

CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CGB
266-4511

Date: October 22, 2008

MEMORANDUM

TO: Mayor Dave Cieslewicz

FROM: Michael P. May, City Attorney

RE: Tax Exemption for Low Income Housing Providers: Impact of Court Decision in *Future Madison Eastpointe, et al. v. City of Madison*

On September 26, 2008, Judge Michael Nowakowski of the Dane County Circuit Court rendered his decision in *Future Madison Eastpointe and WHPC v. City of Madison*, Case No. 07-CV-1129, etc. The Court ruled in the City's favor, rejecting challenges by these housing providers to the determination made by the City Assessor that the property held by the housing providers was subject to the property tax. This memorandum will summarize the background and effect of the *Future Madison* decision.

Background of the *Future Madison* Decision

There were several issues in these combined cases. Surprisingly, the judge ruled on a point that we did not believe the court would reach. The Court decided the cases on the question of the proper use of leasehold income in order to maintain a property tax exemption (the "rent use" issue).

The court addressed language in Wis. Stat. §70.11 (intro.) which requires that in order to qualify for property tax exemption, on property that is leased, the lessor must use "all of the leasehold income for maintenance of the leased property or construction debt retirement of the leased property, or both"

You will recall that there have been a number of discussions, both within the City and with outside housing providers, regarding the application of this statute. In a memorandum I originally wrote to you on November 9, 2007, I suggested that the statute be interpreted as the court did in the *Future Madison* case. Following that memorandum and some meetings with housing providers, I provided you with a supplemental memorandum dated December 5, 2007, and accepted that there was at least an argument that the word "maintenance" might have a broader meaning than I had originally anticipated. Based on the second memorandum, the City determined not to disqualify any more housing providers under this provision of the statute, but to seek resolution through either existing litigation, or by requesting an opinion of the Department of Justice, or both. This also would give the housing providers time to seek

a legislative solution. Legislation has been proposed to clarify the law, and passed both houses of the Wisconsin Legislature at various points last session, but has not become law.

Subsequent to that time, our office did write to the Department of Justice. Our request for an opinion was referred to the Department of Revenue. We have had several further communications with the Chief Counsel of the Department of Revenue, and were expecting a determination from that Department when the *Future Madison* ruling came down.

The *Future Madison* decision may be appealed to the Court of Appeals. Any appeal must be taken by November 14, 2008.

Impact of the *Future Madison Eastpointe* Ruling

In his decision, Judge Nowakowski clearly ruled that the word "maintenance" in the statute does not extend beyond certain physical activities with respect to the property. The Judge explicitly rejected the arguments made by the housing providers that it was meant to cover any and all expenses to keep the property as a going concern. In short, the Judge accepted the definition that our office had originally suggested was the proper one. The Court rejected the alternative reading proposed to us by the housing providers, a proposal that had caused our office to advise against disqualification of more properties.

In one important aspect of the ruling, the Court rejected a defense raised by the property owners related to the uniformity clause in the Wisconsin Constitution. This clause requires that all property be taxed with uniformity. The property owners in the *Future Madison* case argued that other non-profit housing providers had claimed the tax exemption, and the City had not challenged their claims. By challenging the claims of *Future Madison* and WHPC, the City was violating the uniformity clause, argued the property owners.

The Court indicated that there was no showing of a violation of uniformity at this point. The Court cautioned the City, however, that if a significant time went by and there was still a disparity of treatment between similarly situated property owners, there might be a showing of the violation of the uniformity clause.

The Court did not reach other questions relating to tax exemption, questions on construction debt retirement, or a ten acre limitation on the amount of tax exempt property. These issues were raised in each case, but the Court did not reach them since it ruled on the "use of leasehold income" issue, which disposed of the cases.

Based upon the Court's ruling, the City has no choice but to begin to treat similarly situated property as directed in the *Future Madison* case. Because the ruling related directly to the use of leasehold income for maintenance, the City Assessor has started

gathering information on a number of properties who have claimed tax exemption in the past, but who may not qualify under the *Future Madison* ruling.

For the parties in the *Future Madison* case, they will be required to pay taxes on the assessed value of their property on the property tax bills which go out in December, 2008. Because the Court found the property did not qualify for tax exemption, the property owners do not qualify for the partial exemption for 10 acres. For other properties, the status of taxable or tax exempt has already been established for 2008. Thus, any change in tax status will be as of January 1, 2009, meaning that the *Future Madison* case will first affect the property tax bills issued in December of 2009, payable in January 2010.

The ruling of the Dane County Circuit Court is binding on municipalities in Dane County. If the Department of Revenue were to issue guidance on this issue, or if the Court of Appeals were to decide the issue on appeal, the ruling would have statewide application.

If you have any further questions, please contact our office.

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MPM:pah

cc: ACA Larry O'Brien
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