

## MEMORANDUM

TO: Mayor Cieslewicz, Mark Hanson, Mario Mendoza, Ray Harmon, Mike May, Mike Kurth, Larry O'Brien and Anne Zellhoffer

FROM: Timothy J. Radelet

DATE: April 15, 2009

RE: Greentree/WHPC (Southridge) Property Tax Claims

I thought I would follow up the meeting we had last Monday with a memorandum that will summarize briefly the major points I made in my presentation during the meeting.

The City has a long tradition of strongly supporting nonprofit owned low-income housing, all of which has traditionally been property tax exempt. The existing and controlling case law (*Attic Angels* and *Columbus Park* appellate) clearly supports tax exemption. The City's nonprofit low-income housing providers do not understand why in recent years the City has repeatedly attempted to get this case law overruled when it is so clearly supportive of established City housing policies. Thankfully, these efforts have so far been unsuccessful, and the case law remains in place. I urge the City to step back from its efforts to tax low-income housing, and to simply abide by established law and allow tax exemption.

I suggest that one option you provide to the Common Council be to allow the Greentree and WHPC claims for recovery of unlawful tax based upon: (a) a re-review by City staff of the facts involved with each property; (b) current case law; and (c) a different, but very reasonable, interpretation of the statutes.

1. Rent Use Restriction. The memos to Common Council from the City Attorney that were distributed at the last Council meeting (Tabs 3 and 4 in the materials I handed out) state that one reason for denying exemption to both Greentree and Southridge is failure to comply with the "rent use restriction" stated in the first paragraph of Section 70.11. (Tab 2.) The *Future Madison* decision and Department of Revenue advisory letter of last fall provided definitions of some of the words used in the rent use restriction. These definitions are not inconsistent with property tax exemption for all existing nonprofit owned low-income housing projects.

Subsection 70.11(4) provides tax exemption for "Property owned and used exclusively by . . . benevolent associations . . ." So, a nonprofit must "use" its apartment building before it qualifies for exemption. A nonprofit can only "use" an apartment building by leasing the apartments. These leases are *prerequisites* that are essential to qualification for exemption.

The rent use restriction is applicable only to "property described in" Section 70.11. An apartment building is not "described in" Subsection 70.11(4) until it is leased. Therefore, the rent use restriction applies to an apartment building only after it is leased, and so the restriction applies only to subleases. The statutes provide a two step process. First, the building must qualify for exemption. Second, the rent use restriction is applied. The second step does not undo the first. Thus, Greentree Glen, Southridge Village, and all similar properties are entitled to exemption, without regard to how lease rent is applied, as long as the lease rent is used for benevolent purposes. This is consistent with controlling case law (*Columbus Park* appellate), and the *Future Madison* case and the Revenue letter. Use of Sublease rent is restricted per the rent use restriction.

I also reiterate my firm belief that the rent use restriction applies to property owned by housing authorities, unless the leased apartments owned by housing authorities qualify for exemption along with nonprofit housing under Subsection 70.11(4) as explained above. The rent use restriction applies to “property described in” Section 70.11, and property of housing authorities is described in Subsection 70.11(18). (Tabs 2 and 11.)

I recognize that there is a presumption in the statutes that property is taxable. However, tax statutes are not perfectly written and they require reasonable interpretation. The above rationale is a reasonable interpretation of the statutes that results in tax exemption. The law also requires the statutes to be interpreted in a way that does not achieve absurd results. I think most people would agree that interpreting laws in a way that results in allowing nonprofits to collect all of the rent they want, but prohibits them from using it to pay all apartment building operating expenses is absurd. This is the result of the City’s application of the rent use restriction. Further, as nonprofits, where does the City suggest funds will come from to pay these expenses?

2. 10/30 Acre Rule. The City Attorney’s memo to the Council on Southridge (Tab 3) also states exemption should be denied for failure to comply with the “10 acre rule” stated in Subsection 70.11(4). (Tab 2, page 2.) Basically, the concept is that because more than 10 acres of land in Madison is owned by various companies affiliated with Wisconsin Housing Preservation Corp., the 10 acre rule is violated and tax must be paid on the acreage in excess of 10. No single company affiliated with WHPC owns more than 10 acres.

In 2005, in the *Attic Angel’s* case (Tab 5), the Dane County Circuit Court ruled against the City on this approach and reconfirmed existing Wisconsin case law by saying that the 10 acre rule is calculated on the basis of each company that owns title to land, and not on the basis of the underlying affiliations of those companies. I recommend that the City follow this decision and drop the 10 acre rule as a reason for denial tax exemption to WHPC.

I pointed out that Subsection 70.11(4) establishes the same exact rule for property owned by religious organizations, except that the 10 acres is raised to 30 acres for them. Thus, if the City continues to ignore *Attic Angels*, in order to uniformly tax the City will be required to tax all of the land in Madison that is owned directly or indirectly by the Catholic Church, to the extent the aggregate exceeds 30 acres. That would be absurd.

3. Benevolence. One of the reasons cited by the City Attorney in his memo to Common Council for denying property tax exemption for Greentree (Tab 4) is that Greentree is not “benevolent” because it charges “rent in excess of HUD established percentages”. This is an absolute mistake of fact. There are no HUD established percentages applicable to the Greentree project.

To the contrary, Greentree is under contract with the Madison Community Development Authority and the CDA sets the percentage of income that Greentree can charge as rent for 20% of its apartments. (Tab 6.) Greentree fully complies with these requirements and goes way beyond them. 98% of Greentree’s residents are of low-income, as defined by HUD, and 41% of them are of very low-income. 35% of the residents pay less than 30% of their income as rent, and 73% pay less than 45%. The CDA requirement is 45%. (Tabs 9 and 10.)

Greentree also has a handful of residents who are of a slightly higher income, which advances it’s benevolent purpose of integrating households of various income levels within a single housing development. This is consistent with good public policy, the City’s public policy for inclusionary zoning, and Internal Revenue Service guidelines for 501(c)(3) public charities operating low-

income housing. (Tab 10.) It is also consistent with proposed state legislation which is being advanced by the City. (Tabs 13 and 14.)

In addition, the City Attorney's memo suggested that Greentree's rents are too high. WHEDA has established rent guidelines for low-income households are shown at shown at Tab 7. The Greentree rents are in all cases below the WHEDA guidelines.

Given the above, what is the basis for the City to be questioning the benevolence of Greentree? I urge the City to drop its position that Greentree is not entitled to property tax exemption because it is not "benevolent".

4. Greentree and WHPC Offers. Larry O'Brien expressed a concern at the Common Council meeting, arising out of the *Future Madison* case, that WHPC and Future Madison might sue the City based on a uniformity of taxation claim if the City does not tax all low-income housing as it did those organizations in 2006 and 2007. As stated by their attorney, Greg Collins, at our meeting, these organizations will waive any rights they may have to do so if the City will allow the Greentree and WHPC claims and exempt their projects and similar low-income housing in 2009. Future Madison did not file a claim for refund of 2008 taxes, so it cannot bring suit for refund of 2008 taxes.

Recognizing that the 90 day time for responding to the Greentree and WHPC claims expires before the end of April and that City staff and Common Council may need more time to consider these issues, both Greentree and WHPC are willing to extend the time for the City to respond to the claims by 30 days.

5. New Legislation. I reiterate the concern I expressed at our meeting about possible new state legislation. While I am deeply involved in the efforts at the Capitol to have new legislation adopted that will clarify these property tax exemption issues, I am not very optimistic that any such legislation will actually be adopted in 2009. The issues involved are complicated and, although almost one-third of the year has passed, most legislators have not yet focused on them. Therefore, I think the City should not count on relief coming any time soon from the Capitol on these issues and should seek to resolve the issues based on existing state law in a way that promotes public policy established by the Common Council.

6. Summary. I absolutely believe that the City has more than ample and strong bases for determining that Greentree, WHPC, Future Madison and all similar properties are entitled to full property tax exemption under current law. The City has the opportunity to change its course on these matters right now, and I urge the City to do so before disastrous consequences come to pass. Simply put, Madison's low-income tenants cannot afford to pay more rent for taxes, and the nonprofits that own the low-income housing cannot afford to pay the taxes otherwise.

I would be happy to discuss these matters with any of you, or meet with any of you, at any time. Please let me know if you have any questions or if I can provide you with any further information.

cc: Philip J. Schultz  
Daniel O'Connell  
Douglas Strub  
Greg Collins  
Henry Gempeler