



Douglas Pessefall

Just What the Doctored Ordered: **Wisconsin Supreme Court Orders Strong Prescription for Wisconsin Municipalities**

By: Douglas Pessefall

In a significant, unanimous and taxpayer-friendly decision filed on July 8, 2008, the Wisconsin Supreme Court reversed a Dane County Circuit Court decision and reduced by \$5 million the combined property tax assessments

of two Walgreens stores located in the City of Madison. The Court held that the property tax assessment of retail property, leased at above market rates, should be based on the market rates, not contract rates. The Court's decision has potential implications for any property owner or triple net lease tenant who enters into a build-to-suit arrangement (like Walgreens) or sale-leaseback transaction, or purchases property encumbered by leases with rents set above or below market.

The facts in the case were relatively straightforward and undisputed.

The two stores were developed following Walgreens' business model, pursuant to which Walgreens engages a developer to find prime retail sites at heavily traveled areas. The developer buys out existing businesses at selected sites, purchases the properties and builds or develops the properties with "super adequacies" such as drive-through windows, specially designed fiber optic systems and high ceilings. In turn, Walgreens enters into long-term leases with the developers at rents that are intended to amortize the costs and compensate the developers for financing, land acquisition, demolition, construction, development and financing costs, and a profit margin. The net results are rents that all parties conceded were "higher than normal" so as to enable the developers to recover their costs and allow Walgreens to keep capital available for its core business purposes.

In this case, the City applied the income approach to valuation, using the higher-than-normal contract rents in order to determine the assessments. In so doing, the City contended that the leases ran with the land and that any

buyer of the properties would realize the higher-than-normal contract rents. For its part, Walgreens appealed the assessments and argued that the City's assessments improperly captured business value and that the properties should be assessed at lower market rents.

In rejecting the City's arguments, however, the Court noted that Wisconsin law, consistent with the nationally recognized principle that a "lease never increases the market value of real property," prohibited the assessment of real property in excess of its fair market value. Specifically, the Court stated that a given property's fair market value assessment must be made in terms of the ordinary conditions of its sale and exclude any value attributable to creative or unusual financing. Moreover, the Court restated the general rule gleaned from several of its prior decisions that market rents (arm's-length rents paid by similar properties in the marketplace), and not contract rents, must be used by assessors to determine the fair market value of a property for tax assessment purposes in Wisconsin. While the Court acknowledged that a limited exception to the general rule exists where contract rents are below market, in which case the lower contract rents must be used to determine the fair market value of a property, the Court held that the same was not true of higher contract rents because a higher contract rent is not typical of normal financing and payment arrangements. To hold otherwise, the Court said, would be to allow property assessments to become business assessments.

For more information on the Wisconsin property tax assessment process, contact Doug Pessefall (414-978-5534 or dpeffall@whdlaw.com), Joe Pickart (414-978-5541 or jpickart@whdlaw.com) or another member of Whyte Hirschboeck Dudek's State and Local Tax Team. ■



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Columbus Park Tax Exemption Issues Remain Unresolved

By: Daniel Gentges



Daniel Gentges

In 2003, the Wisconsin Supreme Court ruled, in *Columbus Park Housing Association v. Kenosha*, that nonprofit organizations renting low-income housing units were not exempt from real estate taxes under section 70.11(4) of the Wisconsin Statutes, unless their tenants would themselves be exempt from taxation if they owned the units. Prior to *Columbus Park*, the consensus view of section 70.11(4) was that its exemption from real estate taxes for property owned by churches, or religious, educational or benevolent associations extended to benevolent organizations that rented property to low-income families who received federal rent subsidies.

The Wisconsin legislature adopted 2003 Wisconsin Act 195 in response to *Columbus Park*, and Governor Jim Doyle signed Act 195 into law in April 2004. Act 195 reversed *Columbus Park* and prevented local government taxing units from collecting real estate taxes from nonprofit owners of low-income housing. Act 195 did not, however, address the introductory provisions of section 70.11, which require all leasing income derived from a low-income project be applied to maintenance of the leased property, retirement of construction debt or both. Since many benevolent organizations use leasehold income from their low-income rental projects to subsidize care provided to others served by those organizations, to refinance debt, to offset Medicaid losses and to purchase new properties for low-income housing development, this “rent use” condition contained in section 70.11 threatened to undermine the purpose of Act 195 and the very purpose of those benevolent organizations.

Separately, in *Attic Angel Prairie Point, Inc. v. Madison*, a Dane County judge ruled in 2005 that the provision of senior housing was not a benevolent activity in and of itself. The *Attic Angel* decision called into question the property-tax-exempt status of numerous senior housing projects around Wisconsin.

In response, the Wisconsin legislature attempted throughout 2006 and 2007 to clarify both the “rent use” issue and the status of senior housing projects as benevolent uses. In June of this year, the Wisconsin legislature’s

joint finance committee proposed a substitute amendment to the Wisconsin Senate’s budget bill that attempted to address at least partially both issues.

The joint finance committee’s substitute amendment specified that the property tax exemption for benevolent organizations under section 70.11(4) includes organizations that own low-income residential housing as defined in the applicable portions of the Internal Revenue Service’s Revenue Procedure 96-32, and excluded such low-income residential housing from the “rent use” condition contained in the introductory language of section 70.11 (the Wisconsin Assembly proposed analogous amendment language for the budget bill in July of this year).

Revenue Procedure 96-32 provides in relevant part that a project qualifies for low-income housing status if (1) at least 75 percent of the project units are occupied by low-income residents (defined as persons having income levels at or below 80 percent of an area’s median income), and (2) either (a) at least 20 percent of the project units are occupied by very low-income residents (defined as persons having income levels at or below 50 percent of an area’s median income) or (b) 40 percent or more of the project units are occupied by residents whose incomes do not exceed 120 percent of the area’s very low-income limit. Revenue Procedure 96-32 also permits up to 25 percent of a project’s units to be made available at market rental rates to persons who have incomes in excess of the low-income limit.

Unfortunately, both houses of the Wisconsin legislature deleted the joint finance committee’s proposed clarifications to section 70.11 from their biannual budget packages for 2007-09, and the proposed clarifications to section 70.11 have thus far not been revisited during the legislature’s current budget impasse. As a result, the property tax exemption uncertainty facing benevolent organizations that own low-income housing, following *Columbus Park*, Act 195 and the Dane County Circuit Court’s *Attic Angel* decision, will continue for the foreseeable future. Local government taxing units can be expected to probe this uncertainty aggressively to meet their budgeting needs.

For more information, please contact Dan Gentges (414-978-5508 or dgentges@whdlaw.com) or your WHD attorney. ■

Real Estate Team Cited for Excellence in Chambers USA 2008 Report



Brad Dallet



Dan Gentges



Nathaniel Hoffman



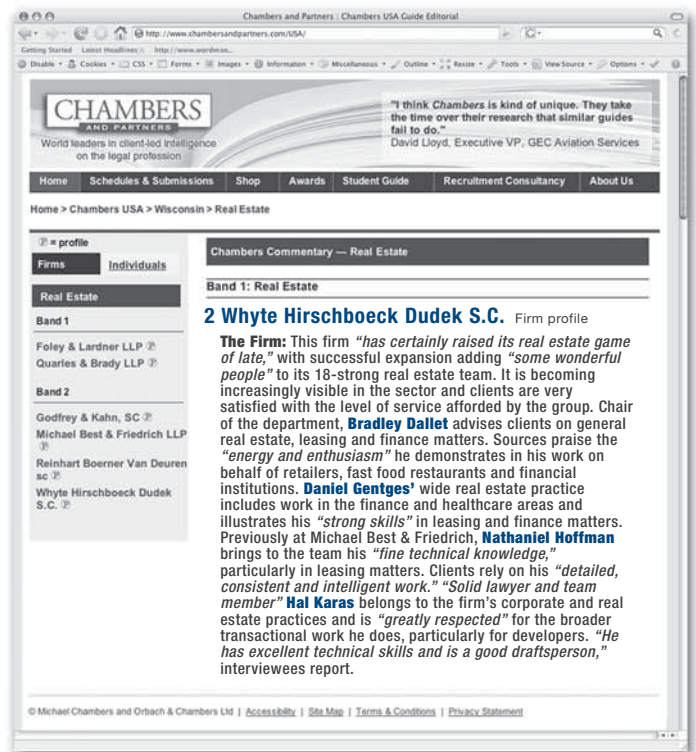
Hal Karas

Whyte Hirschboeck Dudek S.C. is pleased to announce that it is one of 14 law firms in Wisconsin to be included in a recent ranking of U.S. law firms by Chambers and Partners. Chambers publishes the prestigious Chambers USA guide, used by businesses and other organizations in determining the best possible legal representation.

Not only was the Real Estate Team cited for excellence, but real estate attorneys Brad Dallet, Nathaniel Hoffman, Hal Karas and Dan Gentges each earned individual recognition in the Chambers USA guide, based upon their reputations among clients and peers.

Chambers is world renowned for its independent reviews of top law firms and top lawyers in 175 countries. Since 1969, Chambers has been publishing guides derived from extensive peer and client-based research. Law firms included in any Chambers guide are considered to be leaders in their field.

Chambers noted that Whyte Hirschboeck Dudek has increased the visibility of its Real Estate group by adding attorneys with strong skills and fine technical knowledge. Survey participants praised Dallet for the “energy and enthusiasm” he demonstrates in his work on behalf of retailers, fast food restaurants and financial institutions. Gentges illustrates “strong skills” in leasing and finance matters, while Hoffman brings “fine technical knowledge” and “detailed, consistent and intelligent work” to the team and its clients. Karas is “greatly respected” for the broader transactional work he does, particularly for developers. “He has excellent technical skills and is a good draftsman,” interviewees reported. ■



WHD Clients Recognized in The Business Journal Real Estate Awards

The following clients of Whyte Hirschboeck Dudek's Real Estate Team were recently recognized at the annual Business Journal of Greater Milwaukee Real Estate Awards presentation:

- Best New Development – Retail: General Capital Group (Winner) for *Centennial Place*.
- Best Renovation – Residential: Tarantino Co. LLC (Winner) for *St. Catherine Commons*.
- Best Public/Private Partnership: Direct Development (Winner) for *UW-Milwaukee RiverView Residential Hall*.
- Best Public/Private Partnership: Endeavour Development LLC (Finalist) for *The Beerline Crossing*.

All of these projects will make a significant contribution to southeastern Wisconsin and are a tribute to the real estate development community as a whole. We are proud to have had the opportunity to work with these fine developers on these outstanding real estate projects. Congratulations on your accomplishments! ■

Jacque Joins WHD Real Estate Team



Renee Jacque

The Real Estate Team at Whyte Hirschboeck Dudek S.C. is happy to announce the addition of paralegal Renee Jacque. With over 13 years of experience in real estate, finance and corporate transactions, Renee will add tremendous support and value to the clients of WHD. Renee's hands-on, practical approach will assist WHD clients

throughout every phase of their projects.

Renee is from Port Washington, Wis., and has a bachelor's degree in Business Management from Cardinal Stritch University. Renee is also a member of the Paralegal Association of Wisconsin.

We are very excited to have Renee as part of our team, and look forward to utilizing her talents and capabilities to further your real estate needs. ■



Brad Dallet

Brad Dallet is the chair of Whyte Hirschboeck Dudek's Real Estate Practice Group, where he concentrates his practice in the area of general real estate law. Brad is experienced in representing developers, companies and investors in all aspects

of the development, purchase, sale and lease of commercial and residential real estate. For more information on these or other real estate issues, please contact:

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