

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 16

DANE COUNTY

ST. RAPHAEL'S CONGREGATION
404 East Main Street
Madison, WI 53703

Plaintiff,

Case No. 15CV1437

v.

CITY OF MADISON
a Wisconsin Municipal Corporation
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703

Defendant.

**AMICUS CURIAE BRIEF ON BEHALF OF THE FREEDOM FROM
RELIGION FOUNDATION**

The Freedom From Religion Foundation ("FFRF") submits this amicus curiae brief in support of summary judgment in favor of the City of Madison.

INTEREST OF AMICUS CURIAE

FFRF is a non-profit organization whose primary purposes are to protect the constitutional principle of separation between state and church and to represent the rights and views of nontheists and freethinkers.

FFRF seeks to safeguard the interests of its Madison members. FFRF has nearly 24,000 members nationally and more than 1,300 Wisconsin members. FFRF has 350 Madison members, most of whom are Madison taxpayers. FFRF's national headquarters

is located in Madison, in close proximity to the St. Raphael's Congregation property that is the subject of this case.

FFRF advocates against abuses of tax exemptions by churches and religious organizations and seeks a fair application of tax laws so that they do not provide unlawful preference to churches.

ARGUMENT

This case is about whether a church may hold undeveloped and unused property and claim a tax exemption by placing markers on the property. Under Wisconsin's property tax exemption statute, Wis. Stat. § 70.11(4), it may not.

I. St. Raphael's has not met its burden to qualify for an exemption under Wis. Stat. § 70.11(4)

1) The actual use of property determines whether it is exempt

As a threshold matter, exemptions from property taxation may only be granted on the basis of the state exemption statute:

If the meaning of such statute is fairly ambiguous or uncertain as to a specific piece of property or owner, it is the duty of courts to resolve the doubt in favor of the taxability of the property. It is for the legislature to grant these special privileges, and it has always been held that courts will proceed upon the assumption that whatever the legislature intends to exempt will be expressed in such clear language as to leave no doubt, and that what has been left doubtful is not intended to be exempted.

Katzer v. City of Milwaukee, 104 Wis. 16, 79 N.W. 745, 746 (1899). As Wisconsin courts have long noted, “[S]tatutes exempting property from taxation are not to be enlarged by construction. Taxation is the rule, and exemption the exception. He who claims

exemption must bring himself within the terms of the exception.” *Methodist Episcopal Church Baraca Club v. City of Madison*, 167 Wis. 207, 167 N.W. 258 (1918).

Property that is exempt under Wis. Stat. § 70.11(4) must actually be used by the entity seeking an exemption. It is not enough for a church to own the property, it must be “used exclusively” by the church. Wis. Stat. § 70.11(4) provides that the exemption is available to “[p]roperty owned and used exclusively by. . . churches or religious, educational or benevolent associations . . .” As the Wisconsin Supreme Court has made clear, “The use made of property determines whether it is subject to taxation or whether it is entitled to tax exemption.” *State v. City of Madison*, 55 Wis.2d 427, 198 N.W.2d 615, 619 (1972) (citing *Men's Halls Stores, Inc. v. Dane County*, 269 Wis. 84, 89, 69 N.W.2d 213 (1955); *Frank Lloyd Wright Foundation v. Wyoming*, 267 Wis. 599, 605, 66 N.W.2d 642 (1954)).

Since St. Raphael’s is seeking an exemption, it has the burden of demonstrating that its use of the property qualifies for an exemption. See Wis. Stat. § 70.109 (“Exemptions under this chapter shall be strictly construed in every instance with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption.”); *Deutsches Land, Inc. v. City of Glendale*, 225 Wis.2d 70, 591 N.W.2d 583, 588 (1999) (“Since exemption from the payment of taxes is an act of legislative grace, the party seeking the exemption bears the burden of proving that it falls within a statutory exemption.”) (citing *Pulsfus Farms v. Town of Leeds*, 149 Wis.2d 797, 811, 440 N.W.2d 329 (1989)).

2) St. Raphael's does not regularly use the property

Property that is unoccupied and not regularly used is subject to tax regardless of ownership. In *Dominican Nuns v. City of La Crosse*, the Wisconsin Court of Appeals ruled that a church property that was being maintained but had been vacated by a religious order was taxable. 142 Wis. 2d 577, 419 N.W.2d 270 (Ct. App. 1987). This was because, “the property was not being ‘used’ for any of the order’s regular activities or benevolent purposes.” *Id.* at 272.

It is apparent that St. Raphael's does not use the lot in any way contemplated by Wis. Stat. § 70.11(4). The lot is not used for any of St. Raphael's “regular activities or benevolent purposes.” To observers of the property, it appears to be unused. FFRF Staff Attorney Andrew Seidel observed the property, which is across the street from FFRF's office. (Andrew Seidel Aff. ¶¶ 2-3). The lot is practically never used. (Seidel Aff. ¶ 7). Seidel never observed any formal events conducted by St. Raphael's Congregation or the Roman Catholic Church at the St. Raphael's lot taking place Monday to Friday. (Seidel Aff. ¶ 6). Since the installation of the Way of the Cross path in 2012 until May 8, 2014, he observed less than 20 people walking the path. (Seidel Aff. ¶ 8).

As St. Raphael's does not actually use the property, it cannot meet its burden. The lot must be taxed because it is not being “used” for an exempt religious purpose specified in Wis. Stat. § 70.11(4). In one of the earliest property tax exemption cases in the state, the Wisconsin Supreme Court ruled that unused church property that was held in addition to a church's house of worship was taxable. *See Green Bay & M. Canal Co. v. Outagamie Cnty.*, 76 Wis. 587, 45 N.W. 536, 537 (1890). The court said it was “beyond

the possibility of a doubt” that church property that was “vacant and unoccupied” was not exempt. *Id.* at 537.

3) St. Raphael’s claimed uses of the lot are inadequate to confer a tax exemption

i. Irregular prayer services

As the lot is devoid of any daily use by the congregation, St. Raphael’s has instead focused on trivial and irregular use of the property. The only organized activity by St. Raphael’s on the lot was limited to scheduled prayer services, which may have taken place on a maximum of 20 days in 2013 and 26 days in 2014. (Stip. ¶¶ 45-46). Prayer services lasted approximately 30 minutes. (Stip. ¶ 47). St. Raphael’s believes those prayer services would have included between 3 to 6 people. (Stip. ¶ 48).

This limited use of the lot is significant given the nature of the property itself. The property is a 1.31 acres lot located in downtown Madison that is assessed at over \$4 million. Irregular and trivial use of the expansive lot by 3 to 6 people cannot suffice as “use” under the tax exemption statute. If such minimal activity constituted use under Wis. Stat. § 70.11(4), any religious entity could maintain a tax exemption on its property by merely having people visit the property from time to time.

ii. Nonuse by St. Patrick’s and Holy Redeemer Churches

St. Raphael’s also asserts that the lot is exempt as it is “necessary for the location and convenience” of St. Patrick’s Church and Holy Redeemer Church. Given the lack of any discernable use of the property by St. Patrick’s or Holy Redeemer, this claim also

must fail. Even if St. Raphael's could establish use by these churches, such use would still not suffice to create an exemption of the lot in question. The Wisconsin Supreme Court has explicitly held that "land devoid of buildings cannot qualify for an exemption under Wis. Stat. § 70.11(4)." *Deutsches Land Inc. v. City of Glendale*, 225 Wis.2d at 100; *See also State v. Richardson*, 197 Wis. 390, 222 N.W. 222, 223 (1928) ("It is quite apparent that the Legislature, by the [acreage] restriction adopted in 1865, did not intend to permit associations of this character to acquire large bodies of land which should be exempt from taxation. In addition to the limitation as to area, it provided that only land necessary for the location and convenience of the buildings of such association should be exempt."). The Wisconsin Court of Appeals reviewed and dismissed an argument by a nonprofit that its benevolent uses of other properties had any import on the use of the parcel for which an exemption was denied. *Harry & Rose Samson Family Jewish Cmty. Ctr., Inc. v. City of Mequon*, 2014 WI App 90, ¶ 20, 356 Wis. 2d 329, 855 N.W.2d 493. In discussing the import of *Deutsches Land*, the court noted that the Wisconsin Supreme Court "determined whether, *as to each part individually*, Deutsches Land had met its burden of proving that the part was used for an exempt purpose sufficient to justify a total or partial exemption." *Id.* at ¶ 20 (*citing Deutsches Land*, 225 Wis.2d at 76-77, 79, 81-101).

iii. St. Raphael's speculative cathedral building plan

St. Raphael's asserts that the lot should be exempt because it intends to build a cathedral on the site. However, intending to develop a property in the future cannot

suffice as current and actual “use,” which is a prerequisite to receiving a property tax exemption. As the Court discussed in *Green Bay & M. Canal Co. v. Outagamie Cnty.*, the fact that the property may have been bought “with a view of having it used and occupied for a church building some time in the uncertain future, either by this church or some other church to which it might be sold” was said to “make no difference as to its exemption.” 45 N.W. at 537. A mere hope, intention, or aspiration is not a “use” of property.

The potential for future development by St. Raphael’s is speculative. St. Raphael’s has acknowledged that it does not have the funding, and does not know when it will have the funding to build a cathedral: “The Madison Diocese is faced with the daunting task of raising an estimated \$50 million dollars for the project amidst the Diocese’s other pressing financial obligations and needs.” (Mot. for Summ. J. and Supporting Mem. of St. Raphael’s Congregation, 18).

St. Raphael’s, rather than starting construction on a new cathedral, made strategic decisions on how to spend its \$6.4 million in insurance proceeds. For example, it purchased the neighboring school property in 2011 and demolished the former school building. (Stip. ¶ 20). St. Raphael’s has other sizeable property holdings within the City, including two other churches, residences for priests, parish offices, a religious education building, and a student housing facility (Stip. ¶¶ 22, 24, 26-31). While plans to build the cathedral were on hold, St. Raphael’s refurbished a rental property. In late 2012, St. Raphael’s decided to convert the Holy Redeemer school building into faith-based student housing. (St. Raphael’s Proposed Stip. ¶ 46). All Madison taxpayers should not have to

pay more taxes while St. Raphael's invests in its other property holdings in Madison and holds the St. Raphael's lot for future development. It is precisely for this reason that property must be used to maintain an exemption. Otherwise, exempt entities could acquire ever-larger holdings in a municipality—and maintain those undeveloped properties tax-free while they appreciate in value—all based on vague aspirations for development decades down the road.

Allowing the St. Raphael's lot to go unused while maintaining a property exemption highlights the problem with premising property tax exemptions on the proclaimed aspirations of the owners rather than observable use of the property. At any point in the years or decades that it may take St. Raphael's to use the lot, it could change its plans. During the more than eleven years since St. Raphael's Church was destroyed by a fire, the Madison Diocese and St. Raphael's Congregation have not begun construction of a cathedral on the old church site. Instead, St. Raphael's acquired the neighboring property five years ago. It failed to build on that site as well.

St. Raphael's asserts generally that a "transition time should not destroy the tax exemption." (Mot. for Summ. J. and Supporting Mem. of St. Raphael's Congregation, 21). Yet, Wisconsin courts have not granted exemptions based on what may come years or decades in the future. In *Family Hosp. Nursing Home, Inc. v. City of Milwaukee*, a completely built hospital that was readying to receive patients was determined to be exempt. 78 Wis. 2d 312, 254 N.W.2d 268 (1977). That is a far cry from a property that has gone eleven years without religious or benevolent use, with no date set for exempt operations to begin.

Likewise, other jurisdictions have found that the actual use of property—not the intended use—is determinative when reviewing a claimed exemption. *Corp. of Episcopal Church v. Utah Stat Tax Comm’n*, 919 P.2d 556, 559 (Utah, 1996) (“Vacant land which is held for future development . . . is not deemed to be devoted exclusively to religious purposes, and is therefore not tax exempt”); *Hedgcroft v. Houston*, 244 S.W.2d 632, 636 (Tex. 1951) (“[O]wnership with mere intentions, well-grounded plans and hopes cannot confer the exemption, in other words, that intention to use, without use, is not sufficient.”); *Skil Corp. v. Korzen*, 204 N.E.2d 738, 740 (Ill. 1965) (“[E]vidence that land was acquired for an exempt purpose does not eliminate the need for proof of actual use for that purpose. Intention to use is not the equivalent of use.”); *In re Appeal of Worley*, 377 S.E.2d 270, 273 (N.C. Ct. App. 1989) (“[N]o public purpose is served by permitting land to lie unused and untaxed, *present* use, not *intended* use, controls. Thus, property merely held for planned future religious purposes is not exempt.”).

In sum, St. Raphael’s seeks a tax exemption in perpetuity because it may some day raise enough money to build a \$50 million cathedral on the lot. An exemption for this purpose is not allowed under Wis. Stat. § 70.11(4).

II. Municipalities may not grant preferential tax treatment to churches on the basis that religious icons are located on the property

The Wisconsin Constitution requires all like properties to be taxed similarly. “The rule of taxation shall be uniform Taxes shall be levied upon such property . . . as the legislature shall proscribe.” Wis. Const. art. VIII, § 1. There exist only two classifications of property in Wisconsin, that which is taxable and that which the legislature has deemed

exempt. *Northwest Airlines, Inc. v. Wis. Dep't of Revenue*, 2006 WI 88, ¶ 62, 293 Wis. 2d 202, 717 N.W.2d 280. Thus, all property must be taxed uniformly unless it is exempt. The uniformity clause prevents the state and Wisconsin municipalities from taxing church properties differently than other similar properties.

St. Raphael's claims that the Way of the Cross walking path alone is sufficient to confer an exemption. Given the unavailability of a similar exemption to secular entities, the City of Madison may not grant St. Raphael's an exemption on the basis that religious icons and markers are placed on the property. Other nonprofits are not granted exemptions for installing markers or monuments on property that is otherwise not used by the nonprofit. Nor should they be granted such an exemption. If extended to other nonprofits, such a rule would essentially amount to a tax exemption for property used to advertise. Any property containing an advertisement or message from an exempt entity would suddenly fall under the purview of Wis. Stat. § 70.11(4). This would be a clear departure from the limited scope of Wis. Stat. § 70.11(4)—an inappropriate departure absent the unambiguous intent of the Wisconsin legislature. *Katzer*, 79 N.W. at 746.

A special exemption for properties containing religious markers would not only violate the uniformity clause of the Wisconsin Constitution, but also the Establishment Clause of the First Amendment. While tax exemptions are permitted for religious uses when also applied to secular uses, *See Walz v. Tax Comm. of the City of New York*, 397 U.S. 664 (1970), preferential tax exemptions provided to religious entities violates the Establishment Clause. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (finding

a Texas statute that offered religious publications an exclusive tax benefit to be an unconstitutional advancement of religion).

CONCLUSION

The St. Raphael's lot is not currently being used in a manner that comports with the tax exemptions provided under Wis. Stat. § 70.11(4). FFRF respectfully requests that the Court grant summary judgment in favor of the City of Madison.

Dated this 28th day of June, 2016.

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