies.

c. Government-5 and OCI: "Activities of Daily Living": bathing; continence; dressing; eating; toileting; and transferring into or out of bed, chair, or wheelchair.

3. **Residential Care Apartment Complex ("RCAC") (f.k.a. Assisted Living).**

a. Statutory definition in §50.01(ld). Must be certified or registered under Ch. 50.

b. OCI: Assisted living facility care includes supportive, personal, or nursing services. Must either be certified or registered by DHFS. Place where 5 or more adults reside that consists of independent apartments and that provides not more than 28 hours per week of services. RCAC's combine apt. housing with supportive, personal and nursing services. Residents have their own apartments and retain control over their personal space, care decisions and daily routines. Services are individually tailored to each resident's needs. RCAC's are not licensed but must be either registered or certified by state.

4. **Adult family homes.**

a. Statutory definition §50.01(1). Requires license.

b. Residence where 1 to 4 unrelated adults live and receive meals, supervision and personal care. Many are private homes where elderly or disabled live with a foster family. Others are staffed facilities. Adult family homes caring for 1 or 2 unrelated adults are certified by the county. Those caring for 3 or 4 must be licensed by either the state or county.

5. **Nursing homes**.

   a. Statutory definition in §50.01(3). Requires license.

   b. Health care facility that provides room, board, and access to 24 hour daily care for residents needing more care than is allowed to be provided by RCAC's (i.e. assisted living). Residents may be admitted for short term respite or recuperative stays, or for long term care for chronic conditions. Licensed by state. Most are also certified for Medicare and Medicaid.

6. **Community-Based Residential Facilities (CBRF's)**.

   a. Statutory definition in §50.01(1g). Requires license.

   b. Residence where 5 or more unrelated adults live and who receive care (not above intermediate level nursing care), treatment or services above the level of room and board, but no more than 3 hours of nursing care per week per resident.

7. **Continuing Care Retirement Communities (CCRC's) (a.k.a. Life-Care Communities)**.

   a. CCRC's are life-care retirement communities that charge a substantial entrance fee (typically 10k or more) or receive ½ or more of the estate when the resident dies, in exchange for agreeing to provide long term health care for residents who need it. The financial agreements (CCRC contracts) (but not the services provided) are regulated by OCI under Ch. 647. Typically, a CCRC is a campus that houses the entire "continuum of care" model from independent living on the one end, to assisted living in the middle, and then to a nursing home on the other end, and where the residents are typically required to move from one part of the complex to another as their needs increase. CCRC's are, essentially, long-term care insurance for those who can afford it.

8. **Hospice**.

   a. Statutory definition, §50.90(1). State licensed.

   b. OCI: Hospice care is specially designed social and medical services that primarily provide pain relief, symptom management, and supportive services to terminally ill people and their families.

C. The Haves and Have-Nots; and Why Task Force's Scope Must Be Broader Than Just "Independent Living".

The senior-housing industry is growing in size and sophistication. The number of elderly in the state is rapidly growing. The legislature must realize, as the Harvard Study indicates, that the gap between the haves and have-nots amongst the elderly is increasing.[19] Many of our elderly simply don't have the money to get admitted to adult day care, independent living, RCAC's, adult family homes, or CCRC's. And, to effectively deal with the 70.11(4) problems associated with property tax exemption for the elderly, the legislature must also understand the basics of the senior-housing industry. Hence, we provided the definitions above.

At task force meetings, the Nonprofit-5 repeatedly tried to narrowly limit the scope of the task force so that only "independent living" would be considered and analyzed. That, however, would result in "tunnel vision" and would wrongly ignore huge market segments of the industry, including "assisted living – the industry's newest and hottest commodity" (Senior Housing: Looking Toward the Third Millenium, p. 2) and the whole "continuum of care" model that combines various senior housing living arrangements on the same parcel-campus. Consequently, in order to solve the problems, the legislature must not be myopic. It must grasp the industry basics and deal with the differing forms of senior housing.

VII. HISTORY OF PAST EFFORTS TO FIX PROBLEMS (e.g. Efforts to Change "Benevolent" to "Charitable")

As indicated, 1997Act 27 created the BRHA task force to investigate the problems under current law dealing with the BRHA exemption. Above, we've explained the problems, many of which relate to: (i) two, co-existing, contradictory lines of Supreme Court cases, and (ii) the Milw. Protestant Line of cases, and how, under that line of cases, exemptions go to organizations that serve the wealthy and exclude the poor.

Prior to the creation of this task force, there were numerous attempts to get new legislation to address the problems with the BRHA standard.[20] But, heretofore, none of those efforts ever recognized the two, co-existing, contradictory lines of Supreme Court

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[19] "What is especially troubling, though, is that today's dramatic disparities in wealth will follow the baby-boom generation into retirement. While about one-fifth of all those 70 or older in 1993 had net worth of over $200,000, an equally large share had net worth of less than $25,000. Wealth and income disparities will therefore continue to limit the housing choices of millions of Americans, especially those of color." Harvard Study, p. 3. See, also, Nov. 1997, National Policy and Resource Center on Women and Aging, Vol. 2., No. 4, "Reverse Mortgages: A Solution to the 'House-Rich, Cash-Poor' Problem?": "half of elderly owners with a mortgage and one out of five elderly owners without a mortgage had problems making ends meet."

[20] "Bad exemptions are extremely difficult to get rid of. As one former Chairman of the North Carolina Property Tax Commission put it, giving exemptions is like giving candy to children; if you never start, you never have to go through the pain of stopping.. But if you give them candy, they come to expect it, and even come to believe that they cannot live without it. Repealing a bad exemption is a painful process." C.B. McLain, Jr. paper, supra.

cases. That notwithstanding, the past efforts for legislative change can all be summarized as an attempt to eradicate the Milw. Protestant Line in favor of sticking with the definition of "benevolent" from the St. Joe's Line (i.e. to be "benevolent", a non-profit organization must actually admit and provide services without regard to ability to pay; charity is required).

Below, we give the detailed chronology of past efforts to get legislative change to clearly require "charity."

A. **1897-1969**: St. Joe's Line of cases is the *sole* line of cases in place.

B. 1967: Legislature amended §70.11(4) to add the "BRHA" standard to clarify that, "*benevolent* associations" under §70.11(4), can and do include, "*benevolent* nursing and retirement homes for the aged." Milw. Protestant Home for the Aged v. City of Milw., 41 Wis. 2d 284, 164 N.W.2d 289, 293 (WI S.Ct. 1969). The Report of the Joint Survey Committee on Tax Exemptions of the Wisconsin Legislature stated that the amendment was intended to: "clarify the present exemption accorded to a limited amount of property owned by *benevolent* associations by making it clear that the exemption covers *benevolent* nursing homes and homes for the aged . . . . The . . . amendment is desirable as a matter of public policy as it clarifies an existing statute which has been misinterpreted by some local property assessing offices. . . ." Id. at fn. 5. Thus, in 1967, the legislature was satisfied with the St. Joe's Line, and merely wanted to clarify that non-profit, retirement homes for the aged that provide charity and service without regard to ability to pay, and with volunteer labor, are exempt under §70.11(4).

C. 1969: The beginning of chaos. Wisconsin Supreme Court ignores 11 of its prior decisions (i.e. the St. Joe's Line) and issues Milw. Protestant Home decision, starting the new Milw. Protestant Line of cases that, to this day, co-exists and conflicts with the St. Joe's Line.

D. 1977: In 66 OAG 232 (8/10/77), the Wisconsin Attorney General addressed the issue of §70.11(4) property tax exemption for nonprofit apartments for the elderly that may be occupied by those younger than 62 who aren't retired and where services like meals, housekeeping, and nursing care aren't provided because residents must be able to live independent of such support services. The Attorney General discussed the Milw. Protestant Home case and reiterated its basic holding. That is, the Attorney General neglected to recognize the co-existence of the two contradictory lines of cases. The Attorney General did, however, say that:

> "In order to qualify as 'benevolent', the persons to be benefited need not be 'objects of charity,' but the classification must have some limits, *i.e.*, '[t]o help retired persons of moderate means live out their remaining years.' 41 Wis. 2d at 300. Further, all phases of the operation of any such retirement home should have the common denominator of serving aged

and retired persons. 41 Wis. 2d at 301. Also, there must be a significant age limitation as to occupant eligibility. It has been said that the age of 65 is generally considered the 'threshold to old age.' *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 9, 139 N.W.2d 585 (1966). Although it is difficult to say at what age a person becomes 'aged,' and an occupancy eligibility limited to persons over 62 years of age would probably not be subject to question, there must be some further limitation to ensure that these apartments are not occupied by persons who are neither retired or aged. And, as stated before, it must always clearly appear that the corporation is completely free from even the possibility of profits accruing to its founders, officers, directors or members."

See, also, Manual p. 22-6, p. 21.7-8. So while the Attorney General failed to recognize the St. Joe's Line and blindly accepted the Milw. Protestant decision, he did recognize that there must be limits.

E. 1979: In 1979, the Department of Revenue issued a 12/20/79 legal opinion (Manual pp. 22-6, 21.7-8). Like the Attorney General, the DOR failed to recognize the St. Joe's Line of cases, and blindly accepted the Milw. Protestant Line. But, like the Attorney General, the DOR also opined that there must be limits. The DOR stated that, it'd be "questionable whether providing 'deluxe type housing for the elderly' would qualify as a benevolent purpose." Specifically, the DOR opined that:

> "It is my observation that the spirit of the law providing for exempt status of property may be defeated when a project is motivated by a 'need for a more deluxe type housing for the elderly.' It is stated that local HUD housing is too small and inadequate to meet the needs of the people impressed with the proposed project. The project is aimed to meet the needs of 'elderly ladies and elderly married couples (who) are living in large beautiful homes.' It is questionable whether the needs of the elderly in this instance are of the type intended by the exemption. The Milwaukee Protestant Home case was a close 4-3 decision and involved housing for elderly persons of modest resources."

F. 1987[21]: A 1987 State Legislative Audit Bureau Report found that courts had broadly stretched the definition of "benevolent", beyond the legislature's intent, to mean simply "doing good." The report recommended that the legislature adopt a clear statutory definition for the word "benevolent." While the report never recognized the two, co-existing, contradictory lines of cases, it did recognize that, under cases like Milw. Protestant Home, local assessors were exempting "retirement homes which charge large entrance fees, yet do not necessarily admit the financially needy. In one municipality, a religious

[21] At our first task force meeting on 12/15/99, Bill Ford, the attorney for the Legislative Council gave a presentation on various legislative efforts in the 1980's-1990's to amend the 70.11(4) BRHA standard. See task force minutes for 12/15/99 meeting.

organization is building a retirement home which will be operated beginning in 1987 as a cooperative, with shares in excess of $100,000 sold to residents. While it appears that this situation is no different from a purchase of the condominium where an owner pays property taxes, the local assessor believes this retirement center may be granted an exemption as a benevolent retirement home because the courts have ruled that 'helping retired individuals live out their remaining years is benevolent, whether or not it is charitable!'" P. 16 Legislative Audit Report. Furthermore, the Report questioned allowing exemptions where "the primary use of the tax exempt property is to benefit the members" as opposed to the community as a whole. (P. 22, Legislative Audit Report).

G. 1990: Legislative Council established Special Committee on Exemptions from Property Taxation. Special committee directed to review property tax exemptions and recommend whether any should be revised, repealed, or supplanted by a service fee.

H. 1991. Special Committee (i.e. Special Committee on Exemptions from Property Taxation established by the Legislative Council in 1990) makes recommendations that are reflected in Wisconsin Legislative Council Report No. 7 to the 1991 Legislature. Recommendations are:

(1) 1991 AB 497: imposition of service fees on most types of real property exempt from property tax.

(2) 1991 AB 498: Due to for-profit operators' concerns about unfair competition by non-profit, exempt entities, suggestion to change statutory taxed-in-part under then 70.11(8) so that the measure would be U.B.I.T. instead of "pecuniary profit." This bill, among other things, would also amend 70.11(27) concerning M&E equipment and its "exclusive use" to be 95%.

(3) 1991 AB 499: Among other things, this bill (based largely on Florida law) would replace the word "benevolent" in 70.11(4) with "charitable." So that the exemption would be for non-profit, charitable associations providing charitable service (defined as a function or service which is of such community service that its discontinuance may result in the allocation of public funds for the continuance of the function or service) to a reasonable amount of persons based on ability to pay. Particularly, the Special Committee believed that "organizations, including nursing homes and retirement home for the aged, should do more than 'do good' for the community and operate not-for-profit in order to qualify for a property tax exemption." Pg. 29 of WI Legislative Council Report No. 7 (RL 91-7). Joint Survey Committee on Tax Exemptions determined this bill to be legal and *good public policy*. But, bill died in Assembly Ways and Means Committee.

I. Also 1991. After 1991 AB 499 died, the biennial budget bill (1991 AB 91) was amended to incorporate most of what was in 1991 AB 499 – except that benevolent nursing homes and retirement homes for the aged would be exempt if they had IRS 501(c)(3) status. Governor Thompson signed AB 91 into law (1991 Act 39) but only after vetoing the AB 499 provisions amending 70.11(4). The Governor explained that (i) using IRS 501(c)(3) status as an standard for state property tax exemptions would expand the number of exemptions, and (ii) some 501(c)(3) corporations are neither benevolent nor charitable. See 1991 Act 39 §1706m. However, 70.11(8) was repealed and recreated by 1991Act 39 §1706t (U.B.I.T. adopted as statutory taxed-in-part measure).

J. 1993. Various efforts.

(1) 1993-95 state budget bill, 1993 SB 44: replace "benevolent assn" under 70.11(4) to defined "charitable assn" standard in general, and for retirement homes but not for nursing homes. Non-profit organization would have to provide services free, at nominal cost, or based on ability to pay, and be of such benefit to community that discontinuance of service might result in allocation of public funds to continue service. The proposal was later removed from the budget bill by the Joint Committee on Finance.

(2) 1993 SB 256/AB 456. After removal from the budget bill (1993 SB 44), the matter was reintroduced as these companion bills. The fiscal note to SB 256 explained that, residents of retirement homes that would become taxed under the bill, could get Homestead Credit if they qualified and School Property Tax Credit. Both bills died in the Joint Survey Committee on Tax Exemptions. Then DOR Secretary Bugher had written a 10/11/93 memo to the Committee urging it to at least amend 70.11(4) so that "benevolent retirement homes for the aged" would be required to provide charitable services (i.e. charge substantially below cost) to at least 50% of its residents.

K. 1994. Because of problem – 70.11(4) exemptions being granted to homes that "provide relatively luxurious services at market rates", and that "do not serve populations in need of charity care" – DOR proposed narrowing 70.11(4) exemption for retirement homes so that at least 50% of occupants would have to have household income for the prior year that would qualify for Homestead Credit (then, the limit was $19,154).

L. 1995. Motion No. 646 by Joint Finance Committee Co-Chair Senator Joe Leean to narrow 70.11(4) exemption for "benevolent retirement homes for the aged" to only facilities where 50% or more of the residents were at or below the Homestead Tax Credit eligibility level. Motion, however, was never introduced in the Joint Finance Committee.

M. 1996. DOR, influenced by proposals in Pennsylvania, and still recognizing a problem with the BRHA standard, issues memo recommending elimination of BRHA in 70.11(4) and replacing it with "charitable retirement homes for the aged" that are free from profit motive, that provide housing services to a substantial number of residents for fees that don't fully cover the cost of the service, and that benefit a substantial class of persons who are legitimate subjects of charity.

N. 1997. During Joint Finance Committee deliberations concerning 1997 SB 77 (the 1997-99 biennial budget bill), Senator Wineke offered Motion No. 1750 that was adopted by a 12 to 4 vote, and that approved the DOR's 1996 proposal. And, while that motion by Wineke was eventually deleted, the legislature instead created this task force.

Wineke, however, went on to introduce 1997 SB 261 that contained the language in his Motion No. 1750. The Joint Survey Committee on Tax Exemptions determined SB 261 to be legal and *good public policy*. But, it died in the Senate Health, Human Services, Aging, Corrections, Veterans and Military Affairs Committee without a hearing.

O. 1999. LRB 2194/3 is drafted pursuant to which 70.11(4) "benevolent association" would be defined to mean (i) non-profit, (ii) providing service that predominantly and directly benefits the public, (iii) doesn't limit or restrict services based on resident's or client's ability to pay, and (iv) requires that at least 50% of residents of a benevolent retirement home be 65 or older. Never introduced as a bill.

P. **1999.** Wisconsin Supreme Court decides Deutsches Land, Inc. v. City of Glendale, 225 Wis. 2d 70, 591 N.W.2d 583 (WI S.Ct. 1999) making it very clear that Strict Construction Rules are alive and well, and must be respected with respect to interpretation of 70.11(4) property tax exemption. This decision, while not expressly saying so, supports the proposition that the St. Joe's Line definition of "benevolent" is correct, and that the Milw. Protestant Line definition is not correct. But, while the decision related to 70.11(4), it did not overrule the Milw. Protestant Line. Hence, we still have the two co-existing and contradictory lines of cases.

Again, as the above chronology of legislative efforts shows, there is certainly evidence of an unending push to keep the St. Joe's Line definition of "benevolent" and do away with the Milw. Protestant Line definition. That is, as a matter of good public policy, the push is for the legislature to require some level of charity to be provided in order for an entity to get property tax exemption under 70.11(4) as a "benevolent."

VIII. GOVERNMENT-5's PROPOSAL FOR NEW LEGISLATION

The Government-5 proposal for new legislation to fix the problems with the BRHA standard is a 3-part one, to wit:

PART 1: Amend §70.11(4) to eliminate reference to the "benevolent retirement home for the aged" standard ("BRHA") and to close the door on "backdoor assessment challenges."

PART 2: Create new law, §70.11(4b) (residential service facilities for the elderly). This new law does not contain the word "benevolent" or the BRHA standard. It is in-line with modern times and the elderly-housing industry. It harmonizes with other state statutes regarding elderly housing and care. It is sufficiently clear so that, unlike current law, owners and assessors alike will be able to apply it with sufficient clarity. And, it gets at the problems with the BRHA standard, and the court cases interpreting that standard, just as the legislature requested. That is, it will wipe the slate clean so that the competing St. Joe's Line and Milw. Protestant Line will no longer be an issue. It exempts non-profit, licensed nursing homes that accept Medicaid out-right. And, for non-profit, non-nursing-home old age residences, and non-profit, non-Medicaid nursing homes, it allows exemption to the same extent those facilities serve the elderly (residents 65 or older) who are in financial need (incomes at or below the Homestead Credit Limit).

PART 3: Create new law, §70.11(4c) (HUD §202 low-income elderly housing). Sec. 70.11(4c) is needed to not take away the legitimate exemption for §202 HUD-elderly projects, which exemption would, absent §70.11(4c), be eliminated due to our amendment to §70.11(4) and our creation of §70.11(4b).

A. Amending §70.11(4)

Amend 70.11(4) by deleting reference to " ***including benevolent nursing homes and retirement homes for the aged***". Also, add to 70.11(4), to the "but not including" list, the following: "***an organization whose predominant purpose is providing residential services to persons who are retired or elderly.***"

B. Creation of §70.11(4b)

Create a separate exemption, §70.11(4b), as follows:

70.11(4b) RESIDENTIAL SERVICE FACILITIES FOR THE ELDERLY.

(a) DEFINITIONS. In this subsection:

1. “Activities of daily living” means: bathing; continence; dressing; eating; toileting; and transferring into or out of bed, chair, or wheelchair.

2. “Department” means department of revenue.

3. “Elderly” means a resident of a building at the property who is 65 years of age or older as of January 1 of the exemption year at issue.

4. “Exempt percent” means the quotient obtained by dividing the numerator, the total units occupied by residents who are both elderly and needy, by the denominator, the total number of units at the property as of January 1 of the exemption year at issue.

5. “Gross income” means “adjusted gross income” for federal income tax reporting purposes.

6. “Household” has the same meaning as in s. 71.52(4).

7. “Independent living facility” means a residential facility of 5 or more units for the dwelling of elderly persons and their spouses, who are able to care for themselves and live independently, and to which residents the facility-owner does not currently provide on-site medical services as defined in s. 647.01(6), on-site nursing services as defined in s. 647.01(7), or assistance with the activities of daily living. An independent living facility may be part of a larger facility or campus, the other parts of which do include such on-site medical services or nursing services, or assistance with the activities of daily living.

8. “Maximum homestead income” means the maximum income allowed for claiming the homestead credit under subch. VIII of Ch. 71.

9. “Medicaid nursing home” means a nursing home as defined in s. 50.01(3) and licensed under ch. 50 that accepts Medicaid residents.

10. “Needy” means an elderly resident who had individual, or household, gross income, for the year preceding the exemption year at issue, that did not exceed the maximum homestead income, as that maximum was calculated by the department for the year preceding the exemption year at issue.

11. “Non-Medicaid nursing home” means a nursing home as defined in s. 50.01(3) and licensed under ch. 50 that does not accept Medicaid residents.

12. "Taxable percent" means one minus the exempt percent.

(b) Up to ten acres of land necessary for location and convenience of buildings, to the extent of the exempt percent, where all of the following requirements are fulfilled:

1. The land and buildings are owned and used exclusively by a nonprofit organization for one or more of the following purposes:

A. a community–based residential facility as defined in s.50.01 (1g) and licensed under ch. 50 ; or

B. a residential care apartment complex as defined in s.50.01 (1d) and certified or registered under ch. 50; or

C. an adult family home as defined in 50.01(1)(b) and certified or licensed under ch. 50; or

D. a hospice as defined in s.50.90(1) and licensed under ch.50; or

E. an independent living facility; or

F. a non-Medicaid nursing home.

2. The organization has residents who are both elderly and needy.

3. The organization timely files a summary report form under sub (d).

(c) Each resident shall, on or before January 15th of each year, provide to the organization a statement, on a form prescribed by the department, in which the resident shall provide his or her name and address and indicate whether the resident was elderly and needy. Upon request, the organization shall make available to the local assessor copies of these statements.

(d) The organization shall file with the local assessor on or before March 1 of each year a summary report, in the form prescribed by the department, that summarizes data the organization receives from the resident statements under sub (c), and that indicates as of January 1 of the year in which they must be filed:

1. each applicable sub (b) 1A-F purpose for which the land and buildings at the property were used, and whether the land and buildings were being used for a Medicaid nursing home.

2. the total number of units that existed at the property, including a breakdown showing the number of units within each separate sub(b) 1A-F purpose and the number of units within any Medicaid nursing home.

3. for each separate sub(b) 1A-F purpose, the total number of units occupied by at least one resident that was both needy and elderly.

(e) The organization's property shall be assessed for taxation at its fair market value times the taxable percent.

(f) SPECIAL RULES FOR MEDICAID NURSING HOMES AND MULTI-PURPOSE FACILITIES THAT INCLUDE MEDICAID NURSING HOMES. If the land and buildings are owned and used exclusively by a non-profit organization for a Medicaid nursing home or for a Medicaid nursing home and one or more of the purposes in sub (b) 1 A–E, then that Medicaid nursing home shall be entitled to exemption to the same extent as if the nursing home were a non-Medicaid one under sub(b) 1.F. except, that, no resident of the Medicaid nursing home shall be required to provide statements under sub. (c), and so long as the Medicaid nursing home was actually occupied as of January 1, for purposes of calculating exempt percent, all units in the Medicaid nursing home as of January 1 shall be deemed as a matter of law to be occupied by elderly and needy. An organization that owns and uses an occupied Medicaid nursing home shall file with the local assessor on or before March 1 a summary report under sub (d) as a prerequisite to exemption.

C. <u>Creation of §70.11(4c)</u>

Create a separate exemption, §70.11(4c), as follows:

4(c) FEDERAL HOUSING PROJECTS FOR THE ELDERLY

Up to ten acres of land necessary for the location and convenience of buildings where the land and buildings are owned and used exclusively by a non-profit organization that provides housing to low-income, elderly persons, where that housing was financed through, and operates under, the federal government's department of housing and urban development's section 202 program.

IX. ADVANTAGES CONCERNING GOVERNMENT-5 PROPOSAL

A. Recognizes, as legislature has, that there are problems with the BRHA standard. Eliminates BRHA standard entirely and all the confusion and conflicting case law surrounding that standard. Meets 1987 L.A.B. Report pp. 3 and 15 calling for increased clarity and expressed legislative intent in §70.11 exemption statute.

B. Recognizes evolution of the senior-housing industry and harmonizes with other state statutes concerning types of facilities and their regulation.

C. Reflects good public policy as to who, rightfully, should get legislative grace of exemption. Non-profit, non-nursing home senior housing providers, and non-profit, non-Medicaid nursing homes, will get an exemption to the same extent they serve those who are elderly (65 or older) and needy (at or below the Homestead Credit limit). See 1987 L.A.B. Report p. 5: property tax exemption amounts to the provision of a public subsidy. Government's cost of that subsidy is assumed to be less than the cost that government would have to bear if it provided the same services. Pg. 21: general public (as opposed to the group's own members) should be who primarily and directly benefits from exempt organization's activities. M. Derus' 501(c)(3) memo: to qualify as 501(c)(3) exempt purpose, "organization's purposes and activities must serve a public rather than a private purpose."

D. Income limit and age limit help prevent abuse. See, e.g., 1987 L.A.B. Report, p.16, because of court's (in Milw. Protestant Line) deeming that "helping retired individuals live out their remaining years is benevolent, whether or not it is charitable", under current §70.11(4) and BRHA standard[22], there is concern about abuse – especially where large endowment fees (and large monthly fees) are charged. 7/25/94 D.O.R. report, "Revise Property Tax Exemptions for Benevolent Retirement Homes" (recommendation to narrow BRHA exemption to those where at least 50% were occupied by residents with household incomes for year prior to assessment date not exceeding maximum homestead credit limit), and 9/9/96 D.O.R. report, "Property Tax – Revise Exemption for Benevolent Retirement Homes" (recommendation to change standard to "charitable"). 1997 SB 261 (change "benevolent" to "charitable").

E. Reasonable income limit.

(1) Maximum Homestead credit is: $20,290 for year 2000; $24,500 for year 2001 and after. And, recognizes each of: (i) IRS notion of "affordability" (i.e. charges set at a level within the financial reach of a

[22] As explained below, the BRHA standard, as interpreted in the Milw. Protestant Line, is essentially the IRS 501(c)(3) standard as that standard has been currently applied and inadequately enforced.

significant segment of the community's elderly persons; see Rev-Rul. 79-18), and (ii) "direct public benefit" notion behind property tax exemption.

(2) Helps to provide stop-gap for short-fall in private for-profit and non-profit markets. Per A. Gimmy, S. Brecht, C. Dowd, Senior Housing: Looking Toward the Third Millenium, 1998, the Appraisal Institute, p. 21: "At present, the private industry does not provide a housing and service package for low – or moderate – income groups earning $25,000 or less annually."

(3) HUD figures and problems with HUD's 40/60 rule, using county data ("40% units of occupied by those with income less than 60%" rule). This is the test referred to in the DOR's "Background Report" as being used by Care Community, New Berlin (Mark Wimmer, President).

(a) Income data varies greatly among counties in the state. Constitutional uniformity and equal protection issues. Using statewide homestead limit removes those constitutional concerns.

(b) 1999 Median Family Income. Example:

- Men. Co. $21,800
- Jackson Co. $32,600
- Forest Co. $33,600
- Bayfield Co. $36,300
- Milw/Waukesha $57,600
- Madison/Dane $61,400

(c) Above range: $21,800-$61.400

(d) Range X 60%: $13,080-$36,840

(e) Milw. x 60% = $34,560

(f) Milw. MPD salary: $31,700-$43,000

F. By imposing "nonprofit" status, sweeps in IRS requirement that organization not kick-out those who later become "unable to pay." See Rev-Rul. 79-18.

G. Based on evidence presented at task force meetings, 65 year "age" restriction is very reasonable. And, our proposal has no "retirement" requirement.

H. Compliance (e.g. simple affidavit requirement and summary report forms) are not burdensome – especially in light of substantial benefit (i.e. property tax exemption). Compare with IRS tax-exempt bond reporting requirements. Also, CCRC life-care contracts typically allow organization to review residents' financial information.

I. Special taxed-in-part provisions and provisions for percentage exemption are good public policy and recognize the IRS fragmentation test, and existing common law on property-tax exemptions: "use of property, rather than income from property" governs exemption. Men's Hall Stores v. Dane County, 269 Wis. 84, 69 N.W.2d 213 (1955) ("It is use of property and not purpose of income therefrom that determines taxability of property which is asserted to be exempt from taxation"). While the continuum of care model relied upon by current CCRC's (where income from the "independent care" component is used to subsidize the other components of the CCRC campus) violates the above fundamentals of property tax exemption law (it is use of the property, NOT USE OF INCOME FROM THE PROPERTY, that determines exemption), our proposal will still allow CCRC's to operate. Under our proposal, however, each component of a CCRC will be analyzed and allowed an exemption only to the extent each component actually serves the elderly who are needy.

J. CCRC's (i.e. "continuing care retirement communities") are covered by our new 70.11(4b) because 70.11(4b) (b) 1 specifically allows an exemption for a facility that meets more than one of the A-F purposes in 70.11(4b) (b) 1. As was explained at task force meetings, CCRC's: (1) are facilities where residents must enter continuing care contracts as defined in 647.01(2), with a provider as defined in 647.01(9); and (2) are based on a "continuum of care" model that has as one component an "independent living facility" *as well as* progressively higher skilled care. Thus, a CCRC, by industry definition, is a facility that has an "independent living facility" (70.11(4b) (b)1. E.) and one or more of the purposes in 70.11 (4b) (b) 1 A-F. So, under the new law we propose, a non-profit CCRC that meets all the requirements will be property-tax exempt 100% on its Medicaid nursing home, and to the same extent it serves the elderly and the needy in its independent living, assisted, and non-Medicaid nursing home units.

K. Is sufficiently clear so assessors and owners alike will know what is and isn't exempt. See: 1987 L.A.B. Report pp. 3 and 15; John Sauer's 12/15/99 memo to Tom Ourada: "Any new standards this task force recommends must be concise enough not only to allow a tax-exempt entity to determine whether it meets these new standards but also what operational changes must be undertaken to bring the entity into compliance with the new standards. See, also, former DOA-Secretary Mark Bugher's 7/7/99 letter to Doug Johnson, "[r]etirement homes, for example, could be required to have certain portions of their residents below specific income or wealth thresholds to be exempt."

L. Govt-5 Proposal meets WAHSA's 1993 concerns and AAHSA's concerns. Per a 1993 position paper by the Wisconsin Association of Homes and Services for the Aging, Inc. ("WAHSA") concerning 1993 SB 256/AB 456, WASHA is on record supporting "the use of a charitability standard, rather than a benevolence standard, to justify the issuance of a property tax exemption" so long as (i) any definition of "charitable" isn't vague and allows the facility owner to determine whether it will meet the standard and be eligible for exemption, and (ii) non-profit nursing homes get an outright exemption. The Gov't-5 Proposal, with its special provision for Medicaid nursing homes, satisfies each of those WAHSA concerns. See, also, www.aahsa.org, the American Association of Homes and Services for the Aging web site and statements therein evidencing AAHSA's support for making senior housing more accessible to low-income elderly.

M. WAAO (the Wisconsin Association of Assessing Officers) supports our proposal.

N. Preserves exemption for various facilities that are currently exempt under sub (4). For example, to the extent the following are able to qualify for exemption under current 70.11(4):

(1) Convents are still OK because the "not including" sentence precedes the "and also including" sentence. See, also, clergy-housing exemptions in 70.11(4).

(2) Homeless shelters are still OK. See, also, §16.352(1)(d).

(3) Adult day care is still OK.

(4) Housing for the handicapped or mentally or physically disabled, and housing and treatment for alcohol or chemically-dependent, and general (i.e. not elderly-restricted) low-income housing are still OK (e.g. HUD §811 and §8).

Due to concerns raised by the Nonprofit-5, this requires further elaboration.

Assume for example, that Care Center, Inc. is a non-profit assisted-living/residential care apartment complex (RCAC) with 30 fully-occupied units as of January 1, year X. Units 1-11 are occupied by residents who are elderly and needy as defined in 70.11(4b)(a). Units 12-19 are occupied by residents who are elderly but not needy. And, units 20-30 are occupied by non-elderly chemically or alcohol-dependent persons, or non-elderly physically or mentally disabled persons.

Under the Government-5's legislative proposal: units 1-11 would be eligible for exemption under new 70.11(4b); units 12-19 would not be eligible for exemption; and units 20-30 may be eligible for "benevolent" exemption under 70.11(4).

(5) Sec. 70.11(4c) preserves exemption for HUD-202 projects.

O. Closes the door to "back door" challenges (and wasteful litigation) by those trying to get around new §70.11(4b).

P. Sec. 70.11(4b) solidifies exemption for non-profit, licensed nursing homes that accept Medicaid residents. Per our task force meetings, most nursing homes are occupied by those well over 65, who are low-income and receiving Medicaid.

Q. Is in line with and would harmonize with the State's "Family Care" Program. That program is largely intended to help older people stay in their own homes longer. By adopting the proposed legislation offered by the Government-5, elderly people who do stay in their own homes (or who rent and then indirectly pay property tax) will be better able to stay in their own homes (or apartments) because their property tax bills (or rent) will be lower as a result of less exemptions (i.e. exemptions will only go to those facilities that serve the needy).

R. Is in line with and would harmonize with the State's "Badger Care" Program. That program is intended to help disadvantaged people who cannot afford private insurance. We explain below how, under the Milw. Protestant Line definition of "benevolent", non-profit senior housing operators are essentially providing long-term care insurance to the wealthy who then live in tax-exempt units. Our proposal, however, ties exemption directly to helping the needy elderly. In turn, our proposal, would assist the needy in obtaining an aspect of long-term care insurance.

X. JUST SOME REASONS WHY IRS 501(c)(3) STANDARD IS UNACCEPTABLE

The following are just some reasons why the IRS 501(c)(3) federal income tax exemption standard is unacceptable as the sole replacement for the BRHA state property tax exemption standard:

A. **Rev. Rul. 72-124** marked a significant change in the IRS' view of old age homes, and signaled a reversal of Rev. Rul.'s **57-467** (must accept charitable residents), 61-72 (must in fact provide care and housing for those aged who would otherwise be unable to provide for themselves without hardship; and such services must be rendered to all or a reasonable proportion of the residents at substantially below actual cost), and **64-231** (consider lump-sum entrance fee and monthly fees to see if home operates below costs). **Rev. Rul. 72-124** provides that "[p]roviding for the special needs of the aged has long been recognized as a charitable purpose for Federal tax purposes..." Per Rev. Rul. 72-124, the IRS recognized, however, that, *wholly apart from financial distress,* the elderly have special needs that "include suitable housing, physical and mental health care, civic, cultural, and recreational activities, and an overall environment conducive to dignity and independence, all specifically designed to meet the needs of the aged". And, again according to the IRS, satisfaction of those needs can relieve distress and be charitable – *even though no direct financial assistance or relief of poverty is involved.* See, also, Rev. Rul. 79-18 (no direct financial assistance required to get 501(c)(3) status since poverty is but one form of distress the elderly face). But, see, Rev. Rule 72-124 and IRS requirements that: (i) the organization must be within the financial reach of a significant segment of the community's elderly, and (ii) the organization must operate at the lowest feasible cost (herein called the "Significant Segment" and "Lowest Cost" Tests).

1. The above IRS standard, as particularly reflected in Rev. Rul. 72.-124 and 79-18 (coupled with lack of IRS enforcement of the Significant Segment and Lowest Cost Tests) **IS** the current problem with the BHRA standard as interpreted by the courts in the Milw. Protestant Line (i.e. "benevolent" for 70.11(4) simply means "doing good"; "helping retired individuals live out their remaining years is benevolent, whether or not it is charitable").

2. The above IRS standard (coupled with lack of IRS enforcement of the Significant Segment and Lowest Cost Tests) is not good public policy from a property-tax exemption perspective and does not reconcile well with those who are elderly and who either choose to stay in their own homes (and who then pay property tax), or who are not wealthy enough, or who cannot survive the financial screening that takes place in some 501(c)(3) facilities.

B. Lax enforcement by IRS. See, Chronicle of Philanthropy articles and task force minutes regarding Gregg Hagopian's and Pete Weissenfluh's discussions with IRS (James Gaven, then-Acting-Manager of Exempt Organizations, Wisconsin Office of IRS) (IRS determinations of exempt status are done after paper review of applications – whereas state property tax exemption law focuses on actual physical use of property; very rare for IRS to actually visit parcel; very limited staff for auditing). See Sunday, 2/13/00 Milwaukee Journal Sentinel article: "Money sought to help IRS crack down": Clinton admin. seeking 9% increase in IRS budget (largest increase, adjusted for inflation, in 13 years) to increase number of IRS auditors; IRS auditing staff is down one-fourth since 1995; IRS Commissioner "Rossotti and others worry that understaffing and growing timidity by front-line auditors and tax collectors have allowed more Americans and businesses to get away with not paying what they owe." In 1998, of the 51,329 applications for 501(c)3 exemption for "religious, charitable", etc., only 382 were denied. 383 ÷ 51,329 = 0.7% denial. In 1953 there were only 50,000 exempt charities in the U.S.A. Today, there are over 733,000 and they employ over 10 million people and produce more than 7% of the GNP. Chronicle of Philanthropy. Thus, with the large non-profit growth rate, even if extra staff is added, the IRS denies very few 501(c)3 exemption applications and is very short-staffed on its auditing front.

C. IRS allows screening out of residents who can't afford substantial endowment fees and monthly charges. Renders policy on not kicking out those who later, after being initially screened for financial wherewithal, become unable to pay, much less meaningful. With financial screening, and without any low-income requirement, facility cuts its risk of having to pay-out. And, as seen below, facility can establish reserves for pay-outs. Policy reinforces "long-term care insurance for the wealthy" aspect of CCRC's.

D. IRS allows charges for services plus reserves. Services can include luxury dwellings and accouterments. Reserves can include costs for expansion and costs of having to cover those who, after having already been financially-screened and admitted, become unable to pay. Rev. Rul. 72-124. That means that the organization's members are providing their own benevolence to themselves. That is contrary to property tax exemption policy.

E. While IRS definition of "charitable" for 501(c)(3) purposes includes relief of the poor and the distressed, that standard, per IRS rulings: (a) does not require charity, or even require, with limited exception, relief from financial distress (Rev. Rul. 72-124); and (b) means, only meeting the following needs (Rev. Rul. 72-124):

1. Health care needs. Satisfied by organization directly providing, or if organization contracts-out with outsiders to provide. So, organization itself doesn't even have to provide.

2. Financial security needs (after pre-screening for wealth). While organization has to operate at "lowest feasible cost", it can nonetheless factor in such things as debt payments, reserves for members who later can't pay, reserves for physical expansion, and reserves for life-care of each resident. Thus, facility itself can build-up reserves for pay-outs so, effectively, members/residents provide their own "benevolence". Their own self-insurance. And, remember, prescreening is OK and no charity is required.

3. Residential/housing needs. Satisfied by organization providing residential facilities designed to meet "*some combination*" of physical, emotional, recreational, social, religious, and similar needs of elderly.

Thus, under IRS standards, condo-like, high-end housing, with lighted tennis courts, and private fenced-in yards, where the facility charges substantial endowment fees and substantial monthly fees, and screens out those who cannot pay, is "charitable" even though there is no true "charity" or true "benevolence". See, also, J. Simpson and S. Strum, "How Good a Samaritan? Federal Income Tax Exemption for Charitable Hospitals Reconsidered", 14 U. of Puget Sound Law Review, Spring 1991, p. 633 (IRS should revise current standards for federal income tax exemption to encourage organizations to respond to needs of persons unable to pay); and J. Colombo, "Health Care Reform and Federal Tax Exemption: Rethinking the Issues", 29 Wake Forest Law Review, Spring 1994, p. 215 (IRS criticized for not keeping up with the evolution of the health care industry and seeks IRS reconsideration of what the taxpaying public should be entitled to expect from an exempt entity in return for exemption).

XI. THE SAUER PROPOSAL AND THE KITTLESON-ZIELSKI PROPOSAL

As mentioned, besides our proposal (the Government-5 one), there were two other proposals for new legislation – one by task force member Sauer, and the other by task force members Kittleson and Zielski. Each of those proposals should be rejected. Each would result in confusion. And each, we believe, is an effort to preserve the status quo under the Milw. Protestant Line definition of "benevolent." Indeed, in a 12/15/99 memo from task force member Sauer to the DOR task force facilitator Tom Ourada, Sauer said:

> "As the executive director of the trade association which represents not-for-profit long-term care providers, many of whom are exempt from property taxation as benevolent retirement homes for the aged, it would be foolish for me to suggest that my members object to the current provisions under s. 70.11(4), Wis. Stats."

A. The Sauer Proposal

Under the Sauer proposal, as we understand it:

1. BRHA would mean "housing for older persons under §106.04(1m)(m) (i.e. housing under a state or federal program for the elderly and occupied by those 62 or older (Sauer would be willing to make the age be 65 or older), and which may provide care or services beyond room or board (but no requirement to do so). Sauer is not clear on what is meant by "state or federal program."

2. Nursing homes, CBRF's, RCAC's, or CCRC's, would not be within the definition of BRHA.

3. BRHA's and, nursing homes, CBRF's, RCAC's, CCRC's would all be

exempt if:

(a) They were exempt for income tax purposes (IRC 501(c) or (4), Rev. Rul. 72-124). See above why adoption of IRS standards is unacceptable. IRS standards equate to the definition of "benevolent" under Milw. Protestant Line. Recall that Governor Thompson vetoed IRS standard as a test for BRHA's in 1991. And, our year 2000 discussions with IRS reveal inadequate resources to monitor IRS exemptions.

(b) They maintain a policy of not kicking out residents who, after being admitted, can't pay. However, under Sauer proposal, facility could still screen all applicants so that no poor person is even admitted and only the wealthy are admitted.

(c) That operate free from private profit motive (i.e. no private inurement).

(d) That publish fees or donations paid to local government for municipal services such as police, fire, sewer, water, and garbage collection But, there is no requirement that the facility pay any fee to local government.

(e) That are supported in whole or part by donations and gifts. This is vague language. Under it, a single $5 contribution per year by the facility's executive director could satisfy this requirement.

(f) Where the residents may be required to pay for housing and services in whole or in part. That is, after being screened upon admission to ensure wealth, the facility could still charge full market rates to every resident for all housing and services provided and retain exemption.

(g) Criteria should be constant and not change from year to year. This could be viewed as an attempt to reverse basic property tax exemption law in Wisconsin, and throughout the U.S.A., that assessment and exemption are viewed annually as of the statutory assessment date. See, Wis. Stat. §70.01 and §70.32 and Freedom Village II case (Ct. App. 1995).

For all the above reasons, the Sauer proposal is unacceptable. It would solidify the status quo as exists under the Milw. Protestant Line, and perpetuate bad public policy where exemptions go to entities that don't do charity, and that serve the wealthy.

B. The Kittleson-Zielski Proposal

Under the Kittleson-Zielski proposal, as we understand it, exemption would be allowed:

1. To any property owned and managed "in a material way" by a non-profit corporation. This is confusing. What does "material way" mean? What if the non-profit contracts out with a for-profit to provide services?

2. The mission and services provided by the non-profit "must be designed to meet the health, housing and financial security of the elderly and the purpose is to be helpful to the elderly without immediate expectations of material reward." This is confusing. What does it mean? Notice that, rather than a requirement for the entity to <u>actually operate</u> in such a manner, the entity need only be <u>designed</u> to so operate. Does the "financial security" requirement mean charity is required, or can it amount to "self-benevolence" or "self-insurance" where the rich help themselves? Does the "without immediate expectation of material reward" mean the facility can service now, but charge later?

3. The entity is supported in whole or in part by donations and gifts. Again, might a $5 annual gift from the facility's executive director satisfy this requirement in full?

4. The residents may be required to pay in whole or in part. That is, the facility, after prescreening to admit only the wealthy, can charge full-market rates for housing and services.

5. No private inurement.

6. Constant criteria. Does this mean ignoring §70.01 and §70.32 regarding 1/1 annual review?

Like the Sauer proposal, the Kittleson-Zielski proposal would unacceptably leave things under the same problematic state of affairs as exist under the <u>Milw. Protestant Line</u>, and so it too should be rejected.

C. Nonprofit-5's Desire to Maintain Status Quo: The Insurance Angle

As explained, each of the Sauer Proposal and the Kittleson-Zielski Proposal is unacceptable since each would solidify the status quo under the <u>Milw. Protestant Line</u>. Senior housing that screens out the poor and admits only the rich would still be exempt.

A recurring argument in task force meetings made by the Nonprofit-5 in support of the status quo is that it allows the "continuum of care" model to operate. That is, it essentially makes available long-term care insurance for the wealthy.

For example, in a CCRC (Continuing Care Retirement Community), the facility provides the full "continuum of care": independent living; assisted living; and a nursing home. Assume Joe Smith is an able-bodied older person, with money, and the foresight to plan ahead, and that he applies for admission to 12-Oaks, a CCRC. 12-Oaks screens Joe's application to make sure he's rich enough to afford the initial endowment fee (assume, $175,000) and continuing monthly fees into the future (assume $1,800 per month). After Joe survives the "screening", he and 12-Oaks enter a CCRC contract under Wis. Stat. Ch. 647. The reason why that contract is subject to Ch. 647 is because there is an "insurance" aspect to Joe's residency at 12-Oaks. Joe will be plunking down lots of money to ensure that, into the future, as Joe ages and his condition deteriorates, 12-Oaks will take care of him. And, the state wants to make sure that, in that insurance arrangement, 12-Oaks will properly use Joe's money and the money of Joe's co-residents in such a manner that it will be able to make good on its end when life gets rough. So, under Wis. Stat. Ch. 647, Joe's contract with 12-Oaks is subject to OCI review and oversight.

After Joe and 12-Oaks sign the CCRC contract, Joe pays his endowment fee and moves into the "independent living" section of 12-Oaks. He receives no medical or nursing care. He lives in nice and comfortable surroundings. As time goes by and Joe ages, however, his health slips. He gets moved into the "assisted living" section of 12-Oaks where he receives no more than 28 hours of supportive, personal or nursing services per week. Then, as more time goes by, Joe deteriorates further and he moves to the "nursing home" section of 12-Oaks, where he has access to 24 hour care.

As the level of care increases (i.e. as one moves from left to right in the "continuum of care" model, from independent living, to assisted living, to nursing home care), costs associated with servicing Joe increase. Per the Nonprofit-5, property-tax exemption for the entire 12-Oaks CCRC is essential because 12-Oaks needs the profit from its independent living operations to fund its more-costly-to-operate assisted living and nursing home operations. The Nonprofit-5 refer to this as "cross-subsidization." Profit from one distinct part of the overall operations of the property is used to subsidize, or fund, another part of the operations. And, since the Nonprofit-5 want to ensure that profit is maximized, they want to avoid the expense of property tax. See, A. Gimmy, S. Brecht, C. Dowd, Senior Housing: Looking Toward the Third Millenium, 1998, The Appraisal Institute, pp. 4-5. The authors explain the "continuum of care" concept and how, by one company offering services of varying degrees of acuity to meet changing resident needs, that company achieves efficiencies of vertical integration: (i) giving the company power to eliminate service overlaps and duplication; (ii) allowing the company to make referrals to its own services thereby allowing the company to capture more revenue as patient needs change up or down the continuum; (iii) allowing for simpler contract arrangements making the company more desirable; and (iv) helping the company manage risk and costs better under prospective payment systems.

But, as explained, the Nonprofit-5 fail to appreciate that, under property-tax exemption law, it is the use of property – and not the use of money from property – that governs. Under the law, is it "benevolent" to use the independent living part of 12-Oaks for housing wealthy, able-bodied Joe, especially after 12-Oaks screened applicants for wealth to purposely weed out the poor? No. According to the Government-5 and the Supreme Court in the St. Joe's Line, that's not a benevolent use of property. But, under the Milw. Protestant Line, it is.

And so, the Nonprofit-5 effectively urge retention of the status quo so they do not lose the benefit of the Milw. Protestant Line.

The fact that Ch. 647 is involved further demonstrates that the St. Joe's Line is correct. By entering the Ch. 647 CCRC contract, Joe is essentially using his own wealth to buy long-term care insurance, an insurance policy to ensure that he'll be taken care of later. Only the rich can afford that "insurance" because the CCRC won't even contract with the poor. Thus, 12-Oaks' process of screening applicants for wealth, coupled with its high endowment and monthly fees, ensures that, from an actuarial stand-point, the poor are excluded and that only the wealthy are served. That amounts to "self-benevolence" where the rich get richer and the poor get poorer. It is nothing more than long-term care insurance for the wealthy.

In determining whether activity carried on by organization is really a form of insurance, court must examine all the facts and determine the real nature and substance of the organization's activities. That which is in substance a contract of insurance cannot be changed into something else by giving it another name. Martin v. Dane Co. Mut. Ben. Assn., 247 Wis. 220, 231, 19 N.W.2d 303 (WI S.Ct. 1945). In Martin, the Supreme Court, citing its Prairie du Chien Sanitarium and Rogers Memorial Sanitarium cases, supra., said that "[t]he facts of each case must be regarded as a whole and the substance of the scheme of operation as it exists must be examined." Id. at 247 Wis. 220, 233.

In so examining the senior housing industry and particularly CCRC's, life-care contracts, and "continuum of care" operations, the inescapable conclusion is that the activity carried on is insurance – paid for by those who can afford it – for the benefit of those who can afford it. Indeed, the attorney for a prominent non-profit senior housing complex admitted just that.

Bob Gordon, the attorney for the property owner in the case, Friendship Village of Greater Milwaukee v. City of Milwaukee, 181 Wis. 2d 207, 511 N.W.2d 345 (Ct. App. 1993), rev. denied, 515 N.W.2d 714, in the University of Wisconsin Law School's May, 2000 publication, Second Annual Property Tax Issues for the New Millenium: Senior Housing, at page Gordon-6, described the "continuum of care" aspect of non-profit senior housing operators as insurance. Specifically, per Gordon:

> "Minimum age and rules for moving into Friendship Village" (i.e. prescreening applicants for health and wealth) "were all part of a deliberately structured continuum of care, i.e., an attempt to get the aging into the life-care insurance system earlier while they could still live independently, rather than waiting until they were forced to bear the catastrophic expense of moving directly into a nursing home without long term care insurance."

Gordon went further to describe the screening of applicants for health and wealth as an "actuarial" function performed by senior housing operators to minimize their insurance risk.

In light of the above, the industry itself views the "continuum of care" model as long-term care insurance for the wealthy.

The "self-benevolence" and "insurance" associated with cross-subsidization and the "continuum of care" model, we assert, is, under the Milw. Protestant Line definition of "benevolence", nothing but a loophole in the property-tax law for the wealthy. That loophole should be closed. "Self-benevolence" (long-term care insurance for the wealthy) should not equate to the same type of "benevolence" that is deserving of property-tax exemption.

Our proposal would allow assessors to examine each part of a CCRC so that taxed-in-part decisions could be made based on benevolent use of property rather than benevolent use of money from property. For example, under our proposal, if, in the 12-Oaks example: the "independent living" section had 40 units with 20 actually used to house the elderly (65 or older) in need (at or below the Homestead Credit limit); and the "assisted living" section had 40 units with 20 actually used to house the elderly in need; and the nursing home accepted Medicaid and had 40 units, the entire 12 Oaks parcel (building and land-up to 10 acres) would be entitled to a 67% exemption. (20+20+40)÷(40+40+40)=80÷120=67%.

Through the age and income limits of our proposal, we keep the focus of "property" tax exemption analysis where it rightly belongs – on the use of the "property" rather than the use of the money or income therefrom. If the legislature, for some reason, were to buy into the Nonprofit-5 "cross-subsidization" argument associated with the "continuum of care" model, that, pushed to its logical limit, would produce absurd results. For example, a non-profit corporation could operate a drive-through cheeseburger joint in direct competition with McDonald's and A-W, so long as the non-profit would apply its cheeseburger profit to a philanthropic cause. That's not right.

D. Nonprofit-5's Desire to Maintain Status Quo: The No Kick-Out Policy

The Government-5 and Nonprofit-5 generally agree that one good criteria to impose on the nonprofit-senior-housing operator as a prerequisite to property-tax exemption is a "no kick-out" policy, so that the operator will not kick-out any resident who becomes unable to pay periodic fees. As explained, that is already a requirement for 501(c)3 federal income tax exemption status. Rev-Rul. 79-18. The Government-5, however, asserts that that criteria alone is inadequate – especially when one understands that: (a) the IRS allows 501(c)3 operators to prescreen for wealth such that "[t]he organization admits as tenants only elderly persons who are able to pay the full stated rental charges"; (b) the IRS allows 501(c)3 operators to charge those admitted additional amounts so as to build up and "maintain reserves adequate to pay for the life care of any of its residents who may require it" and additional reserves for project expansion; (c) the IRS does not require 501(c)3 operators to provide any "direct financial assistance to the elderly"; and (d) current staffing levels of the IRS are inadequate to audit for compliance. Rev. Rul. 79-19. Thus, when one understands the "full IRS picture," one realizes that IRS 501(c)3 status and the IRS "no kick-out" policy are alone wholly inadequate tests for state property tax exemption because, under them, an operator can prescreen for wealth and admit only those able to pay a sizeable entrance fee and sizeable monthly fees, which fees include extra padding to cover project expansion and the possibility of future expense associated with having to cover for those prescreened financially-able residents who might later become unable to pay. And, as was explained above, that is nothing but the rich taking care of the rich, and the prescreened members looking out for themselves using their own money.

Moreover, according to the DOR's (Rebecca Boldt's) analysis of non-profit kick-out policy in Wisconsin, non-profit operators have often placed "strings" on that policy (e.g. resident must apply for government or private charity before operator will use reserves to carry resident in default; operator will only carry resident in default if, in operator's discretion, doing so won't impair operator's "ability to operate on a sound financial basis"; operator may ask resident's family members or relatives to cover short-fall; operator may require residents to "assign other assets sufficient to pay regular charges"; operator may require resident in default "to move to less expensive accommodations"; etc.). Thus, any existing "no kick-out" policy of any IRS non-profit operator in Wisconsin must, in any event, be closely scrutinized.

XII. UNFAIR COMPETITION

In §II F. 3 and 9 above, we explained that courts, in construing "used exclusively" and "not used for profit" in §70.11(4), have properly refused exemption in those cases where the nonprofit entity engaged in activity in competition with for-profit business operators. For example:

1. Turner Society: no exemption for saloon or barber shop.

2. Northwestern Pub. House: Unlike Turner Society, only small, incidental portion of property used for nonexempt purpose in competition with for-profit printers (i.e., only .00277% of income from printing business) won't destroy exemption.

3. Cardinal I and II: Where 10.7% and 20% of income in two different years is attributable to activity in competition with for-profit commercial printing businesses, entity loses exemption, because that physical "use placed the plaintiff's property in competition with commercial printers and their taxable property". 243 N.W. 325, 326.

4. Order of Sisters: Exemption granted to organization that admits and serves customers without regard to ability to pay.

5. Men's Hall Stores. Retail operation selling, among other things, toothpaste and cigarettes in competition with for-profit stores not exempt.

6. Alonzo Cudworth. Bar/restaurant operation not exempt.

7. Eagles Club. Bar/restaurant and bowling alley not exempt.

The above notwithstanding, the Milwaukee Protestant Home decision and line of cases stand in contrast with the above law because they allow "nonprofit" senior housing providers that screen for health and wealth, and that admit and serve only those who can pay, an exemption thereby giving those non-profits, who are in direct competition with for-profit senior housing providers, a competitive advantage.[23]

"The provision of luxury living accommodations for the wealthy elderly is not a charitable purpose. It is a service which private businesses are well equipped to provide to those who are able to pay." C.B. McLain, Jr. paper, supra.

In Group Health Cooperative of Eau Claire v. Wisconsin Dept. of Revenue, 229 Wis. 2d 846, 853, 601 N.W.2d 1, 5 (Ct. App. 1999) (No. 98-1264), rev. denied (Ct. App. 1999), the court recognized that the legislature, without constitutional problem, can amend law "to 'level the playing field' and to remove tax exemptions . . . for activities under which other groups were incurring taxation." By adopting the Gov't-5 Proposal, the legislature will be leveling the playing field.

Per St. Clare Hospital of Monroe Wisconsin, Inc. v. City of Monroe, 209 Wis. 2d 364, 376, 563 N.W.2d 170 (Ct. App. 1997), while courts certainly acknowledge existence of pressure on non-profits to operate in a competitive, business-like manner[24], when private, for-profit operators and non-profit operators operate similar facilities, allowing property tax exemption to non-profit operators puts the for-profits "at a competitive disadvantage"; and, public policy questions like that should be decided by the legislature – not the courts. Courts "are not to extend property tax exemptions by implication." Id. Jameson Care Center, Inc. v. County of Lawrence, 2000 WL 728901 (Pa. Cmwlth. 2000) (non-profit corporation that competes with for-profit corporation concerning same activity or service is not entitled to property-tax exemption). See, also, "The Impact of Exemptions on the Fairness of Property Tax Systems and the Special Problem of Residential Retirement Centers", C.B. McLean, Jr., IAAO paper (1992): as a matter of good public policy, property tax exemptions for residential retirement centers should require charity, defined as helping the needy without regard to ability to pay. This avoids (a) discriminating against the elderly who choose to live in their own homes and/or who can't afford non-charitable retirement living centers, and (b) unfair competition between "nonprofit" and for-profit, non-charity, senior housing operators.

Thus, the legislature should now level the playing field and remove the unfair competitive advantage that non-profit senior housing operators now enjoy at the expense of for-profit operators and tax-paying property owners – including tax-paying elderly. In doing so, the legislature must understand that, with property-tax exemption, it is use of the property that matters and not the use of income therefrom. Afterall, at issue is the "property tax" (i.e. property-specific) and not the "income tax." Accordingly, with the proper focus, it becomes irrelevant that an "income-tax exempt" entity uses its income to sustain itself. And, relevancy instead becomes properly focused on whether the actual, physical use of the property (and not

[23] 6/13/00 Milwaukee Journal Sentinel: South Milwaukee Aldermen concerned about direct competition between nonprofit and for-profit senior housing providers. 6/1/00 Milwaukee Journal Sentinel article: Mequon residents concerned about proposed nonprofit senior housing project.

[24] In the 2/24/00 issue of The Chronicle of Philanthropy, Marc Owens, past Director of the IRS' Exempt Organizations Division, stated, "there's a big change taking place in the way charities are viewed, and how they relate to the business community. There are a lot of organizations that are starting to fall in between those two . . . you'll start to see a sort of sharing of ideas and concepts and approaches between those two sectors. And the lines will start to blur even more . . . . You're going to have much more of a commercial flavor. . . ."

the income therefrom) is being used for "benevolence." The Government-5 asserts that, consistent with the St. Joe's Line, use for "benevolence" in the senior-housing arena requires using the property to house and help the needy. And, in legislatively-adopting the Government-5's proposal, the legislature will be restoring good public policy and removing unfair competitive advantage.

We recognize and appreciate that the legislature, in 1991, did change the taxed-in-part statute from a "pecuniary profit" test to a U.B.I.T. test (i.e. §70.1105) in an effort to reduce unfair competition between exempt and nonexempt organizations by placing the unrelated business activities of certain exempt organizations upon the same tax basis as nonexempt business endeavors with which they compete. Deutsches ¶31, citing legislative report. Due to inherent problems with IRS revenue rulings, staffing and oversight (as discussed above), however, and with reliance on self-reporting of U.B.I.T., § 70.1105 does not level the playing field between for-profit and non-profit senior housing providers. And so, the legislature needs to now go further to eliminate unfair competition in the senior housing industry by adopting our proposal.

XIII. JUDICIAL SOLUTION WILL BE NATURAL FALL-BACK IF LEGISLATURE DOES NOT ACT.

If the legislature does not act to correct the problems associated with the BRHA standard in current 70.11(4), then attempt to obtain a judicial solution will be the natural fall-back. That is, unless the legislature provides a legislative solution, we can expect more litigation as a means to push the court for a judicial solution.

Existing potential test cases, along with this report, could easily be used to expose the unacceptable conflicting lines of cases in this area, the impropriety of the Milw. Protestant Line, and equal-protection concerns.[25] In future litigation, the court would be expected to be asked to adopt the St. Joe's Line and to reject the Milw. Protestant Line. *When a rule of law thwarts social policy rather than promoting it, it is the duty of the court to undo or modify a rule that it has previously made.* State of Wisconsin v. Dietz, 66 Wis. 2d 1, 15-16, 224 N.W.2d 407 (WI S.Ct. 1974). That, in turn, would reverse the trend of case law in this industry now typified by 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. An example of this happening in the clinic setting is the Monroe Clinic case where the court reversed the swing of the pendulum from earlier clinic/hospital cases. See St. Clare Hosp. of Monroe, Wis. Inc. v. City of Monroe, 209 Wis. 2d 364, 563 N.W.2d 170 (Ct. App. 1997). Moreover, the Supreme Court's Deutsches Land case reveals recent Supreme Court thinking that clearly embraces the Strict Construction Rules that are at the heart of the St. Joe's Line.

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[25] Regarding equal-protection concerns, see, e.g., § XII above (Unfair Competition); and C.B. McLean, Jr., Counsel, North Carolina Property Tax Commission, "The Impact of Exemptions on the Fairness of Property Tax Systems and the Special Problem of Residential Retirement Centers", 1992, International Association of Assessing Officers, "[t]he exemption of such residential property discriminates against all other owners of residential property, including those elderly persons who choose to live in their own homes, and who may not be able to afford the fees charged by 'non-profit' luxury retirement centers."

The legislature, however, could prevent further litigation in this area and promote sound public policy by simply adopting the proposal the Government-5 offers.

XIV. WHAT OTHER STATES ARE DOING

While the BRHA "problem" in Wisconsin is unique due to the highly extraordinary co-existence of conflicting lines of Supreme Court cases defining "benevolent", the solution that we (the Government –5) offer is not unique. States throughout the U.S.A. have come to realize that when an IRS income tax exempt, "nonprofit" corporation provides living for persons with money – to the exclusion of those who can't afford to be admitted – that is neither "benevolent", nor "charitable", nor deserving of property tax exemption.

States are rejecting the state of affairs that exist under 70.11(4) as interpreted by the Milw. Protestant Line, and that would continue under either of the Sauer proposal or Kittleson-Zielski proposal. The following analysis of law in other states reveals a clear, common thread: non-profit, 501(c)(3) corporations that screen for wealth, admitting only the rich and rejecting the poor, that charge large endowment fees and large monthly fees, and that do not provide charity, should not be exempt. (The following analysis is in addition to Rebecca Boldt's (DOR's) analysis of the laws of neighboring states: Illinois, Indiana, Iowa, Michigan, Minnesota and Ohio).

A. ARKANSAS

1. Miller Co. v. Opportunities, Inc., 334 Ark. 88, 971 S.W.2d 781 (S.Ct. Ark. 1998). Apartment complex for those 55 and older not exempt absent evidence of charitable activity or that fees paid by residents were being devoted to charitable purposes. Residents were screened for financial ability prior to admission. Ave. mo. fee: $650.

B. FLORIDA

1. Southlake Community Foundation, Inc. v. Havill, 707 So. 2d 361 (Fla. App. 5 Dist., 2/13/98). Apartment project not used for charitable tax-exempt purpose where property's physical use was for rentals to persons at an income level at which government did not expend public funds for real housing. 80% of units rented to persons making $33,520 per year.

C. COLORADO

1. United Presbyterian Assoc. v. Board of County Comrs., 167 Colo. 485, 448 P.2d 967 (1968). No exemption for home for aged that charges application fee, initial occupancy fee, and monthly rentals competitive with commercial apartments. Fees and rentals negated charitable purpose.

D. IDAHO

1. Evangelica Lutheran Good Samaritan Society (Good Samaritan Village) v. Bd. of Equalization of Latah County, 119 Idaho 126, 804 P.2d 299 (1990). Independent living portion

of CCRC adjoining non-profit nursing home not exempt as a hospital or charitable institution. Facility charged fees. Insufficient general public benefit. Intermediate care portion of facility also not exempt as a hospital.

E. ILLINOIS

1. Alivio Medical Center, 702 NE 2d 189 (Ill. App. 1 Dist, 9/30/98). Ambulatory care facility doesn't qualify for charitable exemption from property tax even though it wrote off 20-25% of billings as uncollectible, because it didn't waive fees for anyone, whether or not they were able to pay, made a net profit, and didn't advertise that it provided charity care.

2. Rebecca Boldt's Analysis: Entity must dispense charity to all who need and apply for it without placing obstacles in applicants' way. See, Methodist Old People's Home v. Korzen, 39 Ill. 2d 149, 157, 233 N.E.2d 537; and Willows v. Munson, 251 N.E.2d 249, 43 Ill. 2d 203 (Ill. Supr. Ct. No. 41889, 1969).

F. IOWA

1. Holy Spirit Retirement Home, Inc. v. Board of Review, City of Sioux City, 543 N.W.2d 907 (11/27/95). Apartment division of nursing home development didn't have "charitable" or "benevolent" purpose and wasn't exempt. Physical and financial independence required of residents. Residents didn't get interest on residency fees nor complete refund upon termination of residency. Concessions on initial residency fees had only been waived for 4 priests. Only limited medical care provided.

2. Friendship Haven, Inc. v. Webster Co. Bd. of Review, 542 N.W.2d 837 (S.Ct. Iowa 1/17/96). Non-profit corporation's retirement cottages for independent living didn't afford charitable benefit to residents – not exempt. Only 2 cottages occupied by people in need of financial assistance. All but 2 residents paid substantial endowments to obtain cottages. Retirement cottages weren't so integrated with rest of multilevel care facilities to allow exemption for entire facility. Cottages did not serve to extend charity to other residents of retirement community who resided in multilevel care facilities.

3. Friendship Center West, Inc. v. Harman, 464 N.W.2d 455 (Ct. App Iowa 10/23/90). Non-profit corporation that operated retirement center not entitled to property tax exemption as charitable institution. Corporation did not consider anyone who could not pay monthly fees or entrance fee, and didn't have funds available to aid persons who were unable to pay fees.

4. Countryside Retirement Home v. Bd. of Review City of Sioux City, 12/23/94. Tax-exempt status denied for housing for elderly when residents were required to pay deposit and monthly fees and all could afford the housing. Community was not gaining from the facility. There was no lessening of government burden.

5. Rebecca Boldt's Analysis: Per 1966 Iowa Attorney General opinion, consider among other things: amount of admission, endowment, and monthly fees; age and income of

residents; whether needy are charged less than normal rates; whether medical or other care is provided; profit.

G. KANSAS

1. Lakeview Village, Inc. v. Board of Co. Commissioners Johnson Co., 25 Kan. App. 2d 597, 966 P.2d 708 (Kan. Ct. App. 10/30/98). Amount of entrance fee should be considered to see if elderly housing facility is operating at lowest feasible cost. Also consider whether facility accepts Medicaid recipients.

H. MICHIGAN

1. Rebecca Boldt's Analysis. See, Michigan Baptist Homes and Development Co. v. City of Ann Arbor, et al., 396 Mich. 660, 242 N.W.2d 746 (MI S.Ct. 1976): non-profit retirement home where residents were accepted on basis of good health and (with few exceptions) ability to pay life-lease fee and monthly service charges – both of which were based on size of apartment rented in home – is not exempt. Home didn't benefit general public by serving the elderly generally. Instead, it provided an attractive retirement environment for elderly in good health who could afford to pay for service.

I. MINNESOTA

1. Community Memorial Home at Osakis, MN, Inc. v. County of Douglas, 573 N.W.2d 83 (MN S.Ct. Dec. 1997). Assisted living facility not supported in whole or in part by donations did not provide housing or services at significantly less than market value or cost, and did not lessen burdens of government, and was not entitled to property tax exemption as a charitable institution.

2. Care Institute, Inc. – Maplewood v. County of Ramsey, 576 N.W.2d 734 (S.Ct. MN 4/9/98). Assisted living facility not tax exempt as institution of purely public charity where: facility was not supported by donations and gifts; recipients of "charity" were required to pay for significant amount of "charity" received; and facility didn't show it lessened government's burdens.

3. Care Institute, Inc. – Roseville v. County of Ramsey, 2000 WL 730406 (S.Ct. MN 2000). Doctrines of *res judicata* and collateral estoppel do not apply to prevent new litigation over facility's subsequent property tax exemption for new tax year. Each tax year is treated anew. In subsequent years, facts and the law may have developed. The owners' characteristics or use of land may have changed. Controlling legal principles may have changed or grown.

4. Rebecca Boldt's Analysis. To be exempt, admission must be open to all without regard to financial ability, and support should not rest on residents' payments but to a substantial extent on contributions. See, also, North Star Research Institute v. County of Hennepin, 236 N.W.2d 754 (1975).

J. MISSOURI

1. Evangelical Retirement Homes of Greater St. Louis, Inc. v. State Tax Comm'n of MO, 669 S.W.2d 548 (MO. banc 1984). No charitable exemption since retirement home systematically excluded low-income tenants unable to pay the initial entrance fee (endowment) of between $20,000-$40,000. Dominant use of property must benefit society generally or an indefinite number of people.

2. Cape Retirement Community, Inc. v. Kuehle, 798 S.W.2d 201 (Mo. App. E.D. 1990). No exemption for retirement facility where residents were required to pay between $17,000-$50,000 entrance fee and where owner doesn't admit those it doesn't expect will be able to pay. Low income people, unable to pay, are excluded by the application and screening process. Those that automatically exclude low income elderly are not public charities and do not benefit society generally. "The public nature of charity is diminished when it's systematically denied to those who need and can least afford the service."

3. Village N., Inc. v. State Tax Comm. of MO, 799 S.W.2d 197 (Mo. App. E.D. 1990). Skilled nursing facility that required at least ½ of all residents to pay admission or endowment fee was nonetheless exempt because other ½ of residents served weren't subject to the endowment fee.

4. See, Mark F. "Thor" Hearne, II, "When a Retirement Home is Ad Valorem Tax Exempt", Journal of Missouri Bar, May/June 1994, 50 J.MO. B. 155, for a discussion of the above cases and Missouri law, and for an excellent discussion as to why 501(c)(3) status alone is insufficient as a test for property tax exemption. Missouri courts properly recognized that the focus must be on the use of the property rather than the character of the owner. "The general nature of the owning organization – other than that it is not-for-profit – cannot be said to determine whether the use of the particular property is charitable or not. The statute clearly makes the use of the property the focus of the exemption." Citing 566 S.W.2d at 223. See, also, 29 N. M.L. Rev. 1 (Crimm law review article), supra, and Kelly Lanning Turner, "Property Tax Exemptions for Nonprofits", Probate and Property, September/October, 1998 (12-Oct Prob. Prop. 25, "just because an entity is exempt from federal income taxes does not mean it is exempt from state and local taxes. State and local taxing authorities have challenged, and continue to challenge, exemptions from ad valorem taxes that non-profit organizations claim."

K. NEBRASKA

1. Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961). Home for aged that charged occupants monthly fee representing occupants' respective share of operating costs, building amortization, and cost of meals is not entitled to property tax exemption.

L. NEW YORK

1. Fetzer v. Town Board of Town of Aurora, 705 NYS 2d 147 (2000). Taxpayers residing in Town and entities owning other nursing homes/retirement communities (one in Town

and one in adjoining Town) have standing to challenge: (a) tax exemption granted to Presbyterian Homes of Western New York, Inc. with regard to property in Town on which that owner was building retirement community/transitional care facility, and, eventually, a skilled nursing facility; and (b) Town's entering into a PILOT agreement with that facility. The decrease in tax base that occurs when a property is improperly exempted from tax constitutes a cognizable injury to taxpayers.

M. NORTH CAROLINA[26]

1. Springmoor, Inc. No. 79PA97, 348 NC 1, 498 SE 2d 177 (S.Ct. N.C. 4/3/98). Statute granting property tax exemption to home for aged, sick or infirm only if home is owned, operated and managed by religious or Masonic organization violates establishment clauses of federal and state constitutions. Unconstitutional portion of statute could not be severed from remaining sections of statute defining home for aged, sick or infirm. Thus, **N.C.G.S. §105-275(32)** is unconstitutional. Contrast that N.C. statute (§ 105-275(32)) to **N.C.G.S. § 105-278.6(a)(2)** that exempts homes for the aged, sick or infirm that own property used exclusively for "charitable" purposes. Per the N.C. Supr. Ct. in Springmoor, the N.C. legislature created § 105-275(32) to grant tax exempt status to certain CCRC's that had lost their status as "charitable" as a result of a series of earlier N.C. Court of Appeals' cases.

2. In re Chapel Hill Residential Retirement Center, Inc., 60 N.C. App. 294, 299 SE 2d 782, cert denied, 308 NC 386, 302 SE 2d 249 (1983). Retirement facility doesn't qualify for exemption as a charitable home for the aged because no resident was unable to pay fees to enter or be served by the facility, nor was any resident subsidized by charitable contributions. Merely supplying care and attention to elderly persons does not alone constitute charity. An exemption would give the facility preferential treatment over those persons over 65 who continue to live in their own discretely owned residences. The facility at issue's screening procedures, admissions guidelines and fee requirements result in activities benefiting only a limited class of elderly persons. Min. endow. fee: $21,500. Monthly occ. fee: $656.

3. Lutheran Retirement Ministries of Alamance County, 70 N.C. App. 236, rev. denied, 312 N.C. 622 (1984). CCRC not exempt. Admission fees: $15K-$60K. Mo. fees: $495-$1,485. Financial and health screening of applicants. Costs are so high, only a small percentage of elderly could afford facility. Merely supplying care and attention to elderly persons alone cannot constitute charity. Facility wasn't providing for special needs of those in need of charity, the aid of whom would benefit society as a whole in addition to residents.

4. N.C. Task Force. As a result of 1998 N.C. Supreme Court decision (Springmoor), ruling N.C.G.S. § 105-275(32) unconstitutional, various CCRC's were declared taxable. In response, in 1998, the N.C. legislature: (a) temporarily exempted some CCRC's from property tax (N.C.G.S § 105-278.6A); and (b) created the N.C. Revenue Laws Study Committee (i.e. the N.C. task force) to study N.C.'s property tax exemption for non-profit CCRC's. The temporary exemption for CCRC's expires 7/1/00. N.C.G.A., Session 1997, Session Law 1998-212, S.B. 1366. Note that N.C.'s law temporarily exempting CCRC's (105-278.6A): (a) requires the

[26] We also call to your attention North Carolina's task force's study of the history of North Carolina litigation regarding that state's tax exemption of homes for the aged, sick or infirm.

provision of some services; (b) requires that revenues be applied toward uncompensated services or to a reserve; (c) requires, in addition to 501(c)(3) status, organization for a charitable purpose; (d) requires an active program to get donations to assist the facility in serving those who couldn't otherwise afford to reside there; and (d) IS ONLY TEMPORARY, expiring on 7/1/00, and allowing time for N.C.'s task force to recommend an alternative.

As of the effective date of this report (7/15/00), Richard Bostic, North Carolina, Fiscal Research, 919-733-4910, informed us that the sunset provision and 7/1/00 deadline had been extended by the North Carolina Legislature for one additional year. Meanwhile, N.C. still has N.C.G.S. § 105-278.6 exempting property owned by a home for the aged, sick or infirm if the property is actually and exclusively occupied and used by the owner for charitable purposes – defined as: *one that has humane and philanthropic objectives; and benefits humanity or a significant rather than limited segment of community without expectation of pecuniary profit or reward. And, the N.C. court decisions discussed above are still in place.*

N. OHIO

1. Bd. of Education of Dublin City School Dist. v. Tracy, 126 Ohio App. 3d 603, 710 NE 2d 1199 (Ct. App. Ohio 3/12/98). Independent living units for senior citizens not exempt.

O. OREGON

1. Oregon Methodist Homes, Inc. v. Horn, 226 Or. 298, 360 P.2d 293 (1961). Home for the aged financed by founder fees and monthly fees not exempt from property tax. Such home was precisely in the same status as if it had been organized and built by the occupants voluntarily banded together as a non-profit cooperative paying the same amounts and receiving the same services. If the home were exempt it would be obvious that elderly persons could avoid property tax by pooling their assets in corporate form for their mutual benefit, and that's not the intent of state property tax exemption law.

2. Friendsview Manor v. State Tax Com., 247 Or. 94, 420 P.2d 77 (1966), reh. 247 Or. 127, 427 P.2d 417. Fact that aging persons, through their founders' fees and monthly fees, paid for their own housing and health care destroyed property tax exemption. In order to be entitled to exemption, it is essential that the room, board, and services not be purchased by the users. Most reasonable explanation for granting property tax exemption is that if entity did not provide service it did, government would be required to use tax dollars to do the job and provide that service. Government is not required or expected to provide room and board to those who can financially fend for themselves.

P. PENNSYLVANIA

1. Couriers – Susquehanna, Inc. v. County of Dauphin, 165 Pa. Cmwlth 192, 645 A.2d 290 (6/20/94). In charitable tax exemption cases, facts are of critical importance because prior decisions based on then current information and facts have limited value as precedent;

concept of "charity" is constantly changing and is based upon such variable factors such as time, place and purpose.

2. Jameson Care Center, Inc. v. County of Lawrence, 2000 WL 728901 (Pa. Cmwlth. 2000). Non-profit corporation that competes with for-profit corporation concerning same activity or service is not entitled to real estate tax exemption. Physical rehabilitation centers.

Q. TEXAS

1. Hilltop Village, Inc. v. Kerrville Independent School Dist., 426 S.W.2d 943 (1968 Tex.). Home for aged whose facilities are primarily available to those able to pay, and which does not accept residents without regard to financial ability, is not property tax exempt.

R. UTAH

1. Friendship Manor Corp. v. Tax Com., 26 Utah 2d 227, 487 P.2d 1272. Housing facility for the elderly not tax-exempt where residents paid for services received and where rental charges were not determined by need of residents.

S. VERMONT

1. Vermont created a commission on property tax exemptions that issued a 1/15/99 report to the Vermont General Assembly. While not really helpful concerning the mission of our task force, Vermont's commission did echo that change in the property tax exemption statutes was needed to modernize and improve language in existing Vermont statutes to make them easier to interpret and administer, and to improve the exemption for "public, pious and charitable" properties to ensure equitable treatment statewide and minimize costly legal actions. Vermont's "pious" or "charitable" standards for exemption are too general and leave the can of worms open to litigate – just like Wisconsin's BRHA standard does.

T. VIRGINIA

1. City of Richmond v. Virginia United Methodist Homes, Inc., 257 Va. 146, 509 SE 2d 504 (Va. No. 980498 S.Ct. Va, 1/8/99). Home's policy of financial screening before admission refutes the notion that the parcel is used to serve the destitute or unfortunate. Fact that home has a reserve account to provide for those residents who become unable to pay doesn't matter when, in fact, fund is applied to residents already living in home. Entrance fee: roughly \$25,000 - \$175,000. Monthly fees: \$1,079 - \$2,979.

2. Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, 238 Va 493, 385 SE 2d 561 (S.Ct. Va 11/10/89). Doubtful that non-profit corporation's property was exclusively used for charitable purposes. No exemption.

U. OTHER

A number of other states have also called for reviews or studies, or have enacted reforms of state and local tax policies on property tax exemption of non-profits, and, for a variety of reasons, there has been an increased interest in challenging the tax-exempt status of non-profits. See, Nina J. Crimm, "Why All is Not Quiet on the 'Home Front' for Charitable Organizations", New Mexico Law Review, Winter, 1999, 29 N.M.L. Rev. 1. Ms. Crimm's article, inter alia, discusses state and local government's enhanced monitoring of non-profits and also the increasing discomfort of relying on the IRS to monitor non-profit organizations. She states: (a) '[o]verall, this article alerts scholars and practitioners that the tax-exempt status for non-profits is no longer a sacred topic"; and (b) "[s]trong deservedness and anti-abuse doctrines underlie tax exemptions for non-profit organizations. These policies demand that non-profits significantly and sufficiently contribute to societal needs – that is, for example, charitable organizations must engage 'exclusively' in charitable activities – and in doing so, they must refrain from competitive behavior with for-profit entities. When non-profits have failed these behavioral requisites, they have become targets for challenge by state and local governments." See, also, Janne G. Gallagher, "Charities Under Siege: Trends in the State and Local Tax Treatment of Charities", SB 30 ALI-ABA 69 (1996).

XV. CONCLUSION

It is chaotic and unacceptable for the law of our state to remain in conflict as it currently is. Under the St. Joe's Line of Supreme Court cases, "benevolent" means charity – admitting and providing services on a non-profit basis to people in need and without regard to ability to pay. In direct contrast to St. Joe's and common sense, however, the Milw. Protestant Line of Supreme Court cases defined "benevolent" as providing service to only those with money enough to pay for service.

"Benevolence" and "benevolent", for property tax exemption purposes, must be defined according to traditional common sense and with the understanding that the public's money is involved. As most people would understand, helping the non-needy, whether they are elderly or not, on a pay-for-service basis is not "benevolent", and not the type activity that should be worthy of property-tax exemption. "Ask yourself if you would be willing to donate money, or use state funds, to provide food and shelter to someone. If so, that someone is probably needy, and helping them with contributions and volunteer labor is [benevolent]. Property used for such purpose should be exempt." C.B. McLean, Jr. paper, supra. But, helping the non-needy should not be.

The legislature must recognize that, under current law, under the Milw. Protestant Line definition of "benevolent": (1) exemptions are going to the wealthy at the expense of elderly needy persons who are deliberately "screened-out" and unwelcome at exempt facilities, and so, the very people the legislature should be helping are getting hurt; (2) when improper exemptions are granted, all taxpayers get hurt because their property tax bill increases to cover the exempt-owner's tab; and (3) non-profits are unfairly competing with for-profits for the same fees-paying non-needy customers.

Beginning in the late 1980's, and throughout the 1990's, there have been lots of knocks on the legislature's door in the form of numerous attempts to get the legislature to adopt a definition of "benevolent" that reflects good public policy by requiring benefits to those in need. While those efforts didn't produce any statutory change, they did produce the creation of this "Benevolent Retirement Home for the Aged" Task Force.

The Government-5 members of that Task Force now present a proposal for new legislation that is good public policy and that fixes that which is wrong with the current property tax exemption for senior housing. Under our proposal,
with its easy-to-apply language, and its age and income restrictions, exemptions will go only to those non-profit organizations to the extent they actually use their properties to serve the elderly in need.

Given our rapidly aging society and the growth in the senior housing industry, it is more important than ever for the legislature to act – and to act now – to eliminate the current conflict in the law, and to stop the abuse that exists as a result of the Milw. Protestant Line of cases. And, given the absurd results that would occur if the legislature were to allow "use of income" rather than "use of property" to be the test for property tax exemption, we respectfully urge the legislature to soundly reject the Sauer Proposal and the Kittleson-Zielski Proposal, and to adopt our proposal.

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