

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2007

A. John Voelker
Acting 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. 2006AP1100

Cir. Ct. No. 2005CV1626

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RIDGE SIDE COOPERATIVE,

PLAINTIFF-APPELLANT,

v.

CITY OF MADISON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 LUNDSTEN, P.J. Ridge Side Cooperative appeals a circuit court judgment, in which the court concluded that Ridge Side was not entitled to a

property tax exemption under WIS. STAT. § 70.11(4).¹ Ridge Side argues that the circuit court erred in determining that Ridge Side is not a “benevolent association” under the statute. We agree with the circuit court that Ridge Side is not a benevolent association and, therefore, does not qualify for an exemption under § 70.11(4). We affirm the circuit court’s judgment.

Background

¶2 Ridge Side is a cooperative organized under WIS. STAT. ch. 185. It was organized and continues to operate as a “limited equity” cooperative for the purpose of providing affordable housing to low- and moderate-income households. The only property Ridge Side owns is the nine-unit apartment-style housing facility at issue in this case.

¶3 All nine units are occupied by members of Ridge Side. One representative from each unit acts as a member of the board of directors. Unit residents do not purchase their units. Rather, they sign an “occupancy and membership contract,” which entitles them to reside in a unit.

¶4 In order to purchase occupancy rights, residents pay a “transfer fee.” Currently, the fee is approximately \$3200. Subject to Ridge Side’s approval, departing residents are permitted to sell their occupancy rights for a sum no greater than the amount of their fee, plus no more than a 5% annual “increase.” Departing members thus receive up to approximately \$150 per year from the sale

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

of their occupancy rights. If Ridge Side dissolves, all proceeds must be donated to non-profit providers of affordable housing.

¶5 Ridge Side filed a petition with the City seeking a property tax exemption under WIS. STAT. § 70.11(4). The City denied Ridge Side’s request, and Ridge Side sought relief in the circuit court. The circuit court agreed with the City that Ridge Side did not qualify for the exemption.

Discussion

¶6 As concerns us here, WIS. STAT. § 70.11(4) exempts from taxation “[p]roperty owned and used exclusively by ... benevolent associations ... while such property is not used for profit.”² The application of a statute to undisputed

² WISCONSIN STAT. § 70.11(4) provides, in full:

EDUCATIONAL, RELIGIOUS AND BENEVOLENT INSTITUTIONS; WOMEN’S CLUBS; HISTORICAL SOCIETIES; FRATERNITIES; LIBRARIES. Property owned and used exclusively by educational institutions offering regular courses 6 months in the year; or by churches or religious, educational or benevolent associations, including benevolent nursing homes and retirement homes for the aged but not including an organization that is organized under s. 185.981 or ch. 611, 613 or 614 and that offers a health maintenance organization as defined in s. 609.01(2) or a limited service health organization as defined in s. 609.01(3) or an organization that is issued a certificate of authority under ch. 618 and that offers a health maintenance organization or a limited service health organization and not including property owned by any nonstock, nonprofit corporation which services guaranteed student loans for others or on its own account, and also including property owned and used for housing for pastors and their ordained assistants, members of religious orders and communities, and ordained teachers, whether or not contiguous to and a part of other property owned and used by such associations or churches; or by women’s clubs; or by domestic, incorporated historical societies; or by domestic, incorporated, free public library associations; or by fraternal societies operating under the lodge system (except university, college and high school fraternities and sororities), but not exceeding 10

(continued)

facts is a question of law for our *de novo* review. *Ansani v. Cascade Mountain, Inc.*, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998).

¶7 The supreme court has previously interpreted WIS. STAT. § 70.11(4) in a manner that resolves the case before us: “In this state a benevolent association *must be completely free from the fact or even possibility of profits accruing to its founders, officers, directors or members.*” *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 294, 164 N.W.2d 289 (1969) (emphasis added); *see also St. John’s Lutheran Church v. City of Bloomer*, 118 Wis. 2d 398, 402, 347 N.W.2d 619 (Ct. App. 1984) (“A benevolent association must be free from even the possibility that profits may accrue to its founders, officers, or directors.”).

¶8 We agree with the circuit court that, under the no-profit-to-members interpretation of WIS. STAT. § 70.11(4) in *Milwaukee Protestant Home for the Aged*, Ridge Side is not a “benevolent association” because its members are eligible for up to a 5% annual gain on their transfer fees.³

acres of land necessary for location and convenience of buildings while such property is not used for profit. Property owned by churches or religious associations necessary for location and convenience of buildings, used for educational purposes and not for profit, shall not be subject to the 10-acre limitation but shall be subject to a 30-acre limitation. Property that is exempt from taxation under this subsection and is leased remains exempt from taxation only if, in addition to the requirements specified in the introductory phrase of this section, the lessee does not discriminate on the basis of race.

³ We need not determine whether there may be additional reasons that Ridge Side may not qualify for an exemption under WIS. STAT. § 70.11(4).

¶9 Ridge Side argues that the no-profit-to-members interpretation is not controlling because subsequent courts have not “explain[ed]” or “interpret[ed]” this rule. We are not persuaded. Ridge Side does not explain why the facts here do not fall squarely within the no-profit-to-members interpretation of WIS. STAT. § 70.11(4), as set forth in *Milwaukee Protestant Home for the Aged*. Specifically, Ridge Side does not assert that the 5% annual gain is not a “profit” for its members.

¶10 Ridge Side also argues, without explanation, that the no-profit-to-members interpretation of WIS. STAT. § 70.11(4) is “dicta.” Even assuming it is dicta, we note that Ridge Side does not assert that the interpretation either misstates the law or should not be the law. Accordingly, Ridge Side gives us no reason why we should not follow this interpretation of the statute.

¶11 Ridge Side argues that the no-profit-to-members interpretation is not as rigid as it might seem. Ridge Side points to the following excerpt from *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 591 N.W.2d 583 (1999), as demonstrating that “use for gain” does not automatically disqualify an organization from benevolent association status:

The fact of the matter is that we have brooked exceptions to the requirement that exempted property be exclusively used by the benevolent organization so that the “plain intent of the statute” is not frustrated. *Catholic Woman’s Club v. City of Green Bay*, 180 Wis. 102, 105, 192 N.W. 479 (1923). In *Northwestern Publishing House v. City of Milwaukee*, 177 Wis. 401, 408-09, 188 N.W. 636 (1922), we concluded that the phrase “used exclusively” did not preclude a religious association from occasionally engaging in commercial publishing where that publishing constituted less than one percent of its business. Similarly, in *Cardinal Publishing Co. v. City of Madison*, 205 Wis. 344, 347-48, 237 N.W. 265 (1931) ..., we determined that “used exclusively” did not preclude “inconsequential or

incidental uses of the property for gain.” *See also Columbia Hospital*, 35 Wis. 2d at 671.

Id. at 83. We do not read this discussion of “exceptions” as including profiting by *members* of an association. The court in *Deutsches Land* considered an *association* that engaged in some for-profit or non-“benevolent” activities. *See St. John’s Lutheran Church*, 118 Wis. 2d at 402 (the rule that members of a benevolent association may not stand to profit “does not mean that the property must be operated at a loss. The question is whether there may be profit to someone other than the benevolent association itself.”).

¶12 In a related argument, Ridge Side asserts that case law requires that determinations made under WIS. STAT. § 70.11(4) be based on the totality of the facts. *See, e.g., University of Wisconsin Med. Found. v. City of Madison*, 2003 WI App 204, ¶20, 267 Wis. 2d 504, 671 N.W.2d 292. Thus, Ridge Side reasons, even if its members stand to profit, that is just one fact to take into consideration. We are not persuaded. First, it is not apparent how this totality approach squares with the requirement that a benevolent association must be completely free from even the possibility of profits accruing to members. Second, even applying the totality approach, Ridge Side fails to demonstrate that the profit allowed to its members is insignificant or offset by other factors.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

