

ATTIC ANGEL PRAIRIE POINT INC.,

Plaintiff,

Vs.

Case No. 03CV1617

CITY OF MADISON,

Defendant.

DECISION AND ORDER ON SUMMARY JUDGMENT

INTRODUCTION

The primary issue in this case is whether Attic Angel Prairie Point's residential units are entitled to property tax exemption as benevolent "retirement homes for the aged" under Wis. Stat. § 70.11(4). Attic Angel Prairie Point, Inc. challenges the City of Madison's denial of its 2002 and 2003 applications for property tax exemption. Having paid its taxes under protest pursuant to Wis. Stat. § 74.35, Attic Angel Prairie Point, Inc. now asks this court to reverse the City's disallowance of the exemption for each year and order refund of the taxes paid.¹

¹ The parties agree that this court has jurisdiction pursuant to Wis. Stat. § 74.35(3)(d) and that Attic Angel Prairie Point timely complied with all procedural prerequisites for commencement of this action. *See* Stipulation of Facts, ¶¶ 3, 13, 17-22, 24, 26-29. Prairie Point commenced actions challenging each of the exemption denials in 2002 and 2003. The two cases were consolidated by Stipulation and Order dated September 22, 2004.

This case comes before the court on cross-motions for summary judgment based on the parties' comprehensive Stipulation of Facts. That Stipulation provides the basis for the following summary of facts.

BACKGROUND

To place this action in context, it is helpful to first identify the three Attic Angel entities relevant to this dispute. Attic Angel Association ("Association") is a Wisconsin nonstock, not-for-profit corporation first incorporated in 1926. It is exempt from federal and state income, sales and use taxes as a charitable organization (Stip. ¶¶ 33-36). The City of Madison has historically granted the Association a property tax exemption for the real property—approximately 5 acres—and personal property Association owns. That exemption is not at issue in this case.

Attic Angel Place, Inc., (formerly known as Attic Angel Community, Inc.) is also a Wisconsin nonstock, not-for-profit corporation similarly exempt from state and federal tax as a charitable organization. The term "Attic Angel Place" refers to facilities consisting of a licensed skilled nursing facility and an assisted living facility.² The Association holds the license for and operates the skilled nursing facility. The sole member of Attic Angel Place, Inc. is the Association and Association selects and may remove Attic Angel Place's Board of Directors (Stip. ¶¶ 53-67). As is true for the Association, the City of Madison does not dispute the separate property tax exemption historically granted to Attic Angel Place for

² The skilled nursing facility is licensed under Wis. Stat. § 50.03. The assisted living facility is registered as a "residential care apartment complex" under Wis. Stat. § 50.034 (Stip. ¶ 63).

personal property and the approximately 9 acres real property it owns (Stip. ¶¶ 61-62; City's initial brief at p. 2).

Attic Angel Prairie Point, Inc., the plaintiff in this case, is a nonstock, not-for-profit corporation first incorporated in 1999 and recognized as a charitable organization exempt from federal and state income/ franchise, sales and use taxes. The sole member of the corporation is the Attic Angel Association and that sole member elects and may remove the members of AAPP's Board of Directors (Stip. ¶ 32, 37).

In January 2000 Attic Angel Prairie Point, Inc. acquired property in Madison "to develop a new retirement community known as Prairie Point, designed to serve individuals age 55 and over" (Stip. ¶ 9). In this Decision, the term "Prairie Point" refers to the retirement community location and "AAPP" refers to the corporate entity Attic Angel Prairie Point, Inc. Prairie Point was subsequently developed as a Planned Unit Development District in accordance with state law and Madison municipal ordinances (Stip. ¶ 10). As of January 1, 2002 and January 1, 2003 AAPP had completed construction or was in the process of constructing retirement homes for the elderly on each of the parcels within the property (Stip. ¶ 74).

For property tax years 2002 and 2003, AAPP sought property tax exemption for 4.372 acres of the Prairie Point property development based on ownership and use "by a benevolent association for the benevolent purpose of providing retirement homes for the aged" (Stip. Exhibits F and G, January 30,

2003 and January 30, 2004 claims for refund). By letters dated March 3, 2003 and April 13, 2004 The City of Madison denied the exemptions for each year. As earlier noted, plaintiff AAPP paid the property tax due³ under protest and filed claims for refunds under Wis. Stat. § 74.35.

The parties agree that AAPP developed and operates Prairie Point “to achieve its intended purpose of meeting the community’s need for retirement homes for the aged, and provision of related services, as part of its continuum of care for elderly persons. Prairie Point was designed to meet the housing, health care, financial security and other needs specific to elderly individuals” (Stip. ¶ 72).

As originally proposed, the Prairie Point Planned Unit Development will occupy 53.9 acres with 13 single-family homes, 100 duplex homes, 18 triplex homes, a 60-unit and a 140-unit apartment complex and a neighborhood center (Stip. ¶ 131-132).⁴ The residential units are designed to meet the needs of elderly people by incorporating features such as single story stepless entries, extra-wide doorways, easy-to use fixtures and non-slip surfaces (Stip. ¶ 73).

Prairie Point has no minimum age requirement for its residents and AAPP is not licensed to provide nursing support to its residents (Stip. ¶¶ 91-92). Almost all residents, however, are over age 65 (Stip. Exhibit Y). Prospective Prairie Point residents must meet residency criteria which include cognitive

³ For 2002, AAPP paid \$13,822.39; for 2003, the payment was \$120,452.78 (Stip. ¶¶ 17 and 25).

⁴ Prairie Point’s original development plan may have been revised. Paragraph 102 of the Stipulation states that at the February 12, 2004 AAPP Board of Directors meeting there was “consensus of the Board

abilities, safe mobility, "acceptable interaction with others," and ability to meet the resident's own personal needs (Stip. Exhibit C to Exhibit S; Exhibit W). A Prairie Point resident who needs or desires to move into either a skilled nursing facility or assisted living has priority, but not a guarantee, for space at Attic Angel Place (Stip. ¶ 105).

A prospective Prairie Point resident initiates the application process by submitting an application form with a \$1000 fee plus a reservation fee to reserve a specific unit. The reservation fee payment reserves but does not vest legal title or ownership in the specific unit's physical structure and surrounding land. The reservation fee is approximately \$10,000 for a duplex unit and \$15,000 for a single-family home. In addition, prospective residents pay a construction order fee when construction of the unit commences. Residents enter into a "Residency and Services Agreement" for a specific unit by which the resident is obligated to pay two types of basic fees: the initial entrance or residency fee and the monthly service fee (Stip. ¶¶ 76-84, 106; Exhibit S is a typical Residency and Services Agreement).

The entrance or residency fee, due in full at the time the Residency and Services Agreement is signed, is the sum of each unit's cost of land and construction, plus a share of AAPP's development costs such as marketing, interest expense, permits, legal fees and expenses of the model home. Exhibit T, the AAPP "Price Plan," shows the proposed range of unit entrance fees from

members present to remain with 48 units in Prairie Point, Phase 2, if increasing the number would result in the project being subject to Madison's mandatory inclusionary zoning ordinance."

approximately \$130,000 to \$446,000. The actual entrance fees represented by existing Residency and Services Agreements range from \$236,207 to \$443,719.⁵ When the resident leaves Prairie Point—whether because of transfer to a different facility, termination of the agreement or death—the resident or the resident’s estate is entitled to a refund of 90% of the entrance fee unless the termination is due to the resident’s willful violation of the Agreement (Stip. ¶¶ 86, 88, 89, 109, 110).

Residents also pay an annually-adjusted monthly fee of \$350-\$370 for services and maintenance provided by AAPP. These services include recreational activities, health, exercise, social and educational programs, security checks, snow removal, grounds maintenance, HVAC maintenance, and use of a fitness room, private dining and meeting area, business center and library. AAPP will financially assist any resident who becomes unable to pay the monthly fee, although no resident has yet applied for such assistance. Residents may also opt and pay for additional services (medical, housekeeping, laundry, transportation, meals, for example) on a fee-for-service basis (Stip. ¶¶ 113, 114, 117, 118, 119).

As noted, there are no age or income-related qualifications for Prairie Point residents. Exhibit V shows the total assets and liabilities at the time of application for each person (without personal identifying information) who has reserved a unit and made an initial deposit. That table shows a range of

⁵ Residents of two Prairie Point units satisfy WHEDA financial conditions and therefore paid reduced entrance fees of \$189,000 (actual cost \$218,625) and \$180,000 (actual cost \$194,562) (Stip. ¶ 111).

individual Prairie Point applicant assets from approximately \$120,000 to \$10,953,418.

The parties agree that Madison has granted property tax exemption for property owned by other entities providing housing to elderly people. Exhibits QQ and RR are excerpts from the City of Madison's 2002 and 2003 assessment rolls indicating ownership of exempt property. Exhibit YYYYY lists ownership and acreage of properties which Madison exempts from property taxes as "benevolent retirement homes for the aged." They are: Attic Angel Association (2.93 acres), Attic Angel Community, Inc. (9.22 acres), Meriter Retirement Services (3.81 acres), Oakwood Village, Inc. (9.46 acres), Oakwood Lutheran Home (9.59 acres), Oakwood Village East Apartment Homes, Inc (9.31 acres, and Oakwood Village East Lutheran Homes, Inc. (8.20 acres).

Attic Angel Prairie Point, Inc. brings these consolidated tax recovery actions under Wis. Stats. § 74.35(3), which authorizes a claimant asserting an unlawful tax to pay the tax, file a claim with the taxation district and, if the claim is disallowed, commence an action in circuit court.⁶ AAPP's complaint also alleges that Madison's taxation of its property while exempting similar property violates the Uniformity Clause of the Wisconsin Constitution, Art. VIII, § 1, and the Equal Protection Clauses of the United States and Wisconsin Constitutions. Finally, plaintiff AAPP seeks relief under 42 U.S.C. § 1983 for Madison's alleged violation of its federal constitutional rights.

⁶ See TOPS Club, Inc. v. City of Milwaukee, 2003 WI App 62, 260 Wis. 2d 563 regarding the exclusivity of the remedy set forth in § 74.35 for claims that property is exempt from taxation.

The court acknowledges and appreciates counsels' joint efforts in preparing the Stipulation and supporting documents for these summary judgment motions.

STATUTE INVOLVED

Wisconsin Statutes § 70.11 establishes the property tax exemption at issue here. Subsection (4) exempts from general property tax:

Property owned and used exclusively by educational institutions offering regular courses 6 months in the year; or by churches or religious, educational or benevolent associations, including benevolent nursing homes and retirement homes for the aged. . . .,

but not exceeding 10 acres of land necessary for location and convenience of buildings while such property is not used for profit.

The introductory portion of § 70.11 establishes the following condition:

Leasing a part of the property described in this section does not render it taxable if the lessor uses all of the leasehold income for maintenance of the leased property or construction debt retirement of the leased property, or both, and, except for residential housing, if the lessee would be exempt from taxation under this chapter if it owned the property.

ISSUES PRESENTED

Both parties seek summary judgment on whether Attic Angel Prairie Point qualifies for a property tax exemption, raising these three questions:

- (1) Is the Attic Angel Prairie Point development a "benevolent. . . retirement home for the aged" within the meaning of Wis. Stats. § 70.11(4)?

- (2) If so, does Prairie Point cause AAPP to exceed the 10-acre property exemption limit in § 70.11(4)?
- (3) Is Prairie Point's Residency Agreement a lease, thus invoking the leasehold-income provisions of § 70.11?

When, as here, both parties move for summary judgment, the court may treat the cross-motions as an agreement that there are no disputes of material fact. The court then decides whether either party is entitled to judgment as a matter of law. *Friendship Village Milwaukee v. Milwaukee*, 181 Wis. 2d 207, 219, 511 N.W. 2d 345 (Ct. App. 1993), "*Friendship Village I*".

In addition, AAPP moves for summary judgment on the following two issues:

- (4) Does Madison's denial of property tax exemption for Prairie Point violate the rule of uniformity established in Art. VIII, § 1 of the Wisconsin Constitution?
- (5) Does Madison's denial of property tax exemption for Prairie Point violate AAPP's right to equal protection of the laws under the Wisconsin and United States Constitutions?

DECISION

Does Prairie Point Satisfy the Requirements for Property Tax Exemption Set Forth In § 70.11?

A. Standard of review

This case requires the court to apply the benevolent retirement home tax exemption statute to the particular facts of the Attic Angel Prairie Point development. This presents an issue of law. *FH Healthcare Development v. City of Wauwatosa*, 2004 WI App 182, ¶ 18, 276 Wis. 2d 243.

Because tax exemptions are acts of “legislative grace,” they are to be strictly construed and doubts are to be resolved against the granting of the exemption. *Kickers of Wisconsin, Inc. v. City of Milwaukee*, 197 Wis. 2d 675, 679-80, 541 N.W. 2d 193 (Ct. App. 1995). Section 70.109, Wis. Stats., states that tax exemptions “shall be strictly construed in every instance with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption.”

Strict construction does not mean the narrowest possible reading; tax exemptions should be construed in a “strict but reasonable” manner. Nonetheless, the party seeking the exemption must bring itself within the terms of the exemption. *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 80, 591 N.W. 2d 583 (1999).

Exemptions are strictly construed in favor of taxability because “the more exceptions allowed, the more inequitable becomes the apportionment of the tax burden. The continuous removal of real property from taxation thus imposes a

particular hardship upon local government and the citizen taxpayer.” *International Foundation v. City of Brookfield*, 95 Wis. 2d 444, 454, 290 N.W. 2d 720 (Ct. App 1980). The legislature therefore limits property tax exemptions to institutions or organizations that provide a benefit to the taxpaying community, serving a public rather than a private purpose. The theory is one of mutual consideration: the public relieves the organization of its property tax burden because the organization provides a public benefit. *University Medical Foundation v. City of Madison*, 2003 WI App 204, ¶ 11, 267 Wis. 2d 504, 514, review denied, 2004 WI 20, 269 Wis. 2d 198. The organization lessens the burdens of the taxpaying public by providing a service, the cost of which would otherwise fall to local government.

To determine whether a particular organization is entitled to an exemption the court must consider the facts as a whole—“the substance and realities of a taxpayer’s activities.” *DOR v. Sterling Custom Homes*, 91 Wis. 2d 675, 679, 283 N.W. 2d 573 (1979).

B. Benevolent retirement home for the aged

In this case, Attic Angel Prairie Point, Inc., bases its exemption request on Attic Angel’s mission of providing housing and services to the elderly as part of the “continuum of care” Attic Angel facilities offer. The City of Madison counters that AAPP cannot qualify for the exemption as a benevolent association because “it is a provider of high-end, exclusive housing at essentially fair market value” of benefit only to its own residents (Madison’s response brief at p. 3).

In support of its property tax exemption claim, AAPP places primary reliance on the Wisconsin Supreme Court's 1969 decision in *Milwaukee Protestant Home v. Milwaukee*, 41 Wis. 2d 284, 164 N.W. 2d 289. *Milwaukee Protestant Home* concerned the Home's property tax exemption request for the Bradford Terrace Addition to the Home. Like Prairie Point, prospective residents paid a founders' fee—partially refunded at termination of the residency agreement—and a monthly occupancy charge. Unlike Prairie Point, the Bradford Terrace Addition shared a single site with the Home, and Bradford Terrace's top two floors contained a convalescent center providing nursing care (41 Wis. 2d at 288-289).

In *Milwaukee Protestant Home*, the Court addressed the 1967 legislative amendment to § 70.11(4) adding "benevolent nursing homes and retirement homes for the aged" to the tax exemption statute. The Court first noted that the amendment did not change but merely clarified the pre-existing exemption for benevolent nursing homes. Declaring that the Legislature has resolved whether operating a retirement home is a proper benevolent function, the Court restated the question before it as "whether the Milwaukee Protestant Home for the Aged meets the standards as to non-profit operation set forth in the tax exemption statute." The Court articulated the test as follows: "it must appear that, (1) appellant is a benevolent association; (2) the personal property is used exclusively for the purposes of such association; (3) the real and personal property is not used for pecuniary profit." 41 Wis. 2d at 293.

The Court found that there was no dispute that Milwaukee Protestant Home was a benevolent association and did not further address that issue. The Court also swiftly laid to rest the “exclusive use” portion of the test: the Home’s ownership and operation of a residence and nursing home for the aged is “what it does and all that it does.” 41 Wis. 2d at 294. Most of the Court’s analysis focused on the third question, whether the combination of founders’ fees and monthly occupancy charges that Bradford Terrace residents paid constituted operation “for pecuniary profit,” since those receipts exceeded the operating costs of Bradford Terrace.

The Court held that the founders’ fee and occupancy charges did not transform the basic benevolent character of the Home, from which the well-worn quote “[c]harging pew rent does not make a church not a church” is drawn. The Court’s fundamental (and less colorful) holding remains, however, that where “there is no element of gain to anyone and where all of the net income is devoted exclusively to carrying on the benevolent purposes of the institution, there is not an operating ‘for pecuniary profit.’” 41 Wis. 2d at 297.

Lastly, the *Milwaukee Protestant Home* Court addressed and rejected the City of Milwaukee’s request to add a fourth step to the benevolent exemption test, the requirement that the facility provide free residence to some percentage of its applicants. It is in this context that the Court engages in a discourse on the distinction between “charitable” and “benevolent” using the evocative image of a “soup kitchen picture of penniless drifters lined up outside a skid row

mission.” The Court concluded that “[c]oncern for the plight of the entirely destitute has its proper place, but the word ‘benevolent’ has no built-in implication or requirement of almsgiving.” Accordingly, the Court declined to require that a benevolent association must provide free services to qualify for a property tax exemption. 41 Wis. 2d at 300.

AAPP views *Milwaukee Protestant Home* as controlling law because it is the most recent Supreme Court case to directly address the “retirement home for the aged” language of § 70.11(4).⁷ Conversely, Madison views *Milwaukee Protestant Home* as a relic superseded if not overruled by more recent cases interpreting the term “benevolent” for purposes of property tax exemptions.

AAPP reads *Milwaukee Protestant Home* to conclude that a stated benevolent purpose is enough: if the nonprofit organization runs a retirement home for the aged, the inquiry stops there because benevolence is satisfied. AAPP’s interpretation of *Milwaukee Protestant Home*’s holding seems to be that the essence of “benevolence” is captured in the organization’s non-profit operation as a retirement home for the aged. The problem with such an interpretation is that equating benevolence with non-profit status strips the term “benevolent” of all meaning. This is because § 70.11(4) *already* requires that the property be used for non-profit purposes to qualify for the exemption. Although “an institution need not be a mendicant to have its work qualify as

⁷ The court of appeals in *St. John’s Lutheran Church v. City of Bloomer*, 118 Wis. 2d 398, 347 N.W. 2d 619 (1984) followed the reasoning of *Milwaukee Protestant Home*.

benevolent⁸ benevolence clearly requires something more than simple existence as a non-profit retirement home for the aged.

Indeed, cases decided after *Milwaukee Protestant Home* add substance to the definition of “benevolent” and explain the method for determining whether an association is in fact benevolent within the meaning of the property tax exemption.

The Supreme Court in *Deutsches Land, Inc. v. Glendale*, 225 Wis. 2d 70, carries forward the three-step test for benevolent organizations set forth in *Milwaukee Protestant Home*. In *Deutsches Land*, the Court considered the eligibility for tax exemption of property owned by a non-profit group of benevolent associations devoted to preserving Germanic heritage and culture. The Court, citing *Milwaukee Protestant Home*, stated that § 70.11(4) requires an organization to show three facts:

- (1) that it is a benevolent organization, (2) that it owns and exclusively uses the property, and (3) that it uses the property for exempt purposes.

225 Wis. 2d at 82.

The City of Glendale agreed that the associations were “benevolent” for purposes of § 70.11(4) but disputed that the property was being used exclusively for exempt purposes. The Court observed that the proper inquiry is fact-specific: it requires the benevolent association to show how the property is actually used

⁸ *Family Hospital Nursing Home, Inc. v. City of Milwaukee*, 78 Wis. 2d 312, 254 N.W. 2d 268 (1977).

as part of the association's burden to show that it falls within the exemption.

225 Wis. 2d at 84. The Court continued:

Benevolent ownership of property is not enough to satisfy the dictates of Wis. Stat. § 70.11(4); benevolent use of that property is also required. . . It is therefore necessary for a benevolent association to detail its use of the property so that tax assessors know what types of activities, if any, are occurring on the property.

Id. At 85.

The *Deutsches Land* Court then examined the organization's actual use of the properties for which exemption was sought—Old Heidelberg Park, the Bavarian Inn and the organization's soccer fields. The Court concluded that the organization, although undisputedly a benevolent association under § 70.11(4), did not meet its burden to show exempt use of its property. 225 Wis. 2d at 102.

In *University Medical Foundation v. City of Madison*, 2003 WI App 204, 267 Wis. 2d 504, the court addressed the property tax exemption eligibility of medical clinic properties owned by the University of Wisconsin Medical Foundation. The court focused on the "exclusive use" element of the three-part *Deutsches Land* test: "The disposition of the Foundation's claim for exemption under Wis. Stat. § 70.11(4) thus turns on whether the Foundation established in the summary judgment record that it used the acquired clinics 'exclusively' for 'benevolent' activities, or at a minimum, that a factual dispute exists as to whether its use so qualifies." 2003 WI App ¶ 19.

In *University Medical Foundation* the clinics relied on *Milwaukee Protestant Home*, as Attic Angel does in this case, for the proposition that

charging a fee for services does not make an otherwise benevolent use of property ineligible for exemption. The court of appeals, however, found *Milwaukee Protestant Home* inapposite because it focused not on whether the property was being put to a benevolent use, but whether the property was being used for pecuniary profit. 2004 WI App at ¶ 22-23. Instead, the *University Medical Foundation* court examined the record to determine whether the Foundation “exclusively used” its clinics for benevolent purposes.

The court of appeals concluded that the Foundation’s use of the clinics for outpatient medical care did not automatically constitute a “benevolent” use. The court observed, however, that providing such care at substantially reduced fees might well qualify. Examining the factual record before it, the court determined that the clinics charged market rates, advertised extensively to attract patients, and that 98% of the clinics’ patients paid for their treatment either through insurance, governmental programs or personal funds. This, the court concluded, made it “difficult to distinguish the Foundation’s provision of patient care at its acquired clinics during the tax years in question from that offered by a for-profit medical provider” 2004 WI App at ¶ 27. The court held that the purpose to which the clinics were primarily devoted was not a benevolent activity for purposes of Wis. Stat. § 70.11(4).

Deutsches Land and *University Medical Foundation*, then, require this court to focus on the question left unaddressed by *Milwaukee Protestant Home*: whether the record demonstrates that AAPP uses its Prairie Point property

exclusively for benevolent purposes. There is no single factor—such as minimum age requirement or percentage of free or discounted services offered—that defines use for a benevolent purpose. Instead, the “facts of each case must be regarded as a whole and the substance of the scheme of operation as it exists must be examined.” *Prairie du Chien Sanitarium Co. v. Prairie du Chien*, 242 Wis. 262, 265, 7 N.W. 2d 832 (1943). A logical starting point is to examine how the benevolent organization defines and describes its own operations.

The court in *M & I First Nat. Bank v. Episcopal Homes*, 195 Wis. 2d 485, 536 N.W. 2d 175 (Ct. App. 1995) considered whether a residency agreement for the DeKoven elderly independent living facility established a landlord/tenant relationship for purposes of regulations governing residential rental practices. Although the *Episcopal Homes* case did not address entitlement to property tax exemption, the court’s analysis is instructive here. The court examined the nature of the legal relationship the parties established by the residency agreement: DeKoven Home made its living units available to residents in exchange for financial remuneration. This, the court emphasized, was the “*primary and dominant purpose of the agreement*,” 195 Wis. 2d at 501. Most significantly, the court rejected the contention that the DeKoven Home was not a landlord because it was primarily devoted to providing geriatric care to its residents. The court stated:

To the contrary, as we have already demonstrated, DeKoven’s dominant and primary purpose was to provide housing. Although DeKoven provided a wellness nurse and other amenities catering to the needs and enjoyment of elderly persons, DeKoven

was not marketed as a nursing home or life-care facility designed to provide geriatric services. . .

Again, we observe that DeKoven was neither a nursing home nor a continuing care facility. . . Instead, DeKoven provided housing to a congenial group of people sixty-two years of age and older.

195 Wis. 2d at 504-505.

Consistent with the methodology prescribed in *Deutsches Land, University Medical Foundation* and *Episcopal Homes*, this court looks first to the document governing the relationship between Prairie Point and the people it serves: the Residency Agreement. The Agreement establishes the criteria for initial and continued residence at Prairie Point, the financial relationship between the parties and the services to be provided. Although AAPP maintains that it is devoted to benevolent use because it is part of the Attic Angel “continuum of care for the elderly,” there is no guaranteed admission to any other Attic Angel facility. There is no minimum age requirement; anyone who meets the residency criteria can apply to live at Prairie Point. A resident must be mobile, capable of self-care and must have the cognitive ability to enter into the Residency Agreement. Residents may be evicted for non-compliance with the Residency Agreement.

Prairie Point is geographically separated from other Attic Angel facilities. Prairie Point is not licensed to provide nursing care, nor does it participate in the Medicaid program. Specialized services are provided only on a fee-for-service basis. Although the Prairie Point development incorporates design features to

ease the difficulties of aging, residents pay for those features as part of the package.

Prairie Point requires a steep financial commitment from its residents: a substantial up-front reservation fee, a construction fee, followed by an entrance or residency fee between \$130,000 and \$446,000 depending on the type of unit desired. The Residency Agreement also requires payment of a monthly occupancy fee. AAPP offers to financially assist anyone unable to pay its fees but, except for two WHEDA-eligible residents, no one requested financial assistance for the years in question.

These facts compel only one conclusion: AAPP's actual use of the Prairie Point development is to provide housing for moderate and upper-income people. This is a useful endeavor, but it is not benevolence. Ultimately, when one examines how AAPP uses the Prairie Point property, the difference between Prairie Point and a commercially-owned residential development becomes vanishingly small. Yet one is taxed and the other is not.

Property tax exemptions exist to reward benevolent institutions for providing a public benefit or meeting a need that would otherwise fall to the taxpayers. AAPP cannot identify what public benefit it confers or taxpayer burden it lifts to fulfill this legislative purpose. AAPP has not met its burden to bring itself within the shelter of the exemption.

Should AAPP, Attic Angel Association and Attic Angel Place be Considered a Single Entity for Purposes of the Ten-Acre Limitation?

Section 70.11(4), Wis. Stats., limits a property tax exemption to “10 acres of land necessary for location and convenience of buildings while such property is not used for profit.” AAPP sought property tax exemption for Prairie Point’s 4.37 acres, well within the 10-acre limit. Property owned by Association, Place and AAPP, however, together exceeds ten acres. The City of Madison requests summary judgment that Association, Place and AAPP are essentially the same organization and therefore should be collectively held to the 10-acre limitation. AAPP counters that it is a legal entity separate and distinct from Association and Place, and thus entitled to its own 10-acre limit.

The preceding decision that AAPP does not qualify as a benevolent retirement home for the aged for purposes of property tax exemption makes it unnecessary to decide this issue. Nevertheless, the court notes that the law in Wisconsin is that the “legal fiction” of a corporation is not to be lightly disregarded. *Consumer’s Co-op of Walworth v. Olsen*, 142 Wis. 2d 465, 474, 419 N.W. 2d 211 (1988). Moreover, the court of appeals decisions in *Friendship Village I* and *II* resolved that the affiliated entities Freedom Village and Friendship Village of Greater Milwaukee, Inc. were each entitled to their own ten-acre tax exemption. *Friendship Village v. Milwaukee*, 194 Wis. 2d 787, 790, 791, ft. 3, 535 N.W. 2d 111 (Ct. App. 1995). This court declines the City of Madison’s invitation to reject *Friendship Village* and collapse the Attic Angel organizations into one entity for purposes of the 10-acre exemption limit.

Is Attic Angel Prairie Point Subject to the Leasehold Income Provisions of Wis. Stats. § 70.11?

The preamble to § 70.11 provides:

Leasing a part of the property described in this section does not render it taxable if the lessor uses all of the leasehold income for maintenance of the leased property, construction debt retirement of the leased property of both and if the lessee would be exempt from taxation under this chapter if it owned the property.

In addition to establishing its status as a benevolent association, an applicant for a property tax exemption under § 70.11(4) must satisfy the preamble's conditions—the "rent use condition" and the "lessee identity condition"—if it leases the exempt property. *Columbus Park Housing v. Kenosha*, 2003 WI 143, 267 Wis. 2d 59.

As a threshold matter, viewing AAPP's Residency Agreement as a lease instead of a contract for continuing-care services is consistent with this court's conclusion that AAPP's primary and dominant purpose at its Prairie Point development is providing housing in exchange for payment. See: *M & I First Nat. Bank v. Episcopal Homes*, 195 Wis. 2d 485, 500-504, 536 N.W. 2d 175 (Ct. App. 1995). Further consideration of AAPP's compliance with these conditions is unnecessary, however, in light of the court's conclusion that AAPP does not qualify as a benevolent retirement home for the aged.

Does Madison’s Denial of Property Tax Exemption to Prairie Point Violate the Wisconsin Constitution’s Rule of Uniformity?

Article VIII § 1 of the Wisconsin Constitution requires that “the rule of taxation shall be uniform.” These principles govern the application of the uniformity clause to property taxation:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden on an *ad valorem* basis.
3. All property not included in that class must be absolutely exempt from property taxation.
4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.

Gottlieb v. Milwaukee, 33 Wis. 2d 408, 424, 147 N.W. 2d 633 (1967). Most uniformity clause cases concern the overvaluation of a specific parcel of property and undervaluation of others, or a challenge to the constitutionality of a statute. See, for example, *Noah’s Ark Family Park v. Village of Lake Delton*, 216 Wis. 2d 387, 573 N.W. 2d 852 (1998) (assessor singled out Noah’s Ark for reassessment based on its recent sale while intentionally refusing to reassess other recently-sold commercial properties); *Norquist v. Zeuske*, 211 Wis. 2d 241, 564 N.W. 2d 748 (1997) (challenge to statutory assessment method for agricultural land).

In this case, plaintiff AAPP complains that Madison has singled out Prairie Point for taxation while other similar organizations owning properties retain exemptions as benevolent retirement homes for the aged under Wis. Stat. § 70.11(4). AAPP states that there is “no discernible difference between these organizations that are part of the class of exempt retirement homes and AAPP that can or should result in the unequal treatment of AAPP’s Property” (AAPP brief in support of summary judgment, p. 34). AAPP asserts that Madison’s Chief Assessor ignored pertinent information concerning these other organizations and instead chose to target Prairie Point for taxation.

Madison acknowledges that the Prairie Point development’s exemption request was scrutinized because the operation of the organization raised new issues for the assessor. Madison denies that the assessor acted arbitrarily or intentionally singled out AAPP for taxation. Finally, Madison asserts that it “plans to review all the other currently exempt properties and to give those properties and their operations the same level of scrutiny as we have now done in Plaintiff’s case” (defendant’s response brief, p. 9).

The court cannot grant summary judgment to AAPP on the uniformity clause challenge because there are disputes of material fact precluding judgment at this stage of the proceedings. To establish a violation of the rule of tax uniformity, a complainant must show that the assessor used an arbitrary method of assessment and used improper considerations, or committed an error of law. *Noah’s Ark Family Park v. Village of Lake Delton*, 216 Wis. 2d at 393; *State ex*

rel. Levine v. Fox Point Review Board, 191 Wis. 2d 363, 373-374, 528 N.W. 2d 424 (1995). The record before this court on summary judgment raises significant factual disputes concerning the nature and characterization of the exempt organizations' activities and the assessor's intent in maintaining these organizations' exemptions while denying AAPP's exemption request. And, although cyclical revaluation plans may be constitutionally permissible,⁹ there remains a significant factual dispute concerning Madison's plan to reexamine other similarly-situated organizations' exemptions. These factual disputes preclude summary judgment on AAPP's uniformity clause claim.

Does Madison's Denial of Property Tax Exemption to Prairie Point Violate AAPP's Constitutional Right to Equal Protection of the Laws?

The Fourteenth Amendment to the United States Constitution and Article I, § 1 of the Wisconsin Constitution both guarantee equal protection under the laws.¹⁰ Because these clauses are substantially equivalent, they are to be interpreted to provide the same protections. Equal protection requires that those who are similarly situated be treated alike under the law. *GTE Sprint v. Wisconsin Bell*, 155 Wis. 2d 184, 193, 454 N.W. 2d 797 (1990).

⁹ *State ex rel. Fort Howard Paper v. Lake Dist. Bd.*, 82 Wis. 2d 491, 510, 263 N.W. 2d 178 (1978).

¹⁰ The Fourteenth Amendment, § 1 of the United States Constitution provides: "[No state shall] deny to any person within its jurisdiction the equal protection of the laws."

Article I, § 1 of the Wisconsin Constitution provides:

Equality; inherent rights. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

AAPP makes essentially the same arguments on its equal protection challenge as on its uniformity clause challenge.¹¹ The alleged violation of a federal constitutional right or law may provide a basis for a civil rights claim under 42 U.S.C. § 1983, which provides: "Every person who, under color of any statute . . . of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." See: *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W. 2d 216 (1991).

In this case, AAPP's complaint seeks relief under § 1983, alleging that Chief Assessor Michael Kurth was acting under color of state law when he denied AAPP's request for property tax exemption. Beyond the parties' agreement that Kurth acted under color of state law in the course of carrying out his duties as assessor, the arguments for § 1983 relief are not sufficiently developed on this motion to permit summary judgment to either party. Accordingly, AAPP's motion for summary judgment on constitutional equal protection grounds meets the same fate as its uniformity clause challenge.

CONCLUSION

Property tax exemptions exist to recognize the fact that benevolent associations provide services and absorb costs that would otherwise fall to

¹¹ In fact, the "requirements of equal protection in taxation are much different than those of the uniform taxation provision [of the Wisconsin Constitution]. *State ex rel. Ft. Howard Paper v. Lake Dist. Bd.*, 82

municipal taxpayers. A property tax exemption shifts part of the tax burden from the benevolent association back to the municipal taxpayer. If an exempt organization is not in fact exclusively benevolent in operation, other property owners end up subsidizing, through payment of their property taxes, their more affluent neighbors. In addition, the exempt organization may gain a competitive advantage over other non-exempt entities offering the same product. This is why Wisconsin law requires that tax exemptions be narrowly drawn and carefully scrutinized.

Attic Angel Association is a venerable institution with a proud Madison history, and this Decision in no way diminishes the benefit Attic Angel Association provides to the community. The separate corporation Attic Angel Prairie Point, Inc., however, has failed in this case to establish that its Prairie Point residential development qualifies for property tax exemption as a benevolent retirement home for the aged. Prairie Point's primary and dominant purpose is to provide market-priced residential housing, not benevolent services to the elderly. Accordingly, the City of Madison properly denied AAPP's property tax exemption requests for the tax years at issue in this case.

ORDER

For the reasons stated in the foregoing Decision, the court hereby GRANTS defendant City of Madison's motion for summary judgment that Attic Angel Prairie Point, Inc. is not entitled to a property tax exemption pursuant to

Wis. 2d 491, 511.

Wis. Stat. § 70.11(4) for its Prairie Point residential development. Because there are disputes of material fact, the court hereby DENIES AAPP's motion for summary judgment that Madison's denial of its property tax exemption request violates the Wisconsin Constitution tax uniformity clause and the federal and state constitutional equal protection clauses.

Dated this _____ day of November 2005.

BY THE COURT

Maryann Sumi, Judge
Circuit Court Branch 2

Cc: Attorney Margaret M. Derus
Assistant City Attorney Larry W. O'Brien