

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 19, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP2613**

**Cir. Ct. No. 2002CV5365**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**DEUTSCHES LAND, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**CITY OF GLENDALE,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Milwaukee County:  
PATRICIA D. MCMAHON, Judge. *Affirmed and cause remanded with  
directions.*

Before Fine, Curley and Brown, JJ.

¶1 CURLEY, J. Deutsches Land, Inc., appeals from the trial court's grant of summary judgment in favor of the City of Glendale, which determined that Deutsches Land did not meet its burden of proof to establish that it is entitled

to a larger exemption for several parcels of its property for the 2001 tax year. On appeal, Deutsches Land insists that: (1) by not ordering judgment for Deutsches Land, the trial court violated the mandate of the court of appeals decision directing judgment to be entered in favor of Deutsches Land, on the basis of the undisputed representations of fact in its “Property Tax Exemption Request” and its “Claim for Recovery of Unlawful Taxes”; (2) in determining tax exemptions for churches or religious, educational and benevolent associations under WIS. STAT. § 70.11(4) (2001-02),<sup>1</sup> the assessor is to determine the amount of “for-profit” use and treat the remainder of “non-profit” and “non-use” as exempt; (3) since portions of the Bavarian Inn and the Fest Hall in Old Heidelberg Park are exempt, ten acres of land necessary for the location and convenience of those buildings are exempt; and (4) the land on which the Bavarian Inn is built and the adjoining parking lot are exempt under the *Cudworth*<sup>2</sup> decision.

¶2 The City disputes all of Deutsches Land’s claims and contends that the trial court correctly applied *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 591 N.W.2d 583 (1999) (hereinafter *Deutsches Land I*), to the

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

WISCONSIN STAT. § 70.11(4) provides, in relevant part:

**70.11 Property exempted from taxation. ...**

(4) ... BENEVOLENT INSTITUTIONS ... Property owned and used exclusively by ... benevolent associations ... but not exceeding 10 acres of land necessary for location and convenience of buildings while such property is not used for profit.

<sup>2</sup> *Alonzo Cudworth Post No. 23, Am. Legion v. City of Milwaukee*, 42 Wis. 2d 1, 165 N.W.2d 397 (1969).

undisputed facts of the case—the trial court reviewed each aspect of Deutsches Land’s exemption claim in detail, reviewed the law applicable to that portion of the claim under *Deutsches Land I*, reviewed precisely what the assessor had done to determine Deutsches Land’s partial exemption for that portion of the property; and determined that Deutsches Land had not met its burden to demonstrate error in the assessor’s methodology, either as a matter of law under *Deutsches Land I*, or as a matter of fact based on the undisputed summary judgment record—and properly granted summary judgment to the City.

¶3 Because: (1) this court did not direct the trial court to enter judgment in favor of Deutsches Land; (2) the assessor followed the dictates of *Deutsches Land I* in calculating Deutsches Land’s exemption on the basis of the exempt use that was specifically demonstrated; (3) Deutsches Land failed to establish that the soccer fields are necessary for the location and convenience of the Bavarian Inn; and (4) the land on which the Bavarian Inn is built and the adjoining parking lot are not exempt under *Cudworth*, we affirm.

## I. BACKGROUND.

¶4 This case and these parties have a long and tortured history in the Wisconsin court system.<sup>3</sup> This particular action, a case in which Deutsches Land

---

<sup>3</sup> In a previous case, the supreme court thoroughly described Deutsches Land’s legal status, the property it holds, and how the property is used. *See Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 76-78, 591 N.W.2d 583 (1999) (hereinafter *Deutsches Land I*). The description explained, in part:

(continued)

is seeking to recover nearly \$50,000 in what it deems to be “unlawful” taxes, was commenced on May 31, 2002, after the City allowed a refund of only approximately \$2,500. The history has been described by this court in a previous appeal:<sup>4</sup>

Deutsches Land filed a Property Tax Exemption Request with the City for its 2001 property taxes for the Bavarian Complex. To support its request, Deutsches Land attached documentation indicating the building room areas and daily room usage. The City Assessor granted a partial exemption. Deutsches Land then filed a Claim for Recovery of Unlawful Taxes with the City, pursuant to WIS. STAT. § 74.35(2), seeking \$49,878.28. The City allowed a refund of \$2,412.39, prompting Deutsches Land to sue the City for a \$49,878.28 refund. The City moved for summary judgment, proffering Deutsches Land documentation: its daily usage records, and its previously disclosed list of witnesses and summaries of their anticipated testimony. In opposition to summary judgment,

---

Deutsches Land is a non-stock, non-profit corporation organized in 1967 under chapter 181 of the Wisconsin Statutes. It primarily serves as a holding corporation for the real estate and fixed assets of five incorporated non-stock, non-profit benevolent associations. These five benevolent associations ... exist for the purpose of preserving Germanic heritage and culture.

For the benefit of benevolent associations, Deutsches Land holds title to roughly 14 acres of property located in the City of Glendale. Though the property officially comprises a single parcel, Deutsches Land treats this 14-acre property as if it were four “lots.” Two of the lots have buildings upon them and the remaining two lots, totaling approximately five and one half acres, are soccer fields.

*Id.* at 76-77 (citation and footnote omitted). The supreme court went on to explain that the land and buildings are also used at times for for-profit purposes. *See id.* at 77-78.

<sup>4</sup> The City’s original motion for summary judgment in this case was denied by the trial court. We granted the City’s petition for leave to appeal that determination, and subsequently reversed the trial court and remanded with directions for the trial court to decide the case on the existing summary judgment record. *See Deutsches Land, Inc. v. City of Glendale*, No. 2003AP1170, unpublished slip op. (WI App Mar. 19, 2004).

Deutsches Land attached its Property Tax Exemption Request, its Recovery Claim of Unlawful Taxes, and a schedule identifying the days per year the specific areas of the complex were used for profit functions. The City contended that summary judgment was appropriate to decide the legal issue of Deutsches Land's entitlement to a partial exemption from property taxes predicated on the uncontested area and usage records Deutsches Land previously submitted. Deutsches Land sought a trial.

*Deutsches Land, Inc. v. City of Glendale*, No. 2003AP1170, unpublished slip op. ¶2 (WI App Mar. 19, 2004) (footnote omitted). In that appeal, after considering the record and the extended appellate history that existed between the two parties, we reversed the trial court's denial of the City's motion for summary judgment, instructing the trial court to decide the case on the existing summary judgment record:

These parties are not strangers to each other, or to the Wisconsin courts. Deutsches Land previously sought a property tax exemption for the Bavarian Complex, albeit for 1993, 1994 and 1995. Although the trial court ruled that Deutsches Land was entitled to a partial exemption, this court reversed and the supreme court affirmed this court, holding that "Deutsches Land had not offered sufficient evidence to support its requested exemptions." [*Deutsches Land I*, 225 Wis. 2d at 76, 79.] To explain its holding, the supreme court addressed Deutsches Land's evidence, the evidence necessary for a partial property tax exemption, and the applicable law, WIS. STAT. § 70.11 (1995-96). Consequently, *Deutsches Land I* is instructive.<sup>5</sup> Deutsches Land had the benefit of the *Deutsches Land I* analysis when it filed its 2001 exemption request and when it opposed the City's summary judgment motion. This, coupled with the presumed completeness of the evidence supporting its exemption request and the required threshold submission in opposition to summary judgment, persuade

---

<sup>5</sup> In the footnote, we stated: "The court's description and analysis of Deutsches Land's legal status, the Bavarian Complex and the law apply to the present suit. See *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 591 N.W.2d 583 (1999). The court's description of Deutsches Land's evidence and analysis of its deficiencies are instructive. See *id.*" *Deutsches Land, Inc.*, No. 2003AP1170, unpublished slip op., ¶6 n.4.

us that the existing record is sufficient to support its claim for a partial property tax exemption for 2001.

Deutsches Land insists that it is entitled to a trial, claiming that the City disputes the accuracy of its evidence, particularly the proffered non-profit uses of two specific areas within the complex. The City, however, has expressly conceded “the accuracy of the logs,” originally filed by Deutsches Land with its exemption request, and also filed by the City with its summary judgment motion.

... Although Deutsches Land and the City disagree on the legal burden to prove exempt status, a trial is not required to apply WIS. STAT. § 70.11(4) and *Deutsches Land I* to the undisputed usage and area logs. Therefore, ... we remand the matter ... with directions to determine the amount of Deutsches Land’s 2001 partial property tax exemption for the Bavarian Complex on the existing summary judgment record.

*Deutsches Land*, No. 2003AP1170, unpublished slip op. ¶¶6-8 (citations omitted). On remand, the trial court granted the City’s motion for summary judgment, holding that Deutsches Land did not meet its burden of proof to establish that it is entitled to a larger exemption for any portion of the property than that allowed by the City’s assessor. Deutsches Land moved for reconsideration, but that motion was also denied. Deutsches Land now appeals.

## II. ANALYSIS.

¶5 In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987); *Wright v. Hasley*, 86 Wis. 2d 572, 579, 273 N.W.2d 319 (1979). That methodology is well known, and need not be repeated here. *See* § 802.08; *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

¶6 “In Wisconsin, the taxation of property is the rule and exemption is the exception.” *Deutsches Land I*, 225 Wis. 2d at 80. As such, “the party seeking the exemption bears the burden of proving that it falls within a statutory exemption.” *Id.* To qualify for a total exemption under WIS. STAT. § 70.11(4), “an organization must show three facts: (1) that it is a benevolent organization, (2) that it owns and exclusively uses the property, and (3) that it uses the property for exempt purposes.” *Id.* at 82. The burden of establishing usage and entitlement to an exemption falls on the benevolent association:

Requiring a benevolent association to show how the property is actually used is merely a part of the association’s burden to show that it falls “within the terms of the exemption.” *In order to sustain its burden of proof, Deutsches Land must show its actual exempt use.*

Benevolent ownership of property is not enough to satisfy the dictates of WIS. STAT. § 70.11(4); benevolent use of that property is also required. *Just as a benevolent association can own title to property without actually using it for benevolent purposes, a benevolent association can own title to property without actually using it at all. In either case, the benevolent association is not entitled to an exemption from property taxes.* It is therefore necessary for a benevolent association to detail its use of the property so that tax assessors know what types of activities, if any, are occurring on the property.

In many situations a benevolent association will demonstrate that its use of the property is so pervasive that the association should be treated as if it is in continual use of the property. [However, t]he benevolent association that uses its property only occasionally and allows it to lie fallow at all other times will have any exemption reflect its actual usage. *Similarly, the benevolent association that uses its property only occasionally and allows others to use it for profit at other times will have any exemption reflect its actual usage.*

*Id.* at 84-86 (citations omitted; emphasis added).

¶7 On appeal, Deutsches Land first contends that “by not ordering judgment for Deutsches Land Inc., the trial court violated the mandate of the court of appeals decision ... directing judgment to be entered in favor of Deutsches Land Inc., on the basis of the undisputed representations of fact in its ‘Property Tax Exemption Request’ and its ‘Claim for Recovery of Unlawful Taxes.’” Deutsches Land insists that:

The Trial Court defied the ruling of the Court of Appeals that there were no factual issues to resolve; the Trial Court disregarded the factual allegations contained in the submissions of Deutsches Land which were conceded to be true by the City of Glendale. The Trial Court did not accept the data submitted by Deutsches Land in its “Property Tax Exemption Request” and it’s [sic] “Claim for Recovery of Unlawful Taxes”. [sic] Instead the Trial Court concluded that the factual allegations in those submissions were insufficient to establish “non-profit” uses of the Bavarian Inn, the soccer fields, Old Heidelberg Park and the parking lot.

Specifically, Deutsches Land appears to argue that the trial court: (1) rejected its logs which it insists showed 64.1% “non-profit” usage of the Bavarian Inn and 35.9% usage by Waldhaus, the “for-profit” entity, and instead held that the “non-profit” use was limited to 4.24%; (2) rejected the “factual determination” that the soccer fields and Old Heidelberg Park were necessary for the placement of the Bavarian Inn, which it insists was resolved by the City’s “admissions”; (3) “was simply wrong in concluding” that Old Heidelberg Park was used only six days out of the year for “non-profit” purposes because it disregarded the “data” in the exemption request indicating that “the park, in season, was open to all members of the Bavarian Societies for informal gatherings and picnics at anytime, and that for five ... months of the year, from November through March, its Fest Hall was used every day for indoor soccer practice”; and (4) erred in applying the



4.24% exemption to the parking lot and land on which the Bavarian Inn was built, because it was not an area on which for profit activities occurred.

¶8 The City contends that Deutsches Land’s claim that this court directed the trial court to enter judgment in favor of Deutsches Land on remand is frivolous, as this court clearly remanded the case back to the trial court to reach a decision based on the existing summary judgment record, and in no way mandated a judgment in favor of Deutsches Land. Moreover, the City argues that the trial court correctly limited Deutsches Land’s exemption to those time periods for which exempt use was specifically demonstrated. It points to *Deutsches Land I*, which it insists categorically rejected any attempt to establish exemptions through generalized assertions and approximate usage, in support of the trial court’s conclusion that, for example, Old Heidelberg Park conducted exempt events on only six occasions during 2000. The City contends that generalized assertions, such as Deutsches Land’s claim that Old Heidelberg Park was open for society gatherings at anytime in season, are exactly what *Deutsches Land I* rejected as insufficient. The City also asserts that Deutsches Land’s claim that for five months out of the year the Fest Hall was used for indoor soccer every day is “equally meaningless” and speculative, as the only evidence supplied in support of that alleged use are tentative, prospective schedules of “when soccer practices *might* ... be held some time *after* those schedules were prepared[,]” and there is no evidence or usage log indicating that any such practices actually took place. (Emphasis in brief.)

¶9 We agree with the City. First, Deutsches Land’s claim that we directed the trial court to enter judgment in its favor is frivolous. We did no such thing, as is evidenced by a simple reading of the slip opinion or the excerpts replicated above. We decline to address that contention any further.

¶10 Second, Deutsches Land appears to be confusing the stipulated daily usage records with its own contentions in regard to how much of an exemption it felt it was entitled to, as to what was deemed to be undisputed. The City conceded that the daily usage records were accurate, and concluded that they were sufficient for the assessor to determine the extent of the exemption to which Deutsches Land was entitled. It did not concede that Deutsches Land was entitled to the exact percentages it claimed it was entitled to or that the soccer fields and Old Heidelberg Park were necessary for the placement of the Bavarian Inn. Nor did it concede that vague assertions of usage would be sufficient to establish a larger exemption.

¶11 The assessor considered Deutsches Land's usage logs and area records and carefully calculated the exemption to which Deutsches Land was entitled—limited to those time periods for which exempt use was specifically demonstrated. Indeed, Deutsches Land was provided with a detailed assessment of how the assessor calculated the exemption and where the numbers came from. The assessor's affidavit supplied for the summary judgment motion also explained the calculated exemption in exhaustive detail. The assessor followed the dictates of *Deutsches Land I*, and calculated the exemption on the basis of the documented non-profit use. The assessor's 4.24% calculation of Deutsches Land's non-profit use of the Bavarian Inn was carefully explained and documented, and we see no reason to recreate those calculations here. Moreover, in regard to Old Heidelberg Park, the situation here is similar to that in *Deutsches Land I*: "Deutsches Land offered sufficient evidence of only the actual corporate use of Old Heidelberg Park; it did not do so for the actual benevolent use of the park." See 225 Wis. 2d at 87. Here, Deutsches Land's usage logs clearly documented only six days of exempt use. Deutsches Land's generalized assertions that the park was open, in

season, at all times for informal gatherings of society members and that the Fest Hall was used on a daily basis, for five months out of the year, for indoor soccer practice are insufficient to establish actual exempt benevolent use. Both only indicate how the property *could* have been used, or perhaps even *may* have been used, but do not document *actual* usage. Per *Deutsches Land I*, that is not enough. Without more, both the trial court and the assessor were correct to conclude that Old Heidelberg Park was used for non-exempt purposes only six days out of the year.<sup>6</sup>

¶12 Deutsches Land further argues that in determining tax exemption for churches or religious, educational and benevolent associations under WIS. STAT. § 70.11(4), the assessor is to determine the amount of “for-profit” use and treat the remainder of “non-profit” and “non-use” as exempt. It insists that “making ‘non-use’ taxable is contrary to” the methodology approved by the supreme court in *Deutsches Land I*, and asserts that “[h]ow periods of ‘non-use’ are treated accounts for the principal difference between Glendale and Deutsches Land regarding the tax exemption requested for the Bavarian Inn.”

¶13 While Deutsches Land is perhaps correct to assert that how “non-use” should be treated is essentially the point of contention between the City and Deutsches Land, the remainder of its contention in this regard is disingenuous. As we have seen, *Deutsches Land I* clearly held:

Just as a benevolent association can own title to property without actually using it for benevolent purposes, a benevolent association can own title to property without actually using it at all. In either case, the benevolent

---

<sup>6</sup> Deutsches Land’s contentions regarding the soccer fields and the parking lots will be addressed in its similar arguments below.

association is not entitled to an exemption from property taxes. It is therefore necessary for a benevolent association to detail its use of the property so that tax assessors know what types of activities, if any, are occurring on the property.

....

... The benevolent association that uses its property only occasionally and allows it to lie fallow at all other times will have any exemption reflect its actual usage. Similarly, the benevolent association that uses its property only occasionally and allows others to use it for profit at other times will have any exemption reflect its actual usage.

*Id.* at 85-86 (citations omitted). Benevolent ownership is not enough—Deutsches Land must show its actual exempt use, and the exemption will reflect its actual usage. *See id.* “Non-use” is taxable. “We have repeatedly stressed that a benevolent association must do more than own or control property to claim an exemption; it must also use that property for benevolent purposes. ... Deutsches Land, like any other entity seeking an exemption, must show that its actual use of the property was for benevolent purposes.” *Id.* at 87-88 (citations omitted).

¶14 Next, Deutsches Land contends that since portions of the Bavarian Inn and the Fest Hall in Old Heidelberg Park are exempt, the ten acres of land necessary for the location and convenience of those buildings are exempt as well. Deutsches Land insists that the supreme court did not reach this issue in *Deutsches Land I*, and since it has now been “conceded that at least a portion of the Bavarian Inn is exempt, the Court on this record can conclude, as did Justices Prosser and Wilcox in *Deutsches Land I*, that the soccer fields are necessary for the location and convenience of the Bavarian Inn.” (Emphasis added.) It then cites to one statement in the exemption request, in which it was asserted that “[i]t was essential that when the Bavarian Inn was constructed in 1967, it be placed on land that was immediately contiguous to its Festival Park and soccer fields,”

insisting it makes clear that when the Bavarian Inn was built, it was essential that it be placed on land that could accommodate the soccer fields and a park. As such, it concludes that the soccer fields and Old Heidelberg Park were necessary for the placement of the Bavarian Inn.<sup>7</sup>

¶15 One statement in the exemption request can hardly be considered sufficient to meet the burden of establishing that the soccer fields (and Old Heidelberg Park) are necessary for the location and convenience of the Bavarian Inn. Indeed, the assertion cited above appears to perhaps support quite the opposite conclusion—that the buildings are there to support the soccer fields, and not vice versa. In any event, Deutsches Land has failed to cite to anything else in the record or further develop its argument in regard to that contention, and as such, we cannot possibly conclude that the soccer fields are necessary for the location and convenience of the Bavarian Inn.

¶16 Finally, Deutsches Land insists that the land on which the Bavarian Inn is built and the adjoining parking lot are exempt under the *Cudworth* decision. In a fairly conclusory manner, Deutsches Land insists that the assessor's 4.24% exemption that was applied to the parking lots on the site of the Bavarian Inn is in conflict with the holding in *Cudworth*:

There the Court dealt with a parking lot serving the Alonzo Cudworth Post on Prospect Avenue in Milwaukee. The Court held that the parking lot was exempt even though portions of the Memorial Hall Building were subject to tax. The Court in *Cudworth* held that the parking lot was not subject to tax, because it was not used for a commercial

---

<sup>7</sup> It is unclear how Deutsches Land intended to include Old Heidelberg Park in this argument, especially in light of the fact that the assessor granted a 1.64% exemption for Old Heidelberg Park and its outbuildings on the basis of its non-profit use.

purpose. Deutsches Land does not charge for use of the parking lot.

As such, Deutsches Land insists that 100% of the four acre parking lot is exempt.

¶17 In *Cudworth*, however, the exemption was derived from WIS. STAT. § 70.11(9), which applies to memorial halls and the real estate upon which they are located. Here, we are concerned with WIS. STAT. § 70.11(4), which applies to the property owned and used exclusively by benevolent associations, but not exceeding ten acres of land “necessary for location and convenience of buildings while such property is not used for profit.” The parking lot for which the assessor granted a 4.24% exemption was part of “Area 2,” the parcel of property containing the Bavarian Inn, and was declared to be “necessary for location and convenience” of the Bavarian Inn, and thus entitled to the same net exemption as the Inn. The circumstances are distinguishable.

¶18 For these reasons, we affirm the trial court’s determination, and also grant the City’s motion for costs and attorney fees, pursuant to WIS. STAT. RULE 809.25(3). Under RULE 809.25(3)(c)2., this court may award costs, fees and reasonable attorney fees if we find that “[t]he party or the party’s attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.” Here, *Deutsches Land I* clearly governs, and although Deutsches Land may not agree with the outcome or the holding in that case, it was a party to the case and should be very familiar with it. Any arguments contrary to the holding and analysis in *Deutsches Land I* are clearly frivolous here. The circumstances are quite similar and there is no basis for a good faith argument for a reversal or modification of that precedent. Moreover, the argument that this court directed the trial court to enter judgment in

favor of Deutsches Land is frivolous and incredulous. Deutsches Land was advised, by letter, that the City believed the appeal to be frivolous and would be moving for costs and fees; however, Deutsches Land continued to pursue the appeal. We find the appeal to be frivolous. As such, we remand the matter to the trial court for a determination of the reasonable costs and attorney fees.

*By the Court.*—Order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

