

**SENIOR HOUSING EXEMPTION ISSUES:
A HISTORICAL PERSPECTIVE**

**UNIVERSITY OF WISCONSIN LAW SCHOOL
SECOND ANNUAL PROPERTY TAX ISSUES FOR THE NEW MILLENNIUM
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I. STATUTORY LANGUAGE

“70.11 Property exempted from taxation. The property described in this section is exempted from general property taxes

(4) EDUCATIONAL, RELIGIOUS AND BENEVOLENT INSTITUTIONS.... Property owned and used exclusively by ... educational or benevolent associations, ... but not exceeding 10 acres of land necessary for location and convenience of buildings while such property is not used for profit”

II. GENERAL RULES FOR “BENEVOLENT ASSOCIATIONS”

A. No statutory definition of “benevolent”.

B. No specific judicial definition of “benevolent”.

C. Three-part general judicial test for “benevolence”:

Milwaukee Protestant Home v. City of Milwaukee, 41 Wis. 2d 284, 293, 164 N.W.2d 289 (1969):

1. Property owner must be a benevolent association.
2. Property must be used exclusively for the benevolent purposes of that association.
3. Property cannot be used for profit.

III. THREE MAJOR DECISIONS: 1969 -1993

A. Milwaukee Protestant Home v. City of Milwaukee. 41 Wis. 2d 284, 164 N.W.2d 289 (1969).

1. Facts:

- a) 1963 Bradford Terrace addition to existing Milwaukee Protestant Home on Lake Drive.
- b) Constructed entirely from endowments received from residents; no charity or donations used in construction.
- c) Residents required to pay nonrefundable endowments to live in facility, plus monthly occupancy charges.
 - (1) Nonrefundable endowments: \$8,000 to \$15,500.
 - (2) Monthly fees: \$150 to \$160.
- d) Facility limited to those who could pay. No charity provided for applicants who could not afford the endowment and fees.
- e) Residents required to qualify both as to financial ability and medical condition, *i.e.*, ability to live independently, as precondition to acceptance.

2. Milwaukee's arguments against exemption:

- a) Entrance was limited to segment of society which could afford endowment and monthly fees.
- b) Facility did not provide charity.
- c) Facility was too expensive.

- d) Facility was too "luxurious".
- e) Facility did not provide on-site medical care.
- f) Financial screening excluded the needy.
- g) Health screening excluded the infirm.

3. Supreme Court decision:

- a) "Retirement homes are not primarily nursing homes or hospitals. They are not almshouses, and the residents do not consider themselves objects of public or private charity. They are what the name implies, homes for retired persons, places of congregate living where retirees go to live, expecting to pay the fees charged and to receive the usual incidents of group home living." (p. 291.)
- b) "Benevolent" does not mean the same thing as "charitable". A retirement home limited to those who can pay can be benevolent, even if it does not provide free services to anyone. "[T]he word 'benevolent' has no built-in implication or requirement of almsgiving. To help retired persons of moderate means live out their remaining years is 'benevolent' whether or not it is also considered, as we would consider it to be 'charitable.'" (pp. 298-300.)
- c) Facility must be judged as an integral part of the entire Milwaukee Protestant Home, not in a vacuum. "A wing need not be chopped off a chicken to determine its form or function." (pp. 301-02.)

B. Family Hospital Nursing Home, Inc. v. City of Milwaukee, 78 Wis. 2d 312, 254 N.W.2d 268 (1977).

1. Facts:

- a) Opened in 1970 as adjunct to old Milwaukee Doctors Hospital.
- b) Operated in separate building from hospital, and separately incorporated to satisfy FHA mortgage rules.

2. Milwaukee's arguments against exemption:

- a) Articles of Incorporation did not use the term "benevolent".
- b) Facility was located in separate building from hospital. City claims it would not have challenged exemption if facility were located in a wing of the hospital.
- c) Facility was sustained by resident fees rather than charity.

3. Supreme Court decision:

- a) Reaffirmed *Milwaukee Protestant Home* holding that benevolence does not require almsgiving. (pp. 321-22.)
- b) Reaffirmed *Milwaukee Protestant Home* holding that being self-sustaining based on resident fees is not inconsistent with benevolence. "An institution need not be a mendicant to have its work qualify as benevolent." (p. 323.)
- c) Requirement that property may not be used for profit does not require facility to operate at a loss. (p. 321.)
- d) "[T]he mere fact that it occupies a separate structure can hardly be a test as to whether it is 'benevolent.' It is how the facility is operated, not its location that is determinative." (p. 321.)

C. *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.

1. Facts:

- a) 1990 addition to existing Friendship Village retirement home in northwest Milwaukee.
- b) Like Bradford Terrace, constructed entirely from endowments received from residents; no charity or donations used in construction.
- c) Like Bradford Terrace, residents required to pay endowments to live in facility, plus monthly occupancy charges, except endowments were 90% refundable.

(1) 90% refundable endowments: \$99,900 to \$150,000.

(2) Monthly fees: \$236 to \$430.

- d) Like Bradford Terrace, facility limited to those who could pay. No charity provided for applicants who could not afford the endowment and fees.
- e) Like Bradford Terrace, residents required to qualify both as to financial ability and medical condition, *i.e.*, ability to live independently, as precondition to acceptance.
- f) Residents given a \$50 per day skilled nursing credit covering up to four years of any nursing home admission.
- g) Minimum age for admission tracked to Federal Fair Housing Act and Wisconsin Open Housing Law: "occupancy by at least one person 55 years of age or older per unit".
- h) Continuum of care: Freedom Village residents could move into Friendship Village when they needed additional care, with health (*i.e.*, independent living) requirements waived; with 90% of Freedom Village endowment applied toward Friendship Village endowment; and with 8% discount of Friendship Village endowment, all structured to permit Freedom Village residents to move into Friendship Village and receive full nursing care with no additional endowment payment.

2. Milwaukee's arguments against exemption: Virtually identical to City's unsuccessful arguments in *Milwaukee Protestant Home*.

- a) Entrance was limited to segment of society which could afford endowment and monthly fees.
- b) Facility did not provide charity.
- c) Facility was too expensive.
- d) Facility was too "luxurious".
- e) Facility did not provide on-site medical care.

- f) Financial screening excluded the needy.
- g) Health screening excluded the infirm.
- h) Minimum age (55) was too low to qualify for treatment as a benevolent retirement home.
- i) Facility did not provide residents the means "to live out their remaining years" as required by *Milwaukee Protestant Home*.

3. Property owner response:

- a) 90% endowment plus monthly fees at Freedom Village in 1990 dollars was essentially equivalent to nonrefundable endowment plus monthly fees at Milwaukee Protestant Home in 1963 dollars.
- b) Minimum age and rules for moving into Friendship Village 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.

4. Court of Appeals decision:

- a) Adopted Fair Housing Act — Open Housing Law definition of aged, *i.e.*, "occupancy by at least one person 55 years of age or older per unit". (p. 225-26.)
- b) Reaffirmed that, in *Milwaukee Protestant Home*, Supreme Court "clearly rejected any requirement that a benevolent association provide free services or be readily affordable by all those in the community." (p. 226.)
- c) Continuum of care permitting residents to move into Friendship Village "without having to meet any additional health requirements" satisfied *Milwaukee Protestant Home* requirement of providing residents "the means to live out their remaining years." (pp. 226-27.)

IV. UNSUCCESSFUL LEGISLATIVE PROPOSALS – 1991-99.

A. Generally, these proposals would have required retirement homes to be "charitable" instead of "benevolent".

B. Definitions of "charitable" were often vague, and would have placed extremely difficult burden on assessors.

C. Proposals modeled on statutes in other states, which had a §501(c)(3) safe harbor; but this safe harbor was eliminated in Wisconsin proposal, thus leaving vague definition of "charitable" standing alone.

D. Other proposed requirements:

1. Minimum statutory age for residents (*i.e.*, 65).

2. Maximum statutory income for residents (*i.e.*, homestead tax credit threshold).

V. EFFECT OF 1999 DEUTSCHES LAND DECISION:

Deutsches Land v. City of Glendale, 225 Wis. 2d 70, 591 N.W.2d 583.

A. No specific guidance on defining "benevolence" in context of retirement homes.

B. Significance is with respect to taxation in part, raising question of whether assessors can tax retirement homes in part based on demography of residents, *i.e.*, based on percentage of residents above a certain age, or below a certain income.