

**BENEVOLENT RETIREMENT  
HOME FOR THE AGED  
LEGISLATIVE TASK FORCE  
  
GOVERNMENT-5 REPORT**

**Dated as of July, 15, 2000**

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WEISS, WEISSENFLUH**

## I. INTRODUCTION

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

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

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

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

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

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

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<sup>1</sup> Gregg C. Hagopian ©, July, 2000.

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

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

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

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

### **A. Thumbnail Sketch of Current Law**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**E. The Words in Current §70.11(4)**

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

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

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

- Property

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

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

1. **“Property” Means General Property.** See Wis. Stat. §70.02. “General property” means real property and personal property. “Real property” is defined in §70.03. “Personal property” is defined in §70.04
2. **“Owned” Means “Beneficial Ownership”.** Wisconsin Tel. Co. v. City of Milw., 85 Wis. 2d 447, 271 N.W.2d 362 (1978) (practical ownership rather than naked legal title). State ex rel. Wis. University Bldg. Corp. v. Bareis, 257 Wis. 497, 44 N.W.2d 259 (1950). (Who is real beneficial owner? Look to substance rather than form). Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee, 181 Wis. 2d 207, 511 N.W.2d 345 (Ct. App. 1993), rev denied, 515 N.W.2d 714. City of Franklin v. Crystal Ridge, Inc., 174 Wis. 2d 358, 497 N.W.2d 747, review granted, 505 N.W.2d 137, reversed, 180 Wis. 2d 561, 509 N.W.2d 730. See Manual pp. 21.7-2 and 21.7-3 and cases cited therein.
3. **“Used Exclusively” Means Actual Physical Use Predominantly for Not-for-Profit Exempt Purposes.** Deutsches Land, Inc. v. City of Glendale, 225 Wis. 2d 70, 591 N.W.2d 583, 589 at ¶18 (WI S.Ct. 1999) (“used exclusively” means vast, predominant, pervasive, actual, physical use for exempt purpose. Occasional use for nonexempt purpose will not destroy 100% exemption. E.g. exempt religious association occasionally engages in commercial publishing when publishing is less than 1% of association’s business, as in Northwestern Publishing House case, 177 Wis. 401 (1922). “Used exclusively” doesn’t “preclude ‘inconsequential

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<sup>4</sup> To be “benevolent” under §70.11(4), besides providing “charity”, the **St. Joe’s Line** also weighs heavily the provision of services by organization members on a “without-pay”, volunteer basis.

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

4. **“Association” Means.** Green Scapular Crusade, Inc. v. Town of Palmyra, 118 Wis. 2d 135, 345 N.W.2d 523 (Ct. App. 1984) (2 or more persons may associate and be an “association” for 70.11(4) purposes. Also, a corporation can be an “association”). Waushara Co. v. Graf, 166 Wis. 2d 442, 480 N.W.2d 16 (WI S.Ct. 1992) ( incorporation is not a prerequisite for exemption under §70.11(4)). See, also, Hahn V. Walworth Co., 14 Wis. 2d 147, 109 N.W.2d 653 (WI S.Ct. 1961) (corporation can be “association” under §70.11(4); possible for property held in trust or by foreign corporation to get exemption under 70.11(4)).
5. **“Retirement” Means.** Per Friendship Village I (Ct. App. 1993) and its definition of aged at “55”, even though the legislature used the word “retirement” in §70.11(4), and even though the attorney general in 66 OAG 232 (8/10/77) opined that there has to be some limit to 70.11(4) to ensure that exempt housing isn’t occupied by those that aren’t retired, the

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

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

6. **“Home” Means.** No definitive ruling. However, see each of St. Joe’s Line and Milw. Protestant Line of cases.
7. **“Aged” Means.** While the exemption in §70.11(4) is for benevolent nursing homes and benevolent retirement homes “*for the aged*”, the legislature, in §70.11(4), never provided an express definition of “aged.” Friendship Village I, 181 Wis. 2d 207, 225. However, the court in Friendship I overlooked that, in other parts of the statutes, *the legislature did give guidance*. For example, in Wis. Stat. §49.47(4), to be eligible for medical assistance, the state imposed income restrictions, and an age limit of 65 or older. In Wis. Stat. §59.07(56) regarding housing authorities, the state allowed favorable treatment for low-income persons 62 or older. In Wis. Stat. §343.20(2m) and §343.14(8), concerning expiration of operators’ licenses, the Department of Transportation has special mailing requirements for licensees 65 or older. In Wis. Stat. §46.85, concerning social service programs for “older” (as opposed to “aged”) individuals, the legislature addressed supportive assistance programs for those 60 or older. In Wis. Stat. §49.171(3)(a), the legislature defined “an aged infirm person” as a person over 65 that is either mentally or physically incapacitated. And, per IRS rulings concerning 501(c)(3) requirements for nonprofit retirement homes, the benchmark for age is 65.<sup>5</sup> Moreover, in 66 OAG 232 (8/10/77), the Wisconsin Attorney General opined that there must be some limitation to ensure that elderly housing exempt under 70.11(4) is not occupied by those who aren’t elderly. The attorney general suggested age 65 (or perhaps 62) as a limit.

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

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

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

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

8. **“Necessary for Location and Convenience of Buildings” Means .**  
Friendship II: Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee, 194 Wis. 2d 787, 535 N.W.2d 111 (Ct. App. 1995) (calculate acreage limit via “simultaneous approach.” That is, as of each January 1, take land under first building along with its “convenience” land before moving on to next building). St. John’s Lutheran Church v. City of Bloomer, 118 Wis. 2d 398, 403, 347 N.W.2d 619 (Ct. App. 1984) (lands used for landscape and parking are “convenience” lands considering they’re owned and used along with exempt building). Deutsches ¶52; need building used for exempt purpose as a prerequisite to getting land exempt as “convenience” land. And, land must be necessary for location and convenience of exempt building as opposed to building being necessary for the convenience of the land. Deutsches ¶¶50-55. See, also, Manual pp. 21.7-8, 21.7-9, and item 10 below “Building Means.”
9. **“Not used for profit” Means Nonprofit Owner and Nonprofit, Exempt Use.** See, also, “used exclusively” above. There must be a nonprofit owner that actually and physically makes predominant, pervasive use of the property for a nonprofit exempt purpose. See: Deutsches Land (S.Ct. 1999) 225 Wis. 2d at 82, ¶16: to qualify for a benevolent exemption under 70.11(4), organization must show: (1) that it’s a benevolent organization; (2) that it owns and exclusively uses the property; and (3) that it uses the property for exempt purposes. “Benevolent ownership of property is not enough to satisfy the dictates of Wis. Stat. § 70.11(4); benevolent use of that property is also required.” Deutsches, 225 Wis. 2d 70, 85 at ¶22. Thus, in order to be entitled to exemption, there must be a nonprofit, exempt owner who actually, physically uses the property “exclusively” (vast predominance) for a nonprofit, exempt purpose. If a benevolent association owns property without actually using it for benevolent purposes (or without actually using it at all), the benevolent association is not entitled to exemption. Deutsches, 225 Wis. 2d 70, 85 at ¶22. Need more than mere “control” of property by a benevolent association. “We have repeatedly stressed that a benevolent association must do more than own or control property to claim an exemption; it must also use that property for benevolent purposes.” Deutsches ¶28. “The application of the exemption statute depends upon who ‘owned and used’ . . . the property on the respective January 1 date. Friendship I, 181 Wis.

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

(a) **Nonprofit Owner**

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

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

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

**(b) Nonprofit Exempt Use.**

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

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

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

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

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

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

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

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

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

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

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

- (a) that is in line with “the natural and exact meaning of the words” the legislature used (109 N.W. 109, 110);
- (b) Strict Construction Rules require the natural and narrower construction of “use” (id.);
- (c) examining the specific exemption statute at issue, as well as other categories of property that the legislature exempted, revealed that the intent of the legislature is that it is the physical use that matters. (Id. at 110-111);
- (d) absurd results would occur if the court ruled otherwise (“it would be absurd to exempt property not itself used for” the exempt purpose named in the exemption statute because the income of the property is used for that purpose. Id. at 111).

The Supreme Court, elaborating, said:

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

from other like property, may be held exempt from the usual burdens of taxation provided only that their net profits or earnings be devoted to the favored purposes, some of which, as already shown, are ultimately purely mercenary. Such results would, we think, greatly surprise the framers of these various exemption provisions in our statutes. From such consideration, we are convinced that all reason is against appellant's construction." 109 N.W. 109, 111.

...

"Elsewhere throughout the country an array of authorities far too numerous for complete citation sustain the view that under a statute limiting exemptions to property 'used for', 'devoted to' or 'used exclusively for' a specific purpose, a devotion of the income of such property to such favored purpose is not sufficient, but that the statutes require the primary physical use therefor of the very property for which exemption is claimed." Id.

". . . we find nothing in Wisconsin to conflict with this volume of authority elsewhere." Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) **Order of Sisters of St. Joseph v. Town of Plover, 239 Wis. 278, 1 N.W.2d 173 (WI S.Ct. 1941).** Where there is a nonprofit, exempt owner, operating (actually using ) property for exempt purpose (operation of TB hospital on largely volunteer basis, where patients are admitted and serviced without regard to ability to pay, and where vast majority (i.e. 97 1/2%) of patients are, in fact, subjects of charity and unable to pay, is “benevolent”), and where there is no private inurement, then property tax exemption is allowed – even though owner may make profit. All benevolent institutions endeavor to operate at a profit. But,

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

- (6) **Men’s Hall Stores, Inc. v. Dane County**, 269 Wis. 84, 69 N.W.2d 213 (WI S.Ct. 1955). Nonprofit corporation, operated by UW dorm students, that sold merchandise in-store in UW dorm to UW dorm residents not exempt as an educational association even though: (1) student-members got experience and training with educational value, (2) no private inurement (profits, and, upon dissolution, assets, go to educational purposes). For §70.11(4) purposes, “[i]t is the use of the property and not the purpose of the income therefrom that determines taxability.” 269 Wis. 84, 89. A close reading of the Men’s Halls case reinforces that, where the actual purpose of the owner, and actual use of the property, are nonexempt, no exemption can be granted – even though the income from that activity may get applied toward an exempt purpose. Here, the actual use of the property was selling merchandise to UW dorm students like toothpaste and cigarettes. That’s the same type activity that for-profit retail stores engage in. It’s not exempt.
- (7) **Alonzo Cudworth Post No. 23, Am. Legion v. City of Milwaukee**, 42 Wis. 2d 1, 165 N.W.2d 397 (WI S.Ct. 1969) (public patronage of separable facility within tax-exempt facility renders publicly patronized portion of building taxable. Public patronage of club facilities where money is exchanged for services on regular basis takes such publicly patronized facilities out of tax exempt status. 42 Wis. 2d 1, 9. So even though American Legion is clearly an exempt organization (42 Wis. 2d 1, 6 (fn. 1)) with an exempt purpose, that does lots of good (e.g. helps hundreds of high school students each year; sponsors 200,000 youth baseball players each year; awards 22,000 medals each year to elementary, junior, and senior high school students for character, scholarship, and citizenship; spends \$8,000,000 each year for child welfare programs and youth programs; and assists and aids with college scholarships), when that organization begins using its property for non-exempt business activities like running a bar and restaurant, that use gets taxed.<sup>6</sup> Hence, like the

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

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

10. **“Building” Means.**

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

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<sup>7</sup> Fraternal organizations are different from “benevolent associations”, so, what is an exempt use/purpose for a fraternal organization is different from what is an exempt use/purpose for a benevolent organization.

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

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

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

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

(a) **The St. Joe’s Line of Cases**

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

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

<sup>9</sup> To be “benevolent” under §70.11(4), besides providing “charity”, the St. Joe’s Line also weighs heavily the provision of services by organization members on a “without-pay”, volunteer basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court ruled that:

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

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

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

- (4) **Catholic Woman’s Club v. City of Green Bay**, 180 Wis. 102, 192 N.W. 479 (WI S.Ct. 1923). Manual p. 21.7-7. This is really more of a “fraternal” case than a “benevolent” one. Nonprofit woman’s club clubhouse, auditorium and day nursery, all exempt. Property used for: club meetings, dance instruction, leased to other clubs, daycare, sheltering homeless women and strangers, and education. Members pay dues, and services are provided on a charge basis sufficient to cover expenses. But, club makes no profit, and all its property was acquired by charitable gifts. No private inurement. Based on “actual use”, property is exempt under then-existing §70.11(4) that exempted property of educational or benevolent associations or fraternal associations and allowing occasional leasing for schools, public lectures or concerts.
- (5) **Knights of Pythias: Trustees of Clinton Lodge No. 152 v. Rock County**, 224 Wis. 168, 272 N.W. 5 (WI S.Ct. 1937). This is not a case involving a “benevolent organization.” Instead, it involves a “fraternal corporation.” Under §70.11(4), Clinton Lodge No. 152, Knights of Pythias of Wisconsin’s use of its first-floor space in its building for recreational purposes by lodge members and their guests (baseball dart game, beanbag game, indoor horseshoes) didn’t render first-floor of lodge building taxed-in-part under the 1931 statute’s (§70.11(4a)) “pecuniary-profit, taxed-in-part” provisions because: (1) recreation is one of the objects of fraternal association (c.f. benevolent associations) (i.e. that use by members was within the purposes of the fraternal assn.), and (2) the first-floor wasn’t used by nonmembers for compensation. While the court cited the Elks case (i.e. Green Bay Lodge), and the Baraca Bible Club cases, those two cases were “benevolent” decisions – not “fraternal” decisions – and they certainly weren’t overruled. Instead, the Elks case and Baraca case were cited for the proposition that, under §70.11(4), “it was held that any use of the property other than for benevolent or charitable purposes or any substantial part of it made the property subject to taxation.” That is, use of property for other than exempt use makes it taxable. (See, also, Kickers of Wisconsin, Inc., v. City of Milwaukee, 197 Wis. 2d 675, 541 N.W.2d 193 (Ct. App. 1995): use of property for recreational soccer is not exempt under §70.11(4)).
- (6) **Rogers Memorial Sanitarium v. Town of Summit**, 228 Wis. 507, 279 N.W. 623 (WI S.Ct. 1938). Rogers Memorial Sanitarium, a nonprofit corporation, is not entitled to exemption under 70.11(4) as a “benevolent” association since most of the service it provides is to those who pay (i.e. 10,215 days of service provided at above cost; 4,080 days of service provided below cost;

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

- (7) **Order of Sisters of St. Joseph v. Town of Plover, 239 Wis. 278, 1 N.W.2d 172 (WI S.Ct. 1941)**. Nonprofit corporation operated by Roman Catholic sisterhood on a without pay, volunteer basis (except for medical services and two nurse positions) that operated a sanatorium as a hospital for TB patients. No private inurement. Non-paying patients accepted without pay. No one is rejected for inability to pay. 97 1/2% of hospital’s patients here are unable to pay and are subjects of charity. Corporation and use are “benevolent.” Exemption allowed.
- (8) **Prairie du Chien Sanitarium Co. v. City of Prairie du Chien, 242 Wis. 262, 7 N.W.2d 832 (WI S.Ct. 1943)**. Manual p. 21.7-7. Fact that articles of incorporation say organization is benevolent doesn’t control. If organization makes substantial profit, that tends to negate benevolence. Private inurement will destroy exemption. Tending toward benevolence, however, are: if organization receives and is dependent on donations; if organization takes those who apply regardless of ability to pay (or at least a fair number of charity cases); if organization members render services without compensation; and no private inurement. Because doctors in hospital at issue here used hospital as an adjunct to their private business, and hospital was used as much to advance the individual fortunes of the doctors as it was for charitable purposes – no exemption. Hospital isn’t “benevolent.”

- (9) **St. Vincent de Paul: Madison Particular Council of St. Vincent de Paul Society v. Dane County, 246 Wis. 208, 16 N.W.2d 811 (WI S.Ct. 1944).** Non-profit, religious and charitable organization, with parish affiliation, and with oversight by the Milw. Archdiocese of the Roman Catholic Church, and whose members are all members of Roman Catholic Church – none of whom receive any compensation for services rendered to organization (except president who acts as full-time manager gets a monthly salary). No private inurement. Organization’s purpose “is to furnish without cost necessities to poor persons who are unable to pay for them . . . .” (16 N.W.2d 811, 812). Organization is a non-profit, exempt owner that engages in “charity and religion” (16 N.W.2d 811, 813). Property used as “salvage bureau” where donated clothing and goods are received and “are distributed to the poor so far as there is demand therefor” (*id.* at 812). What isn’t distributed to poor is sold, with sale proceeds going to poor. But, unlike a run-of-the-mill “second-hand store”, in the case of St. Vincent de Paul, “[n]o person is required to pay for articles unless able, but if able to pay in part he is required to pay so far as able.” *Id.* at 811. Exempt, non-profit use. Organization doubly entitled to exemption under §70.11(4) as charitable (benevolent) and religious.
- (10) **The Eagles: Madison Aerie No. 623 Fraternal Order of Eagles, Inc. v. Madison, 275 Wis. 472, 82 N.W.2d 207 (WI S.Ct. 1957).** Nonprofit Eagles Club (fraternal society operating under the lodge system). Clubhouse facility has dining room, bar, bowling alley, meeting rooms, and halls. The dining area, bar, and bowling alley, and even the meeting rooms and halls, are, at times, used exclusively by only Eagles members and their guests, and at other times open to (and use is shared with) the public. When the public has rights to the shared use, and does so use the property for pay, that’s nonexempt use by the public (as opposed to exempt fraternal society) for pay (pecuniary profit). Court upheld taxing clubhouse on 50% basis under 1953 version of §70.11(8) (the taxed-in-part statute) so that the 50% shared use of the facility for pay by Eagles members and the public was taxed, while the 50% *exclusive* use by Eagles members for fraternal purposes (i.e. exempt purposes) was exempt. Under then-existing §70.11(8), use for “pecuniary profit” meant *nonexempt, taxable* use for purposes not directly included within the objects of the exempt organization for which use compensation was received or applied. *See* 275 Wis. 472, 473-474. Thus, to the extent the Eagles’ club started operating like a for-profit bar, restaurant, bowling alley and competed with those type businesses, it was taxed because ,

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

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

(b) **The Milw. Protestant Line of Cases**

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

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

a. **THE MILW. PROTESTANT MAJORITY**

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

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<sup>10</sup> Charity, as well as the provision of services on a “without-pay”, volunteer basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**b. THE MILW. PROTESTANT DISSENT**

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

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

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

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

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

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

- (1) The Home is used to care for the aged with varying degrees of physical infirmity and senility, without insistence upon compensation equal to or greater than the cost of the services rendered;
- (2) That type of care is charitable – it is humane consideration of others and relieves the public of a burden;
- (3) The Home did not turn people out nor deny admittance to those unable to pay.
- (4) Even though there was an entrance fee and an assignment of all one’s property in return for life care, the financial contributions made by a substantial number of residents of the Home didn’t equal the cost of the service that was rendered;
- (5) There was no private inurement of the Home’s profit to any officer or director – indeed, the Home consistently operated at a loss. *Id.* at 307-308.

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

- (1) Applicants to the Addition aren’t accepted unless they pay, in full, a sizeable founder’s fee and give assurance of their ability to continue to pay monthly service charges (i.e. prescreening for wealth and to weed out the less fortunate);
- (2) Even if the Addition were to adopt a “no-kick-out” policy

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

- (3) The size of a resident's apartment and facilities included aren't determined primarily by the resident's needs but by the amount of the founder's fee he paid;
- (4) Monthly service charges and fees, likewise, aren't primarily determined by a resident's needs but rather the services rendered;
- (5) Residents in the Addition who need medical or special nursing care must pay for that on their own;
- (6) If a resident in the Addition leaves before 3 years, he'll only get part of his founder's fee back;
- (7) If a resident doesn't pay monthly service charges, he can be evicted and liable for costs – including \$1,000 in liquidated damages;
- (8) The Addition residents are not elderly or objects of charity but are instead, very like those residents in private, for profit, nonexempt retirement homes where the residents pay for the service they get;
- (9) Financially-strapped elderly who can't afford to live in MPHA's Bradford Terrace Addition and who are stuck in their own homes have to pay each of the tax bill on their own home plus Bradford Terrace's share of taxes. Id. at 308-310.

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

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

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

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

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

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

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<sup>15</sup> “Mendicant” means needy or begging.

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

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

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

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

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

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

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

#### **G. Deutsches Supports St. Joe’s Line**

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

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

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

#### **H. Certain Other Words in 70.11(4)**

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

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

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

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

### **III. WHAT ARE THE PROBLEMS WITH CURRENT LAW?**

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

#### **1. Two Contradictory Lines of Cases Defining “Benevolent”**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Assessors (and courts) need clear statutory language which articulates legislative intent. To apply law uniformly, precise and objective standards must be applied.

No better example of the lack of clarity can be found than in section 70.11(4), the umbrella statute for benevolent . . . organizations. No clear definition of [benevolent is] found in the statutes.

Case law in this area has likewise not helped the assessor.”

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

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

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

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

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

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

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

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

## 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.<sup>18</sup>

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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<sup>18</sup> 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 Government-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. DEMOGRAPHICS SHOW THAT A SOLUTION IS NEEDED NOW

- A. **WHEDA.** 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. See 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, “Second Annual Property Tax Issues for the New Millenium: Senior Housing.” 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, Milwaukee Journal Sentinel 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. See 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. See, 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 1/2 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](http://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.<sup>19</sup> 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 Millennium, 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, 1997 Act 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.<sup>20</sup> But, heretofore, none of those efforts ever recognized the two, co-existing, contradictory lines of Supreme Court

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<sup>19</sup> “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.”

<sup>20</sup> “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<sup>21</sup>:** 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

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<sup>21</sup> 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 a 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 1991 Act 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 15<sup>th</sup> 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. Creation of §70.11(4c)**

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<sup>22</sup>, 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

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<sup>22</sup> 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 charity 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](http://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.  $383 \div 51,329 = 0.7\%$  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 actually operate in such a manner, the entity need only be designed 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 Milw. Protestant Line, 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 Milw. Protestant Line. 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.  $(20+20+40) \div (40+40+40) = 80 \div 120 = 67\%$ .

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.<sup>23</sup>

“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<sup>24</sup>, 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

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<sup>23</sup> 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.

<sup>24</sup> 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.<sup>25</sup> 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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<sup>25</sup> 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 1/2 of all residents to pay admission or endowment fee was nonetheless exempt because other 1/2 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<sup>26</sup>**

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

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<sup>26</sup> 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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