

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

APPEAL NO. 2016AP2319

ST. RAPHAEL'S CONGREGATION

Plaintiff-Appellant-Cross-Respondent

v.

CITY OF MADISON

Defendant-Respondent-Cross-Appellant

**NONPARTY BRIEF ON BEHALF OF
THE FREEDOM FROM RELIGION FOUNDATION**

APPEAL FROM THE OCTOBER 4, 2016 ORDER,
DANE COUNTY CIRCUIT COURT CASE NO. 2015CV001437
THE HONORABLE RHONDA L. LANFORD, PRESIDING

Patrick C. Elliott
State Bar No. 1074300
Attorney for Freedom From
Religion Foundation, Inc.

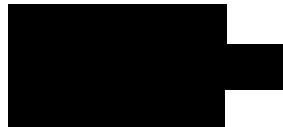


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The Freedom From Religion Foundation (“FFRF”) submits this nonparty brief in support of the City of Madison.

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 more than 28,000 members nationally and more than 1,400 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 religious organizations and seeks a fair application of tax laws so that they do not provide unlawful preference to religious institutions.

ISSUE PRESENTED

Does placing markers on otherwise undeveloped property and making that property open to the public constitute use under Wisconsin’s property tax exemption statute, Wis. Stat. § 70.11(4)(a)?

The circuit court ruled it did, but otherwise found the property taxable because the lot was not necessary for the location and convenience of buildings.

ARGUMENT

The St. Raphael’s lot in question does not qualify for an exemption under Wis. Stat. § 70.11(4)(a) because St. Raphael’s has not shown that the property is actually used, and in fact, the property is not used for its regular activities or benevolent purposes. In addition, the City of Madison cannot

grant preferential tax treatment to St. Raphael's under the Wisconsin Constitution and the Establishment Clause of the First Amendment.

I. The St. Raphael's lot does not qualify for an exemption because the lot is not actually used for St. Raphael's regular activities or benevolent purposes.

When tax exemptions are improperly granted, other taxpayers bear the burden of paying additional tax. In this case, the City of Madison upheld its duty to Madison taxpayers and correctly identified that unused church property is taxable.

A. 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." *Katzer v. City of Milwaukee*, 104 Wis. 16, 21, 79 N.W. 745 (1899). This is because:

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.

Id. 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, 211, 167 N.W. 258 (1918).

Property that is exempt under Wis. Stat. § 70.11(4)(a) 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)(a) 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, 433, 198 N.W.2d 615 (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, 80, 591 N.W.2d 583 (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))).

St. Raphael’s use of the property in the tax year in question must be examined to determine whether the conjoined lot is exempt. In one of the original tax exemption cases in Wisconsin, *Green Bay & M. Canal Co. v. Outagamie Cty.*, the Wisconsin Supreme Court opined that it was “foreign to the case” that a church building was later built on a piece of church property. 76 Wis. 587, 45 N.W. 536, 538 (1890) (vacant lot owned by the church was not tax exempt because it was not used for the legitimate purposes of the church and was not necessary for the location and convenience of buildings). The Court remarked, “How was it in [the year being challenged]? is the only question.” *Id.*

St. Raphael's repeatedly references that its church was destroyed by arson 12 years ago. While tragic, this is not relevant to applying the tax exemption statute. Whether an organization has suffered a loss in prior tax years is not a statutory justification for a tax exemption. To judicially create a special loss exception would go against the rule that tax exemption statutes are "not to be enlarged by construction." *Methodist Episcopal Church Baraca Club*, 167 Wis. at 207. Past use of the property cannot justify a current exemption. See *Dominican Nuns v. La Crosse*, 142 Wis. 2d 577, 419 N.W.2d 270 (1987) (a chapel and convent were not exempt from taxation once they were no longer used for their original purpose). Additionally, *Green Bay & M. Canal Co.* is clear that the use of the property in subsequent years cannot be used to justify an exemption in a prior tax year. 76 Wis. at 591.

What matters is not *how* the property came to be unused, but whether, and in what ways, St. Raphael's was actually using the property in 2014.

B. St. Raphael's does not use the property in any way that provides for an exemption

On appeal and before the circuit court, St. Raphael's advanced various theories as to how its use of the property could be construed as exclusive use under Wis. Stat. § 70.11(4)(a). These novel use claims must be examined by analyzing: 1) the evidence submitted by the taxpayer of exempt use, and 2) whether the claimed use is sufficient under the statute.

The property at issue was created after two parcels were merged on January 1, 2012. (R. App. 017 ¶ 32). One of the parcels—located on the corner of South Henry Street and West Washington Avenue—was purchased by St. Raphael's in 2011. (R. App. 016 ¶ 19). The parcels were combined to form a lot that would serve as the location for a cathedral significantly larger than the church that had burned down. (R. App. 016 ¶ 19). As of January 1, 2012, St. Raphael's had demolished and removed all remaining buildings and structures and the subject property was vacant. (R.

App. 017 ¶ 33). In 2012, St. Raphael's did not rebuild the cathedral site, but constructed a Way of the Cross on the subject property. (R. App. 018 ¶ 37). St. Raphael's requested, and was denied, a property tax exemption on the conjoined property in 2014, which was assessed at \$4,065,000. (R. App. 019 ¶¶ 58-59).

The only activities St. Raphael's engages in on the lot appear to be prayer services for three to six people. (R. App. 019 ¶ 48). These took place for 30 minutes on possibly 20 days in 2013 and 26 days in 2014. (R. App. 018-19, ¶¶ 45-47). St. Raphael's makes no records as to when other Catholic groups may have used the property in 2014. (R. App. 019 ¶ 50). St. Raphael's makes no records of any members of the public who may have used the property. (R. App. 019 ¶ 53).

This type of use is insufficient under the exemption statute. To anyone who observed the property on 334 days in 2014, the property would have appeared to be unoccupied, with no church activities being held. Even on the few days that St. Raphael's hosted activities, only a few people were present for 30 minutes. In total, this would have amounted to approximately 13 hours of activities in 2014. This limited use of the lot is noteworthy given the nature of the property itself. The conjoined lot is 1.31 acres located in downtown Madison that is assessed at over \$4 million. Irregular and insubstantial use of the property by three to six people does not transform the lot into property that is actually being used for the types of activities that are contemplated by the exemption statute.

It is not surprising that St. Raphael's is unable to establish its use of the property since its primary goal is to hold on to the property for future development. Plaques placed on the property "pronounce St. Raphael's continuing commitment to build the Diocese of Madison's Cathedral upon the Property." (R. App. 018 ¶ 39). Ultimately, "St. Raphael's intends to build the Cathedral on the subject property and preserve the Way of the Cross on a smaller scale." (R. App. 018 ¶ 41). At some indefinite time in the future, St. Raphael's would like to build a \$50 million cathedral on the

conjoined lot. (Brief and Appendix of Plaintiff-Appellant-Cross-Respondent at 4-5, “Appellant Brief;” A. App. 020). These statements make it apparent that St. Raphael’s is merely holding the property for future construction.

St. Raphael’s argues that finding the property exempt “creates no danger that St. Raphael’s might be acquire [sic] multiple parcels of available land with ‘vague intentions’ of using or building upon it.” (Appellant Brief at 15). However, St. Raphael’s “reacquired the former school property on the corner of West Washington and Henry Street to expand the Property and facilitate construction of the new Cathedral.” (Appellant Brief at 14; A. App. 019, 021). In addition, St. Raphael’s has submitted no formal plans to begin construction of a cathedral (R. App. 012), cannot know when it would acquire the necessary capital, (R. App. 012), and has stated “a formal capital campaign has not begun.” (Appellant Brief at 15).

St. Raphael’s has done exactly what *Green Bay & Mississippi Canal Co. v. Outagamie Cnty.* warned of—it has acquired an additional parcel of property with “vague intentions” of building upon it at “some time in the uncertain future.” 76 Wis. at 591.

If this type of exemption were permitted, any religious, benevolent, or educational organization could buy property for future development and merely place a monument on the property as a placeholder. According to St. Raphael’s argument, the only limitation would be the maximum acreage allowed by the statute. While holding real property tax-free for more than a decade may be a sound financial investment, it burdens taxpaying citizens and is an abuse of the exemption statute. This type of exemption is contrary to the policy that underlies Wis. Stat. § 70.11(4)(a) and results in an untenable interpretation of the statute.

C. Property that is proclaimed to be religious does not receive an automatic exemption

The placement of religious markers and other landscaping does not transform an unoccupied lot into property that is being exclusively used under Wis. Stat. § 70.11(4)(a). In reviewing property that is claimed to be exempt, Wisconsin courts review the *activities* that are held on the property to determine its use and not merely the physical characteristics of the property.

The circuit court conflated the purpose of the Way of the Cross with the use of the property—stating St. Raphael’s “has put the property to use by building a Way of the Cross.” (R.37 at 9; R. App. 009). However, placing the Way of the Cross on the property is not “use.” The finding of actual use for religious purposes based primarily on the presence of the Way of the Cross by the circuit court was improper.

Property is not used merely because something of religious significance has been placed on it. There needs to be actual continued use of the property for religious purposes. *See generally Dominican Nuns*, 142 Wis. 2d 577 (finding that an unoccupied chapel and convent were not exempt from taxation). Similarly, the conjoined property must be continually and actually used for St. Raphael’s “regular activities or benevolent purposes.” *Id.* at 581. In order to qualify for an exemption there has to be more than “intent” or ceremonial designation of a property for religious purposes. St. Raphael’s has not documented legitimate, regular exempt use and has not met its burden in that regard.

II. Under the Wisconsin Constitution and U.S. Constitution, churches must not be given preferential tax treatment

Church properties must not be granted preferential treatment via government tax exemption schemes. Even had it wanted to do so, the City of Madison could not have legally given St. Raphael's a pass and bestowed an exemption upon it because the property has religious significance in the opinion of the church. The City of Madison is subject to our secular laws, including the Wisconsin Constitution and U.S. Constitution, which mandate uniform taxation and equal treatment between religious and non-religious entities.

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.

While tax exemptions are permitted for religious uses when also applied to secular uses, *see Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696-97 (1970) (Harlan, J., concurring), the government may not give preferential tax exemptions to religious entities. *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 under the Establishment Clause of the First Amendment). Justice Brennan emphasized in *Texas Monthly* the importance in *Walz* that the property tax exemption at issue flowed to a large number of non-religious groups. "The breadth of New York's property tax exemption was essential to [the Supreme Court's] holding that

it was not aimed at establishing, sponsoring, or supporting religion.” *Texas Monthly*, 489 U.S. at 12. The *Walz* decision “in no way intimated that the exemption would have been valid had it applied *only* to the property of religious groups or had it lacked a permissible secular objective.” *Id.* at 13, n.2 (emphasis in original).

Special government exemptions from taxation for religious entities, which are not generally available, raise the serious prospect that the government is doing so to aid religion. When the government provides an exclusive subsidy to religious organizations that are not required by the Free Exercise Clause, it provides “unjustifiable awards of assistance to religious organizations and cannot but conve[y] a message of endorsement to slighted members of the community.” *Id.* at 15 (quotations omitted). Even this appearance of government endorsement violates the U.S. Constitution.

St. Raphael’s seeks a special tax exemption because it has placed religious icons on the property as a placeholder until it can build a \$50 million cathedral. St. Raphael’s has requested an exemption “under the totality of the circumstances” and has highlighted the financial interests it has in receiving such an exemption. (Reply and Response Brief of Plaintiff-Appellant-Cross-Respondent at 6) (“It is an objective mathematical certainty that every dollar St. Raphael’s must pay in taxes, is a dollar that cannot go toward construction of the new Cathedral.”). The Wisconsin Constitution, Article I, Section 18, explicitly guarantees that state citizens are not to be “compelled to attend, erect or support any place of worship, or to maintain any ministry. . . or any preference be given by law to any religious establishments or modes of worship.” It is not the job of taxpayers or the City of Madison to help subsidize the building of a new cathedral by forfeiting taxes owed by St. Raphael’s.

Under the First Amendment and the Wisconsin Constitution, the government cannot grant such an exemption in the absence of some overarching tax exemption scheme that provides the same benefit to

similarly situated benevolent properties. Any such exemption for churches would require municipalities to provide other entities covered by Wis. Stat. § 70.11(4)(a) a similar exemption in order to avoid violating the uniformity clause of the Wisconsin Constitution and the Establishment Clause of the First Amendment. This Court must not provide through judicial construction what the Wisconsin legislature has not contemplated through a statutory scheme.

CONCLUSION

St. Raphael's does not use the lot in question for its regular activities or benevolent purposes as required by Wis. Stat. § 70.11(4)(a). FFRF respectfully requests that the Court rule in favor of the City of Madison.

Respectfully submitted this 28th day of April, 2017.

/s/ Patrick C. Elliott
Patrick C. Elliott
State Bar No. 1074300
Attorney for Freedom From
Religion Foundation, Inc.
10 N. Henry St.
Madison, WI 53703
(608) 256-8900

CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,967 words.

/s/ Patrick C. Elliott

Patrick C. Elliott

Dated this 28th Day of April, 2017

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

/s/ Patrick C. Elliott

Patrick C. Elliott

Dated this 28th Day of April, 2017