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3 FUTURE MADISON EASTPOINTE, INC.,  
4 et al.,

**COPY**

5 Plaintiffs,

HEARING ON MOTIONS  
FOR SUMMARY JUDGMENT

6 v.

Case Nos. 07-CV-1129  
& 07-CV-1130

7 CITY OF MADISON,

8 Defendant.

9 =====  
10 WHPC-MMM, LLC,

11 Plaintiff,

HEARING ON MOTIONS  
FOR SUMMARY JUDGMENT

12 v.

Case No. 07-CV-1817

13 CITY OF MADISON,

14 Defendant.

15 =====  
16 TRANSCRIPT OF PROCEEDINGS held in the above-entitled  
17 matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit  
18 Judge, at the Dane County Courthouse, in the City of Madison,  
19 Wisconsin, on the 26th day of September, 2008, commencing  
20 at 1:15 o'clock p.m.

21 PRESIDING: HONORABLE MICHAEL N. NOWAKOWSKI  
22 Circuit Judge

23 APPEARANCES:

24 GREGORY C. COLLINS, Attorney at Law,  
25 Axley Brynelson, LLP, 2 East Mifflin Street,  
Suite 200, P.O. Box 1767, Madison, Wisconsin,  
appeared on behalf of the plaintiffs;

LARRY W. O'BRIEN and B. ANDREW JONES, Assistant  
City Attorneys, Madison City Attorney's Office,  
210 Martin Luther King, Jr. Blvd., #401, Madison,  
Wisconsin, appeared on behalf of the defendants.



1 fact that you have more motions pending than Mr. O'Brien,  
2 I'll let you go first --

3 MR. COLLINS: Thank you, your Honor.

4 THE COURT: -- if there's anything you want to  
5 add to the arguments that have already been made in writing.  
6 And I will tell you that I've had a chance to review the  
7 briefs that have been submitted, and I think I understand  
8 the positions that you're taking. But if there is something  
9 more that you'd like to argue today, I would be happy to  
10 entertain that.

11 MR. COLLINS: I just have a couple of items I'd  
12 just like to clarify for the Court. With respect to the  
13 motions before the Court, to the extent that there are  
14 factual distinctions between the Future Madison Eastpointe,  
15 Future Madison Wexford case and the WHPC-MMM, LLC case, I  
16 would ask that those be considered separately. The main  
17 issue that I see that are distinct between those two  
18 entities has to do with the legal structure, one are  
19 corporations on Future Madison versus the LLC arrangement  
20 with WHPC-MMM, LLC.

21 With respect to the preamble of the statute, as  
22 we all know when construing the statute the primary purpose  
23 is to give the legislative intent, and with respect to the  
24 preamble, if the language is unambiguous, you simply read  
25 what the statute says. The City of Madison with respect to

1 the leasing part of the property has discussed in its brief  
2 that there may be some ambiguity associated with that  
3 particular provision, and our view is there is no ambiguity.  
4 However, assume for the moment that there is ambiguity in  
5 that language. Then, according to case law, it is  
6 appropriate to examine the legislative history in order to  
7 understand both the legislators' purpose for enacting the  
8 statute and the intent as to the statute's meaning. When  
9 you look at the legislative history in connection with the  
10 Wisconsin Act 327, that legislative history which was cited  
11 in the *Columbus Park* decision stated that the bill would  
12 allow a person who owns the property which is exempt under  
13 711 to lease a part of that property without changing the  
14 tax exempt status of the property if the lessor used all of  
15 the rental income for maintenance construction, at  
16 retirement or both, or if the lessee would be exempt from  
17 taxation under Chapter 70 of the statutes.

18 So, we believe that whether the conclusion is  
19 that the language is unambiguous or that it is ambiguous,  
20 the legislative history supports our view that in connection  
21 with a benevolent organization like the plaintiffs that  
22 lease all of their property as opposed to part of their  
23 property, the rent use condition does not apply.

24 Second, the defendants also argue that the  
25 *Deutsches Land* case stated that part of the property does

1 not simply mean a geographic portion but could be a duration  
2 of time, and that is correct. However, in the present case,  
3 the plaintiffs lease all of their property all of the time.  
4 There is no part that applies to any of the plaintiffs with  
5 respect to the leasing of their particular properties.

6 With respect to the uniformity clause, it is  
7 our view that under the City's argument, I don't know when  
8 the plaintiffs could ever bring a uniformity claim. The  
9 City would have this Court hold that even though the  
10 plaintiffs are being treated differently with respect to how  
11 the City examines whether or not an organization is exempt  
12 from property taxes, we are unable or should be precluded  
13 from making that argument. In our view, if the City is  
14 denying the property tax exemption based upon the rent use  
15 condition, then we are not being treated the same as all  
16 other benevolent organizations that lease all of their  
17 residential housing.

18 In conclusion, we believe that the City is  
19 taking a strict but not a reasonable interpretation of the  
20 statutes. They want the Court to examine the preamble and  
21 section 70.11 sub (4) each in a vacuum without examining the  
22 relationship between those two statutes, the established  
23 case law and the legislative history. We believe that the  
24 proper approach is for this Court to review the statutes in  
25 their totality, to consider the relevant case law, as well

1 as the legislative history.

2           If the City's interpretation of the rent use  
3 condition is correct, then organizations like the plaintiffs  
4 can never achieve property tax exemption status because  
5 their entire source of revenue is the leasehold income. And  
6 I think it's important to note that the Court of Appeals in  
7 *Columbus Park* when addressing the purpose of section 70.11  
8 sub (4) said the purpose of the statute is the promotion of  
9 charitable activities and is defeated only where a tax  
10 exempt organization is permitted to earn a profit on its  
11 properties and uses the property for activities unrelated to  
12 its benevolent purposes. Where a tax exempt organization  
13 does not profit from its property in the aggregate and uses  
14 all the receipts for exempt purposes, the fact that an  
15 organization realizes some margin of income in leasing the  
16 properties and still retains its tax exempt status does not  
17 militate against the objectives underlying the statute but,  
18 rather, upholds them. What the plaintiffs are doing is  
19 consistent with what the Court of Appeals in *Columbus Park*  
20 stated.

21           Finally, Justice Abrahamson in her dissent in  
22 the Supreme Court case of *Columbus Park*, which addressed the  
23 lessee identity issue, said an exemption should not be  
24 construed so narrowly as to defeat the legislative purpose.  
25 It is our belief that the City interpretation creates the

1 illogical result of discouraging benevolent associations  
2 created to provide low income housing from providing the low  
3 income housing. And it is for the reasons stated in the  
4 briefs and here that we believe our motions for summary  
5 judgment should be granted.

6 THE COURT: Thank you.

7 Mr. O'Brien?

8 MR. O'BRIEN: The City's filed at least four  
9 briefs. With all due respect to Mr. Collins, I didn't hear  
10 anything that we have not addressed in those briefs but will  
11 offer to try to answer any questions that you may have had  
12 concerning those matters. Beyond that, I see no point in  
13 repetition.

14 THE COURT: Thank you, Mr. O'Brien.

15 As I indicated, what is before me are competing  
16 motions for summary judgment with respect to the properties  
17 of Future Madison Eastpointe and Wexford, and the  
18 plaintiffs' motion for summary judgment in the WHPC-MMM, LLC  
19 case. That is a mouthful. But the analytic standard by  
20 which these kinds of motions are to be considered has been  
21 so often stated and is so well-understood that I need not  
22 repeat it here today. Suffice it to say that the parties  
23 are in agreement that there are no material facts in dispute  
24 and that solely legal issues are presented. These cases  
25 are, therefore, appropriate for resolution by summary

1 judgment.

2           The question at issue is whether the property  
3 owners have met their burden of showing that they are  
4 entitled to a real estate property tax exemption under  
5 section 70.11(4). It is clear that each of the property  
6 owner plaintiffs qualify as benevolent associations, that  
7 each owns and exclusively uses the property at issue here  
8 and that each uses its property for exempt purposes, and the  
9 City does not argue otherwise.

10           What the City does contend is that none of the  
11 plaintiffs meets the statutory requirements that all of the  
12 leasehold income be used, "for maintenance of the leased  
13 property or construction debt retirement of the leased  
14 property, or both." The City further contends that even if  
15 the plaintiffs could be deemed to meet the "rent use"  
16 requirement, they can only exempt 10 acres of land and that  
17 these plaintiffs each exceed that.

18           The plaintiffs argue preliminarily, and they  
19 repeat that argument on the record here today, that the rent  
20 use requirement is inapplicable to them because the statute  
21 applies only if they lease a part of the property. Since  
22 all of the apartments in their buildings are rented, they  
23 contend that all of their property is leased, not just a  
24 part, and thus, the preamble rent use requirement language  
25 doesn't apply to them.

1                   This contention is easily addressed. It is  
2 unnecessary to resolve the parties' competing legal  
3 arguments concerning the statutory language or history or  
4 case law because it is undisputed as a factual matter that  
5 none of the plaintiffs lease all of their property to low  
6 income residents or to others. The residents rent an  
7 apartment in a multiunit building. They do not rent the  
8 basement, the hallways, parking facilities or the yard.  
9 What they lease, even taken in the aggregate of all of the  
10 tenants, is precisely what the statute applies to, "a part  
11 of the property."

12                   Had the Legislature intended to make the rent  
13 use requirement inapplicable to the rental of residential  
14 housing, they easily could have done so when it amended the  
15 preamble to make the lessee identity requirement  
16 inapplicable to residential housing. That they did not do  
17 so at such a recent time in the past is indicative of an  
18 intent that the rent use requirement still apply to  
19 properties like those of the plaintiffs.

20                   The more central question is whether the  
21 plaintiffs have shown that they have satisfied the rent use  
22 requirement. The answer comes from a proper interpretation  
23 of the phrases "maintenance of the leased property" and  
24 "construction debt retirement of the leased property."  
25 Interpretation of these phrases is governed by long

1 established principles. Exemption statutes are to be  
2 strictly but reasonably construed, and any ambiguity is to  
3 be resolved in favor of taxation and against exemption. The  
4 plaintiffs bear the burden of proving that they and their  
5 circumstances fall within the exemption that they claim.

6 I conclude as a matter of law that none of the  
7 plaintiffs has met the burden of proof, and thus, none of  
8 them is eligible for an exemption under section 70.11(4).

9 I reach this conclusion for several reasons:

10 First, at the very least the statute is  
11 ambiguous. Assuming without deciding that the meaning that  
12 the plaintiffs assign to the word "maintenance" is  
13 reasonable, construing maintenance to include only expenses  
14 for the physical upkeep of the premises is clearly  
15 reasonable and is consistent with the plain and common  
16 meaning of the word maintenance in relation to property.  
17 Thus, on the basis of simply applying the principles of  
18 statutory construction concerning tax exemption statutes,  
19 the plaintiffs lose.

20 Second, the *Wisconsin Property Assessment*  
21 *Manual* developed by the Wisconsin Department of Revenue,  
22 which by law is to guide assessors in evaluating claims of  
23 exemptions as well as other assessment matters, provides a  
24 definition of maintenance from a dictionary, and I quote,  
25 "the labor of keeping something (as buildings or equipment)

1 in a state of repair or efficiency." This is a strong  
2 guidance that maintenance does not include the kind of  
3 expenses that the plaintiffs have claimed are within the  
4 concept. Among those the plaintiffs claim that the manual  
5 would clearly not cover are these, and for Future Madison  
6 and its two properties, advertising, legal expenses,  
7 security deposit interest, rental promotions, audit  
8 expenses, seminars and training, cable TV, Fidelity bond,  
9 credit check expenses, resident activities, property  
10 insurance.

11 For WHPC-MMM, LLC, among those that they have  
12 claimed as falling within the concept of maintenance that  
13 would not be a part of the definition provided by the manual  
14 are conventions and meetings, management consultants,  
15 advertising/marketing, credit card expense, legal expenses,  
16 audit expenses, bookkeeping, bad debt expenses, property and  
17 liability insurance, and profit.

18 It's unnecessary to determine whether each and  
19 every one of the ways the plaintiffs have used leasehold  
20 income is maintenance under the definition provided by the  
21 manual, and a number of others that I have not specifically  
22 mentioned are certainly questionable, but it's unnecessary  
23 to assess each and every one of them because the plaintiffs  
24 themselves concede that they have used leasehold income for  
25 these purposes which clearly are not maintenance, and the

1 statute requires that leasehold income must all be used for  
2 maintenance and/or construction debt.

3 Third, the plaintiffs' argument that  
4 maintenance should be broadly construed to include all of  
5 the operational costs of rental property is not only  
6 violative of the statutory construction principles cited  
7 earlier, it is contrary to the plain meaning of the  
8 statutory language chosen by the Legislature.

9 It is clear the Legislature intended to limit  
10 the permitted uses that leasehold income could be used for  
11 if a property owner wanted to obtain an exemption. If its  
12 intent had been, as the plaintiffs argue, to allow leasehold  
13 income to be used for any usual and customary operating  
14 expense of rental property, it would not have described two  
15 distinct subcategories of that total operating expense  
16 universe as the only allowable ones. This clear intent to  
17 limit what leasehold income can be spent on if one wishes to  
18 obtain an exemption also defeats the plaintiffs' claim that  
19 a narrow view of the word maintenance would be absurd  
20 because it would mean property owners would have to have  
21 some other source of income to cover the other operating --  
22 to cover the other operational expenses or would experience  
23 a financial operating loss. This is not an absurd  
24 construction, it is precisely what the Legislature intended  
25 when it chose to limit what leasehold income could be used

1 for to something less than the total operating expenses.  
2 The plaintiffs' recourse is not to ask the Court to ignore  
3 this intent, it is to seek legislative amendment.

4 Because it is undisputed that the plaintiffs  
5 have used leasehold income for expenses that do not  
6 constitute maintenance of the leased property and which the  
7 plaintiffs do not contend constitute construction debt  
8 retirement, it is unnecessary to address the parties'  
9 competing contentions over the meaning of construction debt.  
10 Since no exemption is available to any of the plaintiffs, it  
11 is also unnecessary to address the parties' competing  
12 arguments regarding the 10-acre limitation found in section  
13 70.11(4).

14 Finally, the plaintiffs argue that they should  
15 be granted exemptions because the City has violated the  
16 uniformity clause of our state constitution by failing to  
17 challenge the rent use compliance of all 588 properties in  
18 the City that are presently classified as exempt under  
19 section 70.11(4). The plaintiffs bear the heavy burden of  
20 demonstrating beyond a reasonable doubt that the City has  
21 acted unconstitutionally. They fall woefully short of  
22 satisfying that burden.

23 There is no evidence in the record before me  
24 of a single instance, much less 500 instances, where another  
25 benevolent association has a property tax exemption under

1 section 70.11(4) but is in violation of the rent use  
2 requirement. More fundamentally, the plaintiffs have not  
3 cited any case that holds that a uniformity clause violation  
4 can arise from purely different administrative treatment of  
5 two property owners where the difference in treatment is  
6 rationally related to practical realities as is true here.

7 Moreover, all parties agree that no appellate  
8 case has previously interpreted the preamble language of the  
9 rent use requirement. They all agree that these cases are,  
10 therefore, test cases. The plaintiffs have not cited any  
11 case where a court has prohibited a municipality from  
12 pursuing a test case on uniformity clause grounds and  
13 required the municipality to challenge every holder of an  
14 exemption if it wishes to challenge any.

15 In response to Mr. Collins' concern expressed  
16 on the record here today, if it were to turn out that in the  
17 year 2009 and 2010 that the City continued to simply deny  
18 the plaintiffs the property tax exemption that they have  
19 been shown not to be entitled to and not to challenge any  
20 other property owner, a uniformity clause challenge might  
21 then become ripe and available, assuming that there was also  
22 proof that in fact there is some other property that is  
23 exempt under the same statutory provision and where the  
24 owner is leasing it as apartments and is not in compliance  
25 with the rent use limitation found in the statute. But for

1 purposes of right now, this day and for these particular  
2 years in question, there is no violation of the uniformity  
3 clause.

4 Therefore, each of the assessments for each of  
5 the years 2006 and 2007 will be affirmed, and each of these  
6 cases will be dismissed, which requires that we have two  
7 separate orders because although there are three cases, two  
8 of them were consolidated and we need simply an order for  
9 that case and then an order for the WHPC-MMM, LLC case.

10 And, Mr. O'Brien, if you'll prepare orders  
11 consistent with my decision, and you may simply preface  
12 those orders by saying for the reasons noted on the record,  
13 the cases are dismissed. But nonetheless, send copies of  
14 those to Mr. Collins when you submit them to me. Provide  
15 him with a period of seven days within which to object to  
16 the form.

17 MR. O'BRIEN: I'm sure Mr. Jones will be happy  
18 to do that, sir.

19 MR. JONES: Yes, your Honor.

20 THE COURT: One of the luxuries of being the  
21 new kid on the block, I take it?

22 MR. O'BRIEN: Or perhaps the old guy on the  
23 block.

24 THE COURT: All right. I think that's all that  
25 we can and need to do today, so we'll be adjourned.

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MR. O'BRIEN: Your Honor, are we off the  
record?

THE COURT: We are.  
(Which concluded these proceedings)  
(1:43 o'clock p.m.)

