Wisconsin Association of Homes and Services for the Aging, Inc.

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To: Interested Legislators

From: John Sauer, Executive Director
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Subject: Tax-Exempt Residential Housing Legislation -- "Rent Use" Revisions

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership association of 200 not-for-profit long-term care organizations. WAHSA member corporations own, operate and/or sponsor 183 not-for-profit nursing homes, of which 44 are county-owned and operated, 14 facilities for the developmentally disabled (FDD), 112 community-based residential facilities (CBRF), 83 residential care apartment complexes (RCAC), and 113 senior apartment complexes, as well as community service programs ranging from home care, hospice, Alzheimer's support and child and adult day care to Meals on Wheels. Our members employ over 38,000 dedicated staff who provide care and services to over 48,000 residents and tenants.

Background

There are two tests under Chapter 70, Wis. Stats., that residential housing providers must meet to be exempt from property taxation. Under s. 70.11 (4), property must be "owned and used exclusively by . . . benevolent associations, including benevolent nursing homes and retirement homes for the aged." This is referred to as the **benevolence test.** Under s.70.11, leased property may be exempt from property taxation "if the lessor uses all of the leasehold income (or rents) for maintenance of the leased property or construction debt retirement of the leased property, or both." This is referred to as the **rent use test.** If leasehold income/rent is used for any other purpose other than maintenance and/or construction debt retirement, that use is not in compliance with s. 70.11 and the leased part of the property may be subject to taxation.

The statute was amended in 1983 to include the **rent use** provision. But it was only within the last several years that some local assessors began to scrutinize the use of leasehold income/rent by residential housing providers. And three recent occurrences have raised the visibility of this issue.

1. On September 26, 2008, Dane County Circuit Court Judge Michael Nowakowski ruled in favor of the City of Madison's denial of a property tax exemption to two Madison low-income housing providers based on their use of the apartment rents their tenants had generated. In both instances, the rents were used by the lessors for purposes other than maintenance and/or construction debt retirement and the decision affirmed the City of Madison's assessment of property taxes on both low-income housing providers.

2. On January 9, 2009, the Madison City Assessor's Office sent a letter to **all residential housing providers** in Madison, requiring them to submit "any other documents detailing the specific use of your leasehold income" by February 20, 2009. The letter went to senior housing providers as well as to low-income housing providers (see: **www.wahsa.org/taxamend.pdf**)

3. The Department of Revenue (DOR) issued an October 23, 2008 opinion to the Madison City Attorney and an attorney representing 13 Madison low-income housing organizations which identified which specific expenses incurred by lessors would and would not meet the statutory meaning of "maintenance" and "construction debt retirement." That opinion also was sent to all municipal assessors and, as such, now serves as the legal guidance for assessors statewide. As a result, it is anticipated that local assessors throughout the State will begin reviewing whether residential housing providers are in compliance with the statutory **rent use test.** If they are found to be out of compliance, as was the case in the City of Madison, they will lose their property tax exemption (see: **www.wahsa.org/rentuse.pdf**).

2007 Senate Bill 403 attempted to address the **rent use** issue by expanding the ways that residential housing providers use their leasehold income. However, the expanded use of leasehold income under SB 403 only would have applied to low-income housing providers. Most senior housing is mixed-use housing and failed to meet the "low-income housing" definition under SB 403. Attempts to amend the bill to include senior housing failed. The bill passed the Senate on a 32-0 vote but pitting seniors against low-income tenants proved to be quite contentious in the Assembly, where the bill died without a vote. A similar provision was added to the budget repair bill; the Governor vetoed that provision.

WAHSA PROPOSAL: Eliminate the "rent use" test for all residential housing, which would include both low-income housing and senior housing. This proposal would mirror 2003 Wisconsin Act 195, the *Columbus Park* law (see: www.wahsa.org/taxamend.pdf).

Arguments in Support of the WAHSA Proposal

- **The "rent use" statute makes no sense.** There is virtually no policy justification for this provision. According to the 10/23/08 DOR opinion, "expenses that are associated with the entity's going concern would not qualify as 'maintenance.' " In other words, you are tax exempt as long as you are building the building and paying it off but you lose your tax exemption as soon as you begin to operate the building, if you are using your rents to meet operating expenses. Under this interpretation, a low-income housing provider who uses his rental income to pay the building's utilities would be subject to the loss of his property tax exemption. The same would apply to a senior housing provider who uses rental income to subsidize the rents of tenants no longer able to pay their rent or to purchase a van so that tenants can be transported to

their medical appointments. **If the DOR opinion is enforced by every assessor in this State, we believe there will be no tax-exempt residential housing in Wisconsin.**

- **The "rent use" threat is a reality.** Last session's SB 403 debate was based on a theoretical concern that local assessors might begin to scrutinize and enforce the **rent use test.** With the Dane County Circuit Court decision, the Madison Assessor's letters, and the DOR opinion, that theory is now a reality and all residential housing providers are fearful they will be unable to meet the **rent use test.**

- **A "rent use" solution that applies to <u>all</u> residential housing providers is the only consensus position.** Unlike 2007 SB 403, the WAHSA proposal would benefit <u>all</u> residential housing providers by permitting them to use their leasehold income/rent in any they see fit, **as long as they still can meet the statutory "benevolence test."** SB 403 denied that protection to most senior housing providers. If legislation similar to 2007 SB 403 is introduced in the 2009-11 session of the Legislature, senior housing providers and low-income housing providers once again will be forced into a fight neither wants. And neither can be certain of the outcome. How is that in the best interest of senior housing and low-income housing tenants?

- **This proposal only addresses "rent use:" it does not speak to benevolence.** Last session's debate, especially in the Assembly, focused more on who should be tax exempt than why. There has yet to be one policy argument in support of the **rent use test**; the debate has centered upon whether senior housing -- specifically, an undefined and unidentified "high end" senior housing -- should be tax exempt. That debate remains alive regardless of whether this **rent use test** is eliminated because senior housing providers still must meet the **benevolence test** to remain exempt from property taxation. Indeed, some senior housing providers have failed that test and today are paying property taxes. But should an 84-year old widow (the average age of a WAHSA senior housing apartment tenant is 83.6 years of age) who lives in a mixed-use senior housing complex and whose greatest fear is the greatest fear of most elderly -- the fear of outliving their resources -- be forced to pay property taxes because her facility uses part of her rent to provide transportation to her doctor's office or to subsidize the Medicaid loss of her campus nursing home?

WAHSA members would support such a SB 403-type rent-use provision <u>if</u> it is expanded to include both senior housing providers and low-income housing providers. The absurdity of the rent use statute is applicable to all residential housing providers and all residential housing providers face the loss of their tax exempt status if the rent use statute remains in effect.