COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP2797 **Cir. Ct. No. 2013CV191**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

HARRY AND ROSE SAMSON FAMILY JEWISH COMMUNITY CENTER, INC.,

PLAINTIFF-APPELLANT,

V.

CITY OF MEQUON,

DEFENDANT-RESPONDENT,

WISCONSIN DEPARTMENT OF REVENUE,

DEFENDANT.

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

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 LUNDSTEN, J. The question here is whether a Jewish Community Center facility in Mequon qualifies as tax exempt under WIS. STAT. § 70.11(4) because the property is used for benevolent purposes within the meaning of the statute.[1] The facility, Family Park, is owned by the Harry and Rose Samson Family Jewish Community Center, Inc. (JCC). The tax years in dispute are 2008 and 2009, although the parties have apparently agreed that the resolution of this dispute will additionally control tax years 2010 to 2013. Starting in 2014, the facility is tax exempt under a provision of the property tax code not in dispute here, § 70.11(12).

¶2 Property exemptions under WIS. STAT. § 70.11(4) include exemptions for "[p]roperty owned and used exclusively by ... religious, educational or benevolent associations." JCC does not contend that Family Park is exempt under the "religious" or "educational" categories in this statute. Rather, JCC argues that its use of Family Park satisfies the "benevolent associations" category. JCC advances two alternative benevolent purpose theories. First, JCC advances an aggregate analysis approach that looks at all of JCC's properties and their uses in Wisconsin. Second, JCC contends that, even if Family Park is considered individually, all of the activities at Family Park have a benevolent purpose. We reject both arguments, and affirm the circuit court.

[1] The relevant statutes here are the 2005-06 and 2007-08 statutes. Because the pertinent language in the 2005-06 and 2007-08 statutes is identical, all references to the Wisconsin Statutes are to the 2007-08 version, unless otherwise noted.

Background

¶3 We accept as true, for purposes of our summary judgment analysis, the following assertions of fact which primarily are found in an affidavit and deposition testimony of the executive director of JCC, and accompanying exhibits.

¶4 JCC is a non-profit social service agency founded upon Jewish ethics and values. JCC is committed to serving the Jewish community, including strengthening Jewish identity and enhancing the quality of Jewish life. At multiple facilities and locations in Wisconsin, JCC offers Jewish cultural, religious, educational, social, and recreational activities and programs.

¶5 The JCC-owned property at issue here, JCC Family Park, is in the City of Mequon. Family Park opened in 2007 and sits on about seven acres. Family Park's amenities are "a building that houses a class-room/gathering/community room, a snack bar, bath house, one outdoor swimming pool and an outside play area with a basketball court, beach volleyball court and sand playground facilities."[2] Brochures of the facility include pictures showing that the pool area includes a lap pool, a section with zero-depth entry, a low diving board, basketball hoops that face the water, play structures, and waterslides. The brochures refer to Family Park as a "Water Park."

¶6 Family Park is open about three months each year, roughly from Memorial Day to Labor Day. Its normal hours of operation are from 10:30 a.m. to

[2] Although we accept the description of a large room at Family Park as a "classroom/gathering/community room," we note that JCC does not dispute the City's assertion that the record is devoid of any allegation of classroom activity being conducted either in that room or anywhere else at Family Park.

7:30 p.m. daily, except Saturdays, when it operates from noon until 7:00 p.m. According to the City's calculations, which JCC does not dispute, Family Park is open approximately 58 hours per week during the summer. The City states that less than an average of 9 hours per week of these 58 hours are devoted to programmed or structured activities. Examples of these structured activities include a half-hour Friday morning pre-school day care program that includes the singing of Jewish songs, and a one-hour "Splash & Schmooze" event for mothers and infants, held once a week for 8 weeks.[3]

¶7 Family Park is a facility available to JCC members. JCC membership is open to all, regardless of religion or ethnicity. JCC members may use all of the JCC's facilities, including Family Park and others in Wisconsin. JCC memberships must be purchased on an annual basis. There are multiple types of memberships. The annual JCC family membership fee is $1,188.

¶8 As noted, Family Park opened in 2007. In February 2008, JCC filed with the City a "Property Tax Exemption Request" asking that Family Park be exempt from property taxation, pursuant to WIS. STAT. § 70.11(4). The City denied the request. For the years 2008 and 2009, the City assessed Family Park at amounts exceeding $1,800,000 and imposed a tax exceeding $30,000 for each of the two years.

[3] Our own review of the record discloses a lack of clarity regarding the mix of programmed/structured activities and unprogrammed/unstructured activities. However, the particular mix does not affect the outcome.

¶9 JCC challenged the City's denial of a tax exemption for the years 2008 and 2009 in Ozaukee County Circuit Court.[4] Both parties sought summary judgment. The circuit court granted the City's motion for summary judgment and denied JCC's motion, first orally and then in writing. The circuit court ruled that JCC failed to prove that Family Park is used exclusively for benevolent purposes within the meaning of WIS. STAT. § 70.11(4). Although this order is not the final order in the case, the parties agree that it is the only order at issue on appeal.

¶10 The decision at issue here was rendered in Ozaukee County by Judge Thomas R. Wolfgram, but the final appealable order was issued in Dane County by Judge C. William Foust. The reason for that does not matter for purposes of resolving this appeal. Nonetheless, we will briefly explain. JCC's Ozaukee County action included a second claim that was not resolved by Judge Wolfgram. This second claim alleged that denying JCC an exemption violated the equal protection clauses of the Wisconsin and United States Constitutions. Broadly speaking, JCC alleged that it was treated differently than similarly situated organizations, such as YMCAs, listed as exempt in WIS. STAT. § 70.11(12)(a). After Judge Wolfgram rejected JCC's claimed entitlement to an exemption under § 70.11(4), and pursuant to the parties' stipulation, the case was transferred to Dane County for resolution of the equal protection claim. Ultimately, JCC stipulated to the dismissal of this constitutional claim, and a final order was entered in Dane County. JCC suggests in its appellate brief that it agreed to the dismissal of its constitutional claim because in 2013 the legislature amended § 70.11(12)(a) to exempt all JCC property beginning with tax year 2014.

[4] JCC tells us that the parties have agreed that a final decision in this case, as to tax years 2008 and 2009, will control the treatment of the years 2010 through 2013.

Regardless, there is no challenge to the disposition of the equal protection claim. Thus, what remains is JCC's challenge to Judge Wolfgram's decision to deny JCC's claim under § 70.11(4).

Discussion

¶11 In ***University of Wisconsin Medical Foundation, Inc. v. City of Madison***, 2003 WI App 204, 267 Wis. 2d 504, 671 N.W.2d 292, we summarized the standard of review and some general principles of law that apply here:

> We review a trial court's grant or denial of summary judgment de novo, owing no deference to the trial court's decision. "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." In our review, we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to a determination of whether a factual issue exists.
>
> Under Wisconsin law, real and personal property are presumptively taxable. Certain property, however, is exempted from tax by statute. Because tax exemption statutes "are matters of legislative grace," they are to 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."

Id., ¶¶9-10 (citations and quoted sources omitted). To this we add the well-settled principle that "[t]he party claiming the exemption must show the property is clearly within the terms of the exception and any doubts are resolved in favor of taxability." ***Trustees of Indiana Univ. v. Town of Rhine***, 170 Wis. 2d 293, 299, 488 N.W.2d 128 (Ct. App. 1992); *see also* ***Deutsches Land, Inc. v. City of Glendale***, 225 Wis. 2d 70, 80-81, 591 N.W.2d 583 (1999) (any doubt about tax exempt status "must be resolved against the party seeking the exemption").

¶12 The specific property tax exemption issue in this case is whether JCC's Family Park property is exempt under WIS. STAT. § 70.11(4). Property exemptions under this statute include exemptions for "[p]roperty owned and used exclusively by ... religious, educational or benevolent associations."[5] JCC does

[5] The parts of WIS. STAT. § 70.11 that are significant for purposes of this opinion are found in the preamble and subsections (4) and (12)(a). The full text of these subsections reads:

> **70.11 Property exempted from taxation.** The property described in this section is exempted from general property taxes if the property is exempt under sub. (1), (2), (18), (21), (27) or (30); if it was exempt for the previous year and its use, occupancy or ownership did not change in a way that makes it taxable; if the property was taxable for the previous year, the use, occupancy or ownership of the property changed in a way that makes it exempt and its owner, on or before March 1, files with the assessor of the taxation district where the property is located a form that the department of revenue prescribes or if the property did not exist in the previous year and its owner, on or before March 1, files with the assessor of the taxation district where the property is located a form that the department of revenue prescribes. Leasing a part of the property described in this section does not render it taxable if the lessor uses all of the leasehold income for maintenance of the leased property or construction debt retirement of the leased property, or both, and, except for residential housing, if the lessee would be exempt from taxation under this chapter if it owned the property. Any lessor who claims that leased property is exempt from taxation under this chapter shall, upon request by the tax assessor, provide records relating to the lessor's use of the income from the leased property. Property exempted from general property taxes is ....
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> **(4)** 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

(continued)

not contend that Family Park is exempt under the "religious" or "educational" categories in this statute. Rather, JCC argues that its use of Family Park satisfies

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> 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 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.
>
> **(12)** CERTAIN CHARITABLE ORGANIZATIONS. (a) Property owned by units which are organized in this state of the following organizations: the Salvation Army; Goodwill Industries, not exceeding 10 acres of property in any municipality; the Boy Scouts of America; the Boys' Clubs of America; the Girl Scouts or Camp Fire Girls; the Young Men's Christian Association, not exceeding 40 acres for property that is located outside the limit of any incorporated city or village and not exceeding 10 acres for property that is located inside the limit of any incorporated city or village; the Young Women's Christian Association, not exceeding 40 acres for property that is located outside the limit of any incorporated city or village and not exceeding 10 acres for property that is located inside the limit of any incorporated city or village; or any person as trustee for them of property used for the purposes of those organizations, provided no pecuniary profit results to any individual owner or member.

the "benevolent associations" category. As applicable to benevolent associations, the parties agree that the test is this:

> [T]o 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.

Deutsches Land, 225 Wis. 2d at 81-82. The parties further agree that the only part of this test in dispute is the third part, that is, whether JCC uses Family Park for exempt purposes and, more specifically, whether JCC uses Family Park for "benevolent" purposes.

¶13 JCC advances two alternative benevolent purpose theories. First, JCC contends that whether its use of Family Park is for benevolent purposes should be resolved by looking at all of JCC's properties and activities in the aggregate. Second, JCC argues that, even if Family Park is considered individually, all of the activities at Family Park have a benevolent purpose. We reject both arguments.

I. "Aggregate" Analysis

¶14 JCC spends considerable time in its appellate briefing discussing allegedly benevolent activities that take place on JCC properties in Wisconsin other than Family Park. According to JCC, the activities conducted at its other properties are relevant because "[a] property can qualify for tax exempt status based on an aggregate analysis of all the component pieces of [an] organization's real estate." Indeed, JCC asserts that we "*must* look at the aggregate activities of all the JCC properties in order to determine [Family Park's] qualification for a property tax exemption" (emphasis added). We understand JCC to be arguing that

if its use of all of its properties, when viewed in the aggregate, has a benevolent purpose, then all of the properties, necessarily including Family Park, qualify for tax exempt status under WIS. STAT. § 70.11(4), even if the use of Family Park, considered individually, does not qualify.

¶15 According to JCC, the type of aggregate-use analysis JCC asks us to apply here is supported by ***Columbus Park Housing Corp. v. City of Kenosha***, 2002 WI App 310, 259 Wis. 2d 316, 655 N.W.2d 495, *rev'd on other grounds*, 2003 WI 143, ¶8, 267 Wis. 2d 59, 671 N.W.2d 633. In the discussion below, we refer to our decision in ***Columbus Park Housing Corp.*** as ***Columbus Park I*** and we reject JCC's reliance on it. As we now explain, the portion of ***Columbus Park I*** that JCC points to is limited to construing a statutory requirement that is not at issue here.

¶16 In ***Columbus Park I***, the property owner, Columbus Park, was a non-profit organization that rehabilitated homes and leased them to low income residents of Kenosha. ***Columbus Park I***, 259 Wis. 2d 316, ¶1. It was undisputed that Columbus Park was a benevolent association and that its benevolent activity was leasing individual properties it owned to low income residents. ***Id.***, ¶3. JCC relies on our discussion of the parties' dispute over whether Columbus Park satisfied a *use of income* requirement on income from *leased* property. *See* ***id.***, ¶¶17-18.

¶17 The income-use requirement is found in the preamble to WIS. STAT. § 70.11. The disputed preamble language reads: "Leasing a part of the property described in this section does not render it taxable if the lessor uses all of the leasehold income for maintenance of the leased property or construction debt retirement of the leased property, or both ...." WIS. STAT. § 70.11. The City of

Kenosha argued that this income-use language plainly speaks in terms of individual properties and that, as to four of Columbus Park's properties considered individually, the income-use requirement was not satisfied because each of those properties had a positive net income for one of the tax years in dispute. *See* ***Columbus Park I***, 259 Wis. 2d 316, ¶18. Focusing on the legislature's use of the word "the" in § 70.11, the City of Kenosha argued that the fact that there was excess income with respect to each of those properties meant that the income was not "all" used for "maintenance of *the* leased property" or "construction debt retirement of *the* leased property." *See* ***id.*** (emphasis added). Thus, so the argument goes, Columbus Park did not satisfy the income-use requirement in the preamble.

¶18 We rejected the City of Kenosha's argument. We acknowledged that the preamble's income-use language appeared unambiguous on its face, but concluded that it was ambiguous as applied. ***Id.***, ¶¶19-24. We explained that there was doubt as to "whether the legislature intended for the [income] use condition to be applied to each individual leased property" under the circumstances before us in which a benevolent organization with multiple properties uses all leasehold income to pay maintenance and debt expenses of the properties "in the aggregate." ***Id.***, ¶20. We looked at what we determined was the underlying purpose of the income-use requirement—that tax exemptions not be granted when an organization uses income "for purposes unrelated to its benevolent use of the property." *See* ***id.***, ¶¶21-22. We wrote:

> [T]he proper inquiry is not whether an individual property shows a profit, but rather, it is whether the benevolent organization earns a profit from all of its leasehold property and fails to use the income for the specified exempt purposes. We therefore hold the preamble's [income] use condition requires an aggregate analysis of the tax-exempt entity's use of its leasehold income.

Id., ¶22. We then went on to conclude that the income-use condition was met by Columbus Park:

> Despite the positive net income shown on four of its properties, Columbus Park does not earn a profit by leasing its properties overall and devotes all of its rental income to the maintenance and debt retirement of all the properties it leases.

Id., ¶24.

¶19 Thus, the portion of ***Columbus Park I*** that JCC relies on is limited to construing the meaning of an income-use requirement in the preamble to WIS. STAT. § 70.11 that is imposed on leased property. That language is not at issue here.

¶20 More broadly, we find nothing in ***Columbus Park I*** suggesting that our aggregate-use analysis in that case has implications beyond income and profitability issues. To the contrary, in a footnote we pointed out that in ***Deutsches Land*** the supreme court did not "squarely address[]" an *income* issue because the benevolent organization in that case failed to present sufficient evidence of its *exempt use* of "one part of its property," a property-specific-approach to determining use that is very different than JCC's proposed aggregate properties approach. *See* ***Columbus Park I***, 259 Wis. 2d 316, ¶18 n.2. This comment highlights that income use and exempt use are different topics. Moreover, looking at ***Deutsches Land*** further reveals that the supreme court there considered three parts of a 14-acre parcel to determine 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. *See* ***Deutsches Land***, 225 Wis. 2d at 76-77, 79, 81-101. More specifically, the ***Deutsches Land*** court looked separately at parts—referred to as Old Heidelberg

Park, Bavarian Inn, and the soccer fields—of a 14-acre parcel to determine whether each part on its own satisfied statutory requirements. *See* ***id.*** at 81, 88, 100. We find nothing in JCC's briefing that might explain how the separate consideration of related properties in ***Deutsches Land*** squares with JCC's aggregate-use argument here.

¶21 JCC also contends that the sort of "aggregate analysis" it asks us to apply was used in ***Trustees of Indiana University***, 170 Wis. 2d 293, and ***Covenant Healthcare System Inc. v. City of Wauwatosa***, 2011 WI 80, 336 Wis. 2d 522, 800 N.W.2d 906. We disagree. Neither case even arguably involves an aggregate-use analysis. Rather, in both cases a smaller property, removed from a benevolent organization's main property, was analyzed on its own merits to determine whether that property qualified under pertinent provisions of WIS. STAT. § 70.11. *See* ***Trustees of Indiana Univ.***, 170 Wis. 2d at 297, 299-305 (a summer camp in Wisconsin owned by Indiana University qualified as exempt because it was on the "grounds" of the University as that term is used in § 70.11(3)(a) and because the educational activities conducted at the camp were "sufficiently 'traditional'" to qualify as having an educational purpose under § 70.11(4)); ***Covenant Healthcare***, 336 Wis. 2d 522, ¶¶3, 5, 13, 24-25, 29 (a clinic facility, located five miles from its owner's tax-exempt hospital, qualified as exempt because, among other reasons, the clinic was "used exclusively for the purposes of a hospital" within the meaning of § 70.11(4m)(a)).

¶22 We agree with the City that JCC has failed to identify any authority supporting its proposed aggregate-use analysis. And, we observe, JCC does not engage in an analysis of statutory language that might explain why an aggregate-use approach is required by WIS. STAT. § 70.11(4). Accordingly, we turn our attention to JCC's arguments that are specific to Family Park.

II. Family Park Considered Individually

¶23 We turn to JCC's argument that, even if Family Park is considered individually from JCC's other properties, Family Park's use is benevolent within the meaning of WIS. STAT. § 70.11(4).

¶24 There is no dispute regarding the relevant features and uses of Family Park. As indicated in the background section, the most prominent features are a pool area, a bathhouse with snack bar, a "classroom/gathering/community room," a basketball court, a beach volleyball court, and a sand playground for young children. The pool area is substantial and includes features such as zero-depth entry, basketball hoops that face the water, and waterslides. The primary use of Family Park, as measured by hours of use, is non-programmed/non-structured open use by members. The City calculates that, during the three summer months that Family Park is open, less than 9 hours per week on average, out of 58 hours, are devoted to programmed/structured activities. Regardless of the precise mix, it is undisputed that, during most hours Family Park is open, it is used by members for non-programmed/non-structured activities.

¶25 In its appellate briefs, JCC lists some programmed/structured activities specific to Family Park, but makes no effort to discuss how much time is spent on various activities or to describe further what comprises the activities.[6] What JCC does argue is that recreational use can be for a benevolent purpose and

[6] In its brief-in-chief, JCC lists "aquatic education classes, ... the lighting of Shabbat candles and blessings over challah, a Jewish children's story-time outreach program, Kosher family barbeques, and 'Splash & Schmooze' events providing an opportunity for mothers of young children to create play groups and teach social skills." In its reply brief, JCC lists "aquatic education[] classes, Kosher family barbeques, 'Splash & Schmooze' events, and children's story-time."

that, considering all of the Family Park activities together, those activities have a "benevolent" purpose. According to JCC, the benevolent purpose is "community building," which JCC sometimes refers to as "Jewish community building."

¶26 For example, quoting testimony of its executive director, JCC argues:

> [Family Park] is integral to JCC's community building goal and the recreational activities are necessary to facilitate bringing "people together in a safe environment that is giving them an opportunity to meet new people and create connections" and ultimately achieve the primary purpose of building the Jewish Community.

Similarly, JCC points to an example given by its executive director in an effort to explain why all of its *recreational* activities have a community building purpose: the executive director stated that a trip to Miller Park for a Brewer's game might appear "[o]n the surface" to be "recreational," but "it creates an unbelievable connection to community."

¶27 The best summary of JCC's argument that we find in its briefing is this:

> JCC has established, without evidence to the contrary, that its properties are used for the purpose of furthering its mission of strengthening the Jewish Community. All activities that occur at [Family Park], including, aquatic education[] classes, Kosher family barbeques, "Splash & Schmooze" events, and children's story-time, are all conducted in furtherance of this benevolent mission.
>
> By bringing members of the Jewish community together for recreational activities at [Family Park] the JCC is furthering its specific purpose "to welcome all Jews and their families, in order to help them move along a continuum of Jewish growth, and to build Jewish memories." Part of what makes the JCC so successful at strengthening the Jewish Community is that it offers a wide

> variety of activities and opportunities that in turn bring a wide variety of Jewish people together.

(Citations to the record omitted.)

¶28 The City, in keeping with its tally of programmed/structured activity time compared with unprogrammed/unstructured activity time, argues that we should look at the unprogrammed/unstructured activity time and assess whether this predominant use of Family Park has a benevolent purpose under WIS. STAT. § 70.11(4).

¶29 For the reasons below, we conclude that the result here does not hinge on differentiating between programmed/structured activities and unprogrammed/unstructured activities. Rather, even looking at the issue as formulated by JCC, we conclude that JCC has failed to meet its burden. That is, JCC has failed to show that Family Park clearly fits the benevolent purpose exemption, leaving us in doubt about whether Family Park qualifies under WIS. STAT. § 70.11(4), a doubt that requires affirming the circuit court's denial of tax exempt status. *See* ***Trustees of Indiana Univ.***, 170 Wis. 2d at 299 ("The party claiming the exemption must show the property is clearly within the terms of the exception and any doubts are resolved in favor of taxability.").

¶30 Before moving on, we further clarify what is not in dispute.

¶31 The dispute here is not, as it often seems to be, whether a property is used "exclusively" for benevolent purposes as the term "exclusively" is used in

WIS. STAT. § 70.11(4).[7] In cases such as ***Deutsches Land*** and ***Janesville Community Day Care Center, Inc. v. Spoden***, 126 Wis. 2d 231, 376 N.W.2d 78 (Ct. App. 1985), the supreme court and this court have considered whether an exempt use was sufficiently "exclusive" when compared with activities that did not add to the exempt status of the property. *See* ***Deutsches Land***, 225 Wis. 2d at 86-87 (record failed to support property owner's contention that benevolent use was pervasive when compared with use for "corporate picnics"); ***Janesville Community Day Care***, 126 Wis. 2d at 237-39 (comparing educational activities with non-educational, or at least non-traditional, educational activities, such as physical care and feeding). Here, the parties do not debate whether some uses dominate or whether the mix of uses matters. As we have seen, the parties discuss the uses of Family Park differently, but the net result is that the exclusivity of use is not a disputed issue.

¶32 We also perceive no dispute that the predominant use of Family Park, whatever combination of activities are considered, is accurately described as "recreational." The City stresses the recreational nature of the use of Family Park. JCC does not dispute the City's use of "recreational." JCC states in its appellate briefing that Family Park "was always intended to accommodate recreational activities" and that its applications to the City for the development of Family Park "correctly described the intended recreational facilities and its then-attorney correctly represented that the site would be utilized for recreational activities."

[7] As the court in ***Deutsches Land, Inc. v. City of Glendale***, 225 Wis. 2d 70, 591 N.W.2d 583 (1999), explained, "used exclusively" in WIS. STAT. § 70.11(4) does not literally require exclusive use because such a reading would frustrate the plain intent of the legislature. *See* ***Deutsches Land***, 225 Wis. 2d at 82-84. Rather, the correct exclusive use question is this: "How consequential was the [non-benevolent] activity when compared to the total activity on the property?" ***Id.*** at 84.

JCC embraces the term "recreational" and argues that the recreational activities at Family Park have a benevolent purpose.

¶33 Turning to the topics the parties do dispute, we now explain that JCC makes some valid points regarding problems with the City's arguments, but JCC fails to affirmatively back up its central proposition—that all of its uses of Family Park have a benevolent purpose under WIS. STAT. § 70.11(4)—with case law authority or developed argument.

¶34 The parties' dispute begins with the general meaning of the term "benevolent," as that term is used in WIS. STAT. § 70.11(4). We understand JCC to be arguing that "benevolent" very broadly means doing, or being inclined to do, something good. JCC disputes the City's assertion that the activity in question must benefit the public and relieve the state from burden or expense. As we explain below, we do not resolve the parties' dispute over whether it is required that an activity benefit the public or relieve the state of an expense. Rather, we conclude that JCC's argument on this topic falls short because JCC fails to persuade us that "benevolent" merely means doing, or being inclined to do, something good.

¶35 JCC's argument regarding the general meaning of "benevolent" consists of a simple assertion that the City's view is too narrow, followed by brief references to ***Family Hospital Nursing Home, Inc. v. City of Milwaukee***, 78 Wis. 2d 312, 254 N.W.2d 268 (1977), and the Wisconsin Property Assessment Manual. JCC directs our attention to the following language in ***Family Hospital*** :

> The word "benevolent" has a broad meaning. The ***Protestant Home*** case referred to Justice Winslow's definition in ***St. Joseph's Hospital Asso. v. Ashland County***, 96 Wis. 636, 639, 640, 72 N.W. 43 (1897):

> "The word 'benevolent' means, literally, 'well-wishing.' It is a word of larger meaning than 'charitable.' It has been well said that, 'though many charitable institutions are very properly called benevolent, it is impossible to say that every object of man's benevolence is also an object of his charity.'"

Id. at 318. JCC then points to the Wisconsin Property Assessment Manual, which, according to JCC, "instructs that benevolence is not limited to 'charity,' but involves simply 'doing good' or having '[a]n inclination to perform, kind, charitable acts.'"[8] Based on this limited discussion, JCC seems to assert that it need only demonstrate that its activities at Family Park provide some benefit to some people.

¶36 In contrast, the City argues that a "benevolent" purpose requires a benefit to an indefinite number or class of persons that relieves the state of an expense that the state would otherwise incur. The City points to the following language in ***Trustees of Indiana University***:

> "[T]raditional charitable objectives," ... means [activities] must provide
>
> > systematic instruction, either formal or informal, directed to an indefinite class of persons ... which benefits the general public directly and must be the type that would ordinarily be provided by the government or that would in some way lessen the burdens of the government.

Trustees of Indiana Univ., 170 Wis. 2d at 302 (quoting ***International Found. of Employee Benefit Plans, Inc. v. City of Brookfield***, 95 Wis. 2d 444, 456, 290

[8] Looking to the manual itself, we see that the manual's not-limited-to-charity statement is drawn from ***Family Hospital Nursing Home, Inc. v. City of Milwaukee***, 78 Wis. 2d 312, 254 N.W.2d 268 (1977), and its "doing good" and "inclination" language is from a standard dictionary definition of "benevolent." 2013 WISCONSIN PROPERTY ASSESSMENT MANUAL, ch. 22, at 22-5 (revised 12/11) (found at http://www.revenue.wi.gov).

N.W.2d 720 (Ct. App. 1980)). The City also partially quotes the portion of ***University of Wisconsin Medical Foundation*** that states: "'Benevolent' activities are defined as those that benefit the public and, 'to some extent at least, relieve the state from expense.'" ***University of Wisconsin Med. Found.***, 267 Wis. 2d 504, ¶21 (quoting ***Methodist Episcopal Church Baraca Club v. City of Madison***, 167 Wis. 207, 210, 167 N.W. 258 (1918)).

¶37 If the City is correct that the activities at Family Park must provide a benefit to an indefinite number or class of persons in a way that relieves the state of an expense that the state would otherwise incur, we would agree with the City that JCC has failed to meet its burden. JCC does not even argue that it satisfies these requirements, whatever the parameters of these requirements might be. Rather, JCC argues that it has no such burden.

¶38 We need not and do not resolve this aspect of the parties' dispute. We simply note that it is unclear from the parties' briefing, and from our own limited research, whether a "benevolent" purpose under WIS. STAT. § 70.11(4) always requires a benefit to an indefinite number or class of persons or that the benefit conferred, to some extent, must always relieve the state of an expense it would otherwise have incurred.

¶39 Regardless of the City's take on the general meaning of "benevolent," JCC's argument on this topic does not persuade us. Whatever the precise meaning, "benevolent" in WIS. STAT. § 70.11(4) plainly means something more than merely "well-wishing," "doing good," or having an "inclination to perform ... kind ... acts." Those phrases are so broad as to be nearly meaningless. If the bar was that low, the church club in ***Methodist Episcopal*** would have qualified. *See* ***Methodist Episcopal Church***, 167 Wis. at 211 (denied exempt

status even though church club's activities and purposes "are laudable and its influence wholesome"). Similarly, the soccer club in ***Kickers of Wisconsin, Inc. v. City of Milwaukee***, 197 Wis. 2d 675, 541 N.W.2d 193 (Ct. App. 1995), could have easily qualified as a benevolent association and there would have been no need to engage in the more complex question of whether the soccer activities were sufficiently educational. *See* ***id.*** at 683, 686-87 (denied exempt status even though "[t]he importance of sports and athletic competition [provided by Kickers] in building character, teaching skills and values, and fostering the healthy growth and development of children is beyond question").[9]

¶40 Because the parties' arguments about the general meaning of "benevolent" in WIS. STAT. § 70.11(4) do not help us resolve the tax exempt status of Family Park, we move on.

¶41 In an argument more specific to the facts before us, JCC disputes the validity of the City's assertion that "recreational" activities can never have a benevolent purpose. As explained below, we agree with JCC's criticism of the City's assertion, but also reject JCC's attempt to establish that the opposite is true.

[9] We note that JCC criticizes the City and the circuit court for speaking in terms of whether an activity is a "benevolent activity." According to JCC, this manner of discussing the issue confuses the true issue, that is, whether an activity has a benevolent purpose. We disagree that the use of "benevolent activity" language indicates a misunderstanding of the issue or creates confusion. What JCC fails to acknowledge is that this court and the supreme court have used the terms "benevolent activity" and "benevolent use" as a shorthand reference to an activity or use that has a benevolent purpose. *See, e.g.,* ***University of Wisconsin Med. Found., Inc. v. City of Madison***, 2003 WI App 204, ¶24, 267 Wis. 2d 504, 671 N.W.2d 292 ("The supreme court has long held that 'neither a single test nor isolated answers' to inquiries concerning an organization's operations 'will automatically determine' when an organization is engaged in a benevolent activity."); ***Deutsches Land***, 225 Wis. 2d at 85 ("benevolent use of that property is also required").

¶42 JCC disputes the City's blanket assertion that "[r]ecreation for a group's members is not a benevolent use or purpose qualifying for tax exemption under [WIS. STAT. § 70.11(4)]." According to JCC, the two cases the City relies on do not support the City's proposition. We agree. The City cites ***Methodist Episcopal Church***, 167 Wis. 207, and ***Kickers of Wisconsin***, 197 Wis. 2d 675, but neither case speaks to whether, as a general proposition, recreational activity may have a benevolent purpose.

¶43 In ***Methodist Episcopal Church***, the court simply addresses particular facts. The "laudable" purpose of the church club at issue there was "to furnish a home and a meeting place for the members of the Sunday school class; to maintain interest in the work of the class, and to facilitate the acquiring of new members." ***Methodist Episcopal Church***, 167 Wis. at 211. These particular uses were, in the supreme court's view, plainly insufficient to support exempting the club property from taxation. *See* ***id.*** at 210-11. The case contains no general pronouncements on whether recreational activities may sometimes have a benevolent purpose.

¶44 The City's reliance on ***Kickers*** is also misplaced. According to the City, in ***Kickers*** we held that "if the legislature had intended recreational use with incidental social benefits to be tax exempt, the legislature would have left no doubt in the statutory language." The problem with the City's characterization of our ***Kickers***' reasoning is that it does not track any reasoning that we used in that case. That is, there is no language in ***Kickers*** stating, expressly or impliedly, that "recreational use with incidental social benefits" does not qualify as having a benevolent purpose under WIS. STAT. § 70.11(4). We acknowledge that in ***Kickers*** we used the terms "recreation" and "recreational" to describe the purpose of the predominant use of Kickers' property. *See* ***Kickers***, 197 Wis. 2d at 683,

685. For example, we stated: "[E]ven as measured by Kickers's own summary judgment submissions describing its programs, Kickers is 'substantially and primarily devoted to' recreational purposes." ***Id.*** at 683. But the topic at hand in ***Kickers*** was not whether the use of the property was benevolent, but rather the sole question was whether Kickers qualified as an educational association. *See* ***id.*** at 678, 681 n.2. As to whether Kickers might qualify as a benevolent association, we declined to address the topic because Kickers failed to provide supporting argument for such a proposition. *See* ***id.*** at 681 n.2. Accordingly, our references in ***Kickers*** to recreational uses and purposes are best read as meaning the activities were not sufficiently educational to qualify the property under that specific exemption category. Nowhere in ***Kickers*** do we weigh in on whether the recreational activity on the Kickers' property had a "benevolent" purpose, much less whether recreational activity might in some circumstances have a benevolent purpose.

¶45 However, the fact that we agree with JCC's criticism of the City's reliance on ***Methodist Episcopal Church*** and ***Kickers*** does not much help JCC. The question remains whether there is legal support for JCC's proposition that the types of recreational activities that dominate the use of Family Park have a benevolent purpose. In this regard, the only significant affirmative arguments JCC makes are based on ***Lake Country Racquet & Athletic Club, Inc. v. Morgan***, 2006 WI App 25, 289 Wis. 2d 498, 710 N.W.2d 701, and ***Janesville Community Day Care***, 126 Wis. 2d 231. Accordingly, we turn our attention to those arguments.

¶46 According to JCC, its "programming" must be deemed to have a benevolent purpose because its "programming is nearly identical" to programming provided by YMCAs, which we described as benevolent activities in ***Lake***

Country. JCC contends that its benevolent use of Family Park, like the predominant activities at YMCAs, is recreational. JCC argues that the import of our decision in ***Lake Country*** is that we acknowledged that recreational activities like those conducted at Family Park can be conducted for a benevolent purpose. JCC asserts: "There is no basis for concluding that the YMCA is an exempt benevolent organization under Wisconsin law and the JCC is not."

¶47 We do not agree with JCC's reading of ***Lake Country***. As we demonstrate below, in ***Lake Country*** we did not weigh in on whether the activities conducted at YMCAs have a "benevolent" purpose under WIS. STAT. § 70.11(4). Moreover, even if the activities of the YMCAs in ***Lake Country*** qualified those associations as benevolent associations under § 70.11(4), JCC does not back up its assertion that the programming at YMCAs discussed in ***Lake Country*** is "nearly identical" to programming at Family Park, a topic we take up in ¶50 below.

¶48 As to whether the recreational activities at YMCAs have a benevolent purpose, we said little in ***Lake Country***. It is true that we spoke of YMCAs as benevolent organizations providing programming to the public, but in this respect it is apparent that our brief comments were based on the *legislature's* assessment that such organizations are sufficiently benevolent to warrant adding them to the list of associations in WIS. STAT. § 70.11(12) whose property is statutorily deemed tax exempt without undergoing individual scrutiny under § 70.11(4). *See* ***Lake Country***, 289 Wis. 2d 498, ¶28. We wrote: "[T]he legislature has made a judgment about the benevolent mission of YMCAs and YWCAs." ***Id.*** The question was not whether YMCA activities were "benevolent" under § 70.11(4), but rather whether YMCAs collectively have a sufficient statewide impact for purposes of addressing a constitutional "private legislation"

challenge under article IV, section 18 of the Wisconsin Constitution. *See* ***Lake Country***, 289 Wis. 2d 498, ¶¶9-10, 22-23, 29-30.

¶49 We acknowledge that in the "Background" section of ***Lake Country*** we provided a general listing of activities "taken from the parties' affidavits and other materials" about YMCAs in Wisconsin. *See* ***id.***, ¶¶2-3. But at no point did we either examine the particular activities of YMCAs, or the mix of such activities. More to the point, we did not address whether the predominant use of YMCA properties was sufficiently benevolent under WIS. STAT. § 70.11(4) to warrant a tax exemption under that statute. We did explain in ***Lake Country*** that the reason the legislature acted to add YMCAs to § 70.11(12) in 2001 was to address the YMCAs' concern over whether their properties, if scrutinized individually, would qualify under § 70.11(4). *See* ***Lake Country***, 289 Wis. 2d 498, ¶¶4-5. We wrote: "Collectively, state YMCAs sought legislative action to remove from local assessors the responsibility to determine local YMCAs' tax status [under § 70.11(4)] and establish a statutory exemption for all YMCAs [under § 70.11(12)]." ***Id.***, ¶5.[10]

[10] In a similar vein, when criticizing the City's reliance on ***Methodist Episcopal Church Baraca Club v. City of Madison***, 167 Wis. 207, 167 N.W. 258 (1918), JCC points to a YMCA reference in that case. JCC writes: "The ***Methodist Episcopal Church*** Court did not hold that recreational activities could not be conducted for benevolent purposes; in fact, it indicated just the opposite by supporting an exemption based on the YMCA's benevolent mission." As we have already discussed, we agree with JCC that ***Methodist Episcopal Church*** does not opine that recreational activities can never have a benevolent purpose. *See supra*, ¶43. But it is also true that the ***Methodist Episcopal*** court's conclusory reference to the tax treatment of YMCAs in other states says nothing helpful about the particular Family Park activities at issue here. Like ***Lake Country Racquet & Athletic Club, Inc. v. Morgan***, 2006 WI App 25, 289 Wis. 2d 498, 710 N.W.2d 701, there is no detailed discussion in ***Methodist Episcopal Church*** of the YMCA activities. See ***Methodist Episcopal Church***, 167 Wis. at 211-12 (without additional discussion, concluding that a "most casual comparison reveals a wide and striking gap between the benevolent activities of [YMCAs in other states] and those of the [club at issue], both in character and extent").

¶50 Furthermore, even if the activities of the YMCAs in ***Lake Country*** qualified those associations as benevolent associations under WIS. STAT. § 70.11(4), we would reject JCC's assertion that its Family Park programming "is nearly identical" to programming at the YMCAs discussed in ***Lake Country***. The only activity details we find in ***Lake Country*** are briefly set forth in our background section in that decision. There, we quote purpose and goal statements and then list activities:

> YMCAs maintain fitness centers that offer the same types of facilities as for-profit health clubs.
>
> In addition, the various YMCAs in Wisconsin offer many different types of community programming. From the YMCAs' submissions, these include: programs for persons with special needs; swimming lessons; child care services; leadership development programs for teens; after- and before-school care; fitness and social activities for seniors; pre-school programs; mentoring programs; and civic education programs for youths. YMCAs also provide financial assistance to many qualifying program participants based on financial need.

Lake Country, 289 Wis. 2d 498, ¶¶2-3. It is reasonable to assume that there is some overlap between YMCA activities and those at Family Park. However, the cursory description of activities in ***Lake Country*** prevents a meaningful comparison of the range of activities. For example, based on the listing in ***Lake Country*** and the record before us, we cannot tell whether there are programs at Family Park that are the equivalent of the YMCAs' "programs for persons with special needs," "leadership development programs for teens," "pre-school programs," "mentoring programs," "civic education programs for youths," and "financial assistance" programs. There is no description of these programs in ***Lake Country***. And, JCC neither attempts to compare Family Park activities with

the listed YMCA activities nor directs our attention to evidence in our record purporting to compare Family Park programs with YMCA programs.[11]

¶51 Thus, on the topic of whether the recreational activities at Family Park have a benevolent purpose under WIS. STAT. § 70.11(4), we find no guidance in ***Lake Country***.

¶52 We turn to JCC's reliance on ***Janesville Community Day Care***, 126 Wis. 2d 231. JCC likens Family Park recreational activities to the custodial care activities we discussed in ***Janesville Community Day Care***. JCC reasons that our discussion of custodial care activities in that case shows that many different types of activities can have a benevolent purpose. This reasoning is flawed because the activities JCC points to in ***Janesville Community Day Care***—including napping, eating, diaper-changing, and playing—were activities we clearly, albeit implicitly, assumed did *not* have an exempt purpose. *See* ***id.*** at 234-35, 238. Rather than suggesting that custodial care activities may have a benevolent or otherwise exempt purpose, we explained that these activities did not undercut the day care center's exempt status because the record supported the factual and legal determinations that the custodial care activities were merely incidental to the activities that supported an exemption, that is, educational activities. ***Id.*** at 239.

[11] We have, on our own, located deposition testimony suggesting, without supporting detail, that all of JCC's Wisconsin properties combined provide programming similar to YMCAs. But we find nothing specific to Family Park in this regard.

¶53 In sum, we find nothing in ***Lake Country*** or ***Janesville Community Day Care*** providing support for JCC's assertion that the recreational activities at Family Park have a benevolent purpose.[12]

¶54 Moreover, JCC has otherwise failed to meet its burden. JCC presents us with assertions, but does not provide meaningful legal and factual discussions affirmatively answering such key questions as whether "community building" and "Jewish community building" are benevolent purposes under WIS. STAT. § 70.11(4); whether all of the activities at Family Park, taken as a whole, but primarily consisting of nonprogrammed/nonstructured activities, significantly further such community building; and whether the type of "community building" JCC's executive director speaks of differs in kind from other membership clubs that are primarily devoted to providing recreational facilities to members.

¶55 Accordingly, we resolve this case much as we did in ***Kickers***. That is, by relying on the heavy burden placed on the party seeking a tax exemption. As in ***Kickers***, we look to the following language in ***Trustees of Indiana University***: "The party claiming the exemption must show the property is clearly within the terms of the exception and any doubts are resolved in favor of taxability." ***Trustees of Indiana Univ.***, 170 Wis. 2d at 299. As in ***Kickers***, we

[12] We note that JCC's attempt to rely on ***Janesville Community Day Care Center, Inc. v. Spoden***, 126 Wis. 2d 231, 376 N.W.2d 78 (Ct. App. 1985), appears to reveal JCC's possible misapprehension of the meaning of "incidental" in this WIS. STAT. § 70.11(4) context. Multiple times in its appellate briefing, JCC refers to recreational activities at Family Park as "incidental" to the purpose of community building. At the same time, and inconsistently, JCC argues that the recreational activities at Family Park, combined with some religious and educational activities, are the uses of the property that have a benevolent purpose, namely, a community building purpose. Clearly, what JCC means to argue is the latter, not the former. Arguing that the recreational activities at Family Park are "incidental" only makes sense if *other activities* at Family Park are sufficiently benevolent and exclusive to warrant an exemption, an argument JCC does not make.

conclude that the party seeking tax exempt status for its property, here JCC, failed to establish that its property is "clearly within" the claimed exemption. *See* ***Kickers***, 197 Wis. 2d at 686-87.

¶56 In closing, we emphasize that we do not hold that the recreational activities at Family Park cannot be considered benevolent for purposes of WIS. STAT. § 70.11(4). Rather, we hold that JCC has failed to meet its burden of establishing with clarity that the activities have a benevolent purpose under the statute or under cases interpreting and applying the statute.

Conclusion

¶57 For the reasons above, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.