STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JERUSALEM EMPOWERED AFRICAN METHODIST EPISCOPAL CHURCH,

Plaintiff,

v. Case No. 12-CV-8079

CITY OF MILWAUKEE,

Defendant.

BRIEF OF PLAINTIFF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Jerusalem Empowered African Methodist Episcopal Church ("JEAMEC" or the "Church") is a small church with a congregation of approximately thirty-eight members. The Church is located on a 4.4 acre parcel at 9540 West Good Hope Road, Milwaukee, WI 53224 (the "Property"). The Church acquired the Property from King of Kings Lutheran Church in December, 2008. Because the Property was operated by a church when it was acquired by JEAMEC, the Property was tax exempt. In fact, the City of Milwaukee (the "City") has considered the Property to be tax exempt since at least 1967. Despite this record, the City now claims that 2 acres of the 4.4 acre parcel should be taxable (a position the City never took when the Property belonged to King of Kings Lutheran Church). JEAMEC seeks a declaration under Wis. Stat. § 70.11, that the Property is tax exempt.

SUMMARY JUDGMENT IS APPROPRIATE

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).

There is no dispute of material fact relevant to whether JEAMEC is entitled to tax exemption for the Property. The Property is used exclusively by the Church (for non-profit church purposes) and is less than 10 acres. *See* Statement of Undisputed Facts, *infra*. As a result, this is a relatively simple case that involves the application of a statute (Section 70.11(4) Wis. Stats.) to undisputed facts. That is an issue to be decided by the Court as a matter of law. *Wisconsin Evangelical Lutheran Synod v. City of Prairie du Chien*, 125 Wis. 2d 541, 549, 373 N.W.2d 78, 82 (Ct. App. 1985) (construction of Section 70.11(4) under a particular set of facts is a question of law).

The City also argues that pursuant to Section 74.35 (2m) Wis. Stats., the Church should not be able to raise its right to a tax exemption because the Church has not paid the claimed property taxes for 2010, 2011 and 2012. However, because it is undisputed that JEAMEC does not have and cannot raise or borrow the money to pay these taxes, it would be unconstitutional to deny JEAMEC its day in court on this basis. Furthermore, a tax appeal system where some property owners have only one method to challenge an unlawful tax (a method that requires property owners to pay the disputed tax first) while other property owners have three methods to challenge an unlawful tax (only one of which requires paying the disputed tax first), unconstitutionally denies property owners like JEAMEC equal protection of the law. These constitutional questions are also to be decided by the Court as a matter of law. *In re Gwenevere T.*, 2011 WI 30, ¶16, 333 Wis. 2d 273, 797 N.W.2d 854 ("Whether a statute and the application of a statute are constitutional are . . . questions of law . . . .").

Accordingly, JEAMEC's motion for summary judgment is properly before this court.

STATEMENT OF UNDISPUTED FACTS

The following statement of undisputed facts is based upon the admissions by the City in its Answer to Amended Complaint, the Affidavit of Sandra Banks, the pastor of the Church, the deposition testimony of Lee Sherman and Christopher Berge (the City's assessors who personally inspected the Property and wrote a report stating that the Property *should* be exempt) and the City's tax file for the Property produced in discovery.

JEAMEC's Religious, Benevolent, and Charitable Use of Its Property

1. The African Methodist Episcopal Church ("AME Church") is a worldwide church with headquarters in Tennessee. It has member churches in nearly every state and dozens of countries around the world. (Banks Aff. ¶3; Answer to Amended Complaint ¶7.)

2. The mission of the AME Church is to minister to the social, spiritual, and physical development of all people. Its ultimate purposes are to: (1) make available God's biblical principles, (2) spread Christ's liberating gospel, and (3) provide continuing programs that will enhance the entire social development of all people. (Banks Aff. ¶4; Answer to Amended Complaint ¶7.)

3. JEAMEC is a member church of the AME Church and shares its mission and purposes. (Banks Aff. ¶5; Answer to Amended Complaint ¶7.) JEAMEC currently has approximately 38 members in its congregation. (Banks Aff. ¶5.)

4. JEAMEC spends much of its time and resources on improving the everyday lives of its members. JEAMEC's benevolence does not end with JEAMEC members, but extends to the local community by helping families receive medical attention, food during the holidays, and school

supplies at the start of each school year. JEAMEC is a community institution and offers assistance to local families in need. (Banks Aff. ¶6; Answer to Amended Complaint ¶7.)

5. JEAMEC has owned the Property since December, 2008. The Property is 4.4 acres in size and contains one building – the church itself. Two acres of that Property – the portion claimed to be taxable by the City – is an open field. (Banks Aff. ¶¶7-8; Answer to Amended Complaint ¶7.) The two acres in question are used exclusively by the Church and are not used for any profit-making purpose. (Banks Aff. ¶8.)

6. JEAMEC acquired the entire 4.4 acre parcel from King of Kings Lutheran Church in December 2008. At the time of the acquisition, the Property was tax exempt. (Banks Aff. ¶7.) The file for the Property produced by the City shows that the Property was owned by King of Kings since the 1960s and has been treated as tax exempt since at least 1967. (Kamenick Aff. ¶8, Ex. G.)

7. JEAMEC uses the Property's two acres of open field for frequent weekly, monthly, and annual events related to the church's benevolent mission, including: outdoor worship services (monthly during the warmer months); daily vacation bible school for one week during the summer; a bi-weekly car wash and barbecue that serves as both fundraiser and evangelism opportunity; weekly outdoor bible study during the summer; two annual health fairs providing free professional medical advice and care to hundreds of low-income members of the community; an annual community youth crime awareness and prevention program; football and soccer practice; a Graduation Ceremony for individuals that have graduated and their families and friends; a community rummage sale (as a fundraiser for the Church) and an annual back-to-school supply drive that provides free school supplies to hundreds of low-income children in the community. (Banks Aff. ¶9.)

The City's Taxation of JEAMEC's Property

8. On June 25, 2010, the City sent a letter to JEAMEC contending that JEAMEC owed full property taxes for 2009, because JEAMEC had failed to file for exemption on time after purchasing the Property. (Banks Aff. ¶10; Answer to Amended Complaint ¶9.)

9. The Church submitted the proper exemption form and was notified that no property taxes were due for 2009. (Banks Aff. ¶11.) The City passed a Resolution stating that "[JEAMEC] is a religious and benevolent organization which should not be subject to property taxation on its church building and should not be required to pay 2009 property taxes based on a technicality." (Banks Aff. ¶11; Answer to Amended Complaint ¶9.)

10. On September 23, 2010, the City sent JEAMEC a letter contending that as of 2010 the Church was allowed only a partial exemption for the Property and that 2 of the 4.4 acres were taxable. (Banks Aff. ¶12; Answer to Amended Complaint ¶9.)

11. In 2011, the City sent JEAMEC a delinquent tax bill for $5,207.63, which included interest and penalty charges on 2010 taxes. (Banks Aff. ¶13; Answer to Amended Complaint ¶9.) Later in 2011, the City sent JEAMEC a combined property tax bill for $10,689.44; this number included the taxes and penalty charges from 2010 and the taxes owed for 2011. (Banks Aff. ¶14; Answer to Amended Complaint ¶9.) The City also contends that additional taxes of $5,876.94 are due for 2012. (Banks Aff. ¶15; Answer to Amended Complaint ¶9.)

12. The City's records assert that as of July 31, 2013, for the three-year period of 2010-2012, a total of $27,207.37 is due including interest and penalties. (Kamenick Aff. Ex. D.)

13. At no time relevant to this lawsuit has JEAMEC had enough money to pay the disputed taxes and continue the day-to-day operations necessary to run the church. JEAMEC has also been incapable at all times relevant to this lawsuit of obtaining a loan to pay off the disputed taxes. JEAMEC's cash flow is negative; the church has no room in its budget to pay the disputed taxes in installments, much less all at once. (Banks Aff. ¶16; Answer to Amended Complaint ¶9.)

14. The City has informed counsel for JEAMEC that the City intends to foreclose on the Property this August based upon the Church's failure to pay the taxes. (Kamenick Aff. ¶9.)

The City's Own Assessors Believe the Property Should Be Tax Exempt

15. On July 9, 2012, Lee Sherman, the City of Milwaukee tax assessor responsible for the geographic part of the city in which the Church is located issued a written report concluding that the "2 acres of land in question located at the rear of the church building at the subject property should be exempt" (emphasis added). (Sherman Dep. at p. 40, lines 4-11, p. 61, lines15-22; Sherman Dep. Ex. 1.)[1]

16. Mr. Sherman personally inspected the Property (Sherman Dep. at p.61, lines 6-11) and personally inspected nine other potentially comparable properties (all 9 of the properties were other churches in the same geographic part of the city). (Sherman Dep. at 59-60.)

17. Mr. Sherman concluded that eight of the other nine churches he inspected were comparable to the JEAMEC property. (Sherman Dep. at 59-60.) One of the nine potential comparables involved 4 separate parcels, two used by the church and exempt, and two not being used by the church and currently assessable. (Sherman Ex. 1 at numbered page 199.) Mr. Sherman had questions as to whether this property was comparable. (Sherman Dep. at 59-60.)

[1] The excerpts from the depositions and the deposition exhibits that are cited in this brief are attached to the Kamenick affidavit filed herewith.

18. As can be seen in the City's report (including the pictures), each comparable church contained the same or more vacant land as JEAMEC's property. (Sherman Ex. 1 at numbered pages 195-198; 201-216.)

19. With respect to the 2 acres in question, Mr. Sherman's report concluded that "based on its location immediately to the rear of the church building, it is not likely to be developed for any purpose other than a facility connected to a church. (Sherman Dep. at p. 62, lines 6-11; Sherman Ex. 1.)

20. Mr. Sherman also testified that assessment decisions by the city relating to property taxes have three primary goals, "uniformity, and being fair and equitable" (Sherman Dep. at 28, lines 19-23) and that treating the Property as tax exempt "is consistent with our goal of providing uniform assessments." (Sherman Dep. at p. 62, lines 12-15.)

21. Mr. Sherman testified that as part of his work he reviewed the City's tax file for the subject property and nothing contained in the file shed any light as to why the City contended that 2 acres of the 4.4 acre parcel were taxable. (Sherman Dep. at 53-54.) His specific testimony on that subject was as follows:

> **Q:** And I take it looking at the file you didn't see any documentation in there of when that decision was made or why it was made?
> **A:** That's correct

(Sherman Dep. at p. 54, lines 12-15.)

22. Mr. Sherman further testified as follows:

> **Q**: In the ordinary course of business in the assessor's office, if a change to a church's exemption that would change it from all exempt or partially exempt were made, would there need to be some written record of that?
> **A**: Yes

(Sherman Dep. at p. 68, lines 11-16.)

23. Mr. Sherman further testified that he saw no such documentation in the file for the Property and he had no explanation for its omission. (Sherman Dep. at p. 69, lines 7-16.)

24. After Mr. Sherman submitted his report concluding that the property should be exempt, no one from the City has ever told him that they disagreed and that his conclusions were wrong. (Sherman Dep. at p.64, lines 7-9.)

25. Christopher Berge is an employee of the City that also works as an assessor. He assisted Mr. Sherman in preparing the July 9, 2012 report relating to the Property. He agrees with each of the opinions in the report. (Berge Dep. at p. 20, lines 9-11.) Specifically with respect to whether the Property should be tax exempt Mr. Berge testified as follows:

> **Q:** So you would agree that you have the opinion that I read before, that the two acres of land located at the rear of the church building should be exempt, was that your opinion at the time this document was written?
> **A:** Yes.

(Berge Dep. at p. 20, lines 12-17.)

ARGUMENT

I. JEAMEC IS ENTITLED TO A DECLARATION THAT ITS REAL PROPERTY IS TAX EXEMPT UNDER SECTION 70.11

Pursuant to Wis. Stat. § 70.11(4), real property is exempt from taxation when that property is "owned and used exclusively by . . . churches" up to a maximum of 10 acres "of land necessary for location and convenience of buildings." In interpreting Section 70.11(4), the Wisconsin Supreme Court has clarified "that, 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." *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 81-82, 591 N.W.2d 583, 588 (1999).

Here there is no dispute as to those three facts. JEAMEC is a church. (Banks Aff. ¶¶1, 5, 8; Answer to Amended Complaint ¶7.) The Property is owned and used exclusively by the Church (and is less than 10 acres). (Banks Aff. ¶¶6-10; Answer to Amended Complaint ¶7.) The Property has a building on it (the church building) and the two acres of open field are used for numerous church purposes related to the church building. (Banks Aff. ¶¶8-9; Answer to Amended Complaint ¶7.) Under Section 70.11, the property is therefore exempt.

Wisconsin courts have found tax exemptions for church property in at least two analogous cases. In *Wisconsin Evangelical Lutheran Synod v. City of Prairie du Chien*, 125 Wis. 2d 541, 549, 373 N.W.2d 78, 82 (Ct. App. 1985) ("*WELS")*, a church sought exemption for 11 scattered lots totaling about four acres used for housing pastors and ordained teachers. 125 Wis. 2d at 545. After quoting the statutory language noted above, the court summarized the statute as saying the synod "may claim a property tax exclusion for up to 10 acres of property *used for its general, nonprofit purposes*." *Id.* at 550 (emphasis added). The court also noted that the statute implicitly permitted *any* use of the property within the statutory limits, concluding that the parcels should be tax exempt. *Id.* at 550-51. JEAMEC uses the two acres of open field for its "general, nonprofit purposes" – specifically its religious exercises and benevolent outreach – which therefore should be exempt.

In the year immediately preceding *WELS*, the court of appeals addressed the use of empty land more specifically, in *St. John's Lutheran Church v. City of Bloomer*, 118 Wis. 2d 398, 403, 347 N.W.2d 619 (Ct. App. 1984). In that case, the local government argued that a church's "retirement

home, *surrounding land*, and nearby garage were not tax exempt under sec. 70.11(4)." *Id.* at 399 (emphasis added). In concluding that the surrounding land was exempt (as well as the home itself and the garage), the court noted that it was used as "landscaping" for the retirement home, and was not used for profit. *Id.* at 403. Given that landscaping – something designed merely for aesthetics, to please the eye –qualifies as "necessary for location and convenience of buildings," § 70.11(4), *a fortiori*, JEAMEC's land, which is not only kept in its pleasing natural state but is actually used for exempt purposes, should be exempt.

JEAMEC has attempted to find out why the City contends that the property is not exempt but the City's file for the Property does not show any basis for that conclusion, and the City's own assessors have submitted a written report and testified under oath that the Property should be exempt. The City's assessors admit that:

- the "2 acres of land in question located at the rear of the church building at the subject property *should be exempt*." (emphasis added) (Sherman Dep. at p. 61, lines 15-22 and Sherman Dep. Ex. 1; Berge Dep at p. 19, lines 14-22, p. 20, lines 9-17.)
- with respect to the 2 acre portion in question, "based on its location immediately to the rear of the church building, it is not likely to be developed for any purpose other than a facility connected to a church." (Sherman Ex. 1.)
- because eight other comparable churches have been treated as tax exempt and contain at least as much vacant land as JEAMEC's property, treating the Property as tax exempt "is consistent with our goal of providing uniform assessments." (Sherman Dep. at p. 62, lines 12-15.)

Moreover, on January 9, 2011 the Milwaukee Common Council adopted a Resolution declaring the Property tax exempt. (Banks Aff. Ex. C; Answer to Amended Complaint ¶9.) Under that Resolution, the Church received a tax exemption for all 4.4 acres of the Property for 2009; neither the use, the occupancy, nor the ownership of the Property has changed since that time. Because the Property was specifically found by the City to be exempt for 2009 and nothing changed in 2010, 2011 or 2012, the Property continues to be exempt. *See* Wis. Stat. § 704.11 ("The property described in this section is exempted from general property taxes . . . if it was exempt the previous year and its use, occupancy or ownership did not change in a way that makes it taxable.").

In addition, in its written discovery responses, the City stated that it relies on the Wisconsin Property Assessment Manual for guidance in determining whether a property is given a tax

exemption. (*See* City Response to Document Request No. 16; Kamenick Aff., ¶7, Ex. F.) That Manual considers almost the exact situation in this case and states as follows:

> However, vacant land adjacent, or in close proximity, to an exempt building, and currently used for exempt purposes, may qualify for exemption. Consider a church-owned lot located across the street from the church. The lot was used exclusively for church related outdoor activities such as parking, picnics, socials, recreational activities, etc. The lot was exempt as "land necessary for the location and convenience of buildings."

Wisconsin Property Assessment Manual at 22-7 (Kamenick Aff. Ex. F). The Wisconsin Property Assessment Manual is an official document created by the Wisconsin Department of Revenue to "discuss and illustrate accepted assessment methods, techniques and practices with a view to more nearly uniform and more consistent assessments of property at the local level." Wis. Stat. § 73.03(2a); *see also* Wis. Stat. § 70.32(1) ("Real property shall be valued by the assessor *in the manner specified in the Wisconsin property assessment manual* provided under s. 73.03(2a)) (emphasis added).

At this point the City may not stand on its pleadings and must set forth admissible evidence that places some material fact in dispute. *See* Wis. Stat. § 802.08(3) ("When a motion for summary judgment is made . . . , an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits [or other admissible evidence], must set forth specific facts showing that there is a genuine issue for trial."). However, the City lacks any such information. As testified to by the City's own assessor:

> **Q**: In the ordinary course of business in the assessor's office, if a change to a church's exemption that would change it from all exempt or partially exempt were made, would there need to be some written record of that?
> **A**: Yes

(Sherman Dep. at p. 68, lines 11-16.)

Here the City's file, as reviewed by its own assessor and as produced in discovery, contains nothing that sheds any light as to why the City decided that 2 acres that had been exempt from taxation for many years under King of Kings ownership and that was determined by the City in 2009 to be tax exempt under JEAMEC ownership should be subject to taxes beginning in 2010. (Sherman Dep. at 53-54.) His specific testimony on that subject was as follows:

> **Q:** And I take it looking at the file you didn't see any documentation in there of when that decision was made or why it was made?
> **A:** That's correct

(Sherman Dep. at p. 54, lines 12-15). Mr. Sherman further testified that he had no explanation for its omission. (Sherman Dep. at p. 69, lines 7-16).

Based upon the testimony of the City's assessor and the City's own tax file, there are no facts in the City's possession that contradict the opinion of the City's assessor that the Property should be tax exempt

The City may contend that the 2 acres in issue are not "necessary for the location and convenience of buildings." However, the City's own assessors did not come to this conclusion – in fact they reached the opposite conclusion and opined that the land should be tax exempt – and there is no factual or legal support for any such argument. In *Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee*, 194 Wis. 2d 787, 535 N.W.2d 111 (Ct. App. 1995), the court of appeals clarified the proper interpretation of this language.[2] "Land necessary for location of buildings and land necessary for convenience of buildings are of equal importance." 194 Wis. 2d at 793. The court of appeals gave specific guidance as to the meaning of "convenience" in this context. The court said that in determining what land is convenient to a building, "the trial court should consider how 'convenience' is commonly defined." *Id*. at 796. Applying a dictionary definition, the court of appeals concluded that convenience in this context means, "a condition favorable to achieving the function or purpose of a building or group of buildings." *Id.*

Thus, the question becomes whether the 2 acres in issue create a condition favorable to achieving the function or purpose of the church building. The evidence in this regard is undisputed. The mission of the AME Church, of which JEAMEC is a member, is to minister to the social, spiritual, and physical development of all people. Its ultimate purposes are to: (1) make available God's biblical principles, (2) spread Christ's liberating gospel, and (3) provide continuing programs that will enhance the entire social development of all people. (Banks Aff. ¶¶4-5; Answer to Amended Complaint ¶7.)

JEAMEC uses the two acres of open field for frequent weekly, monthly, and annual events related to the church's benevolent mission, including: outdoor worship services (monthly during the warmer months); daily vacation bible school for one week during the summer; a bi-weekly car wash and barbecue that serves as both fundraiser and evangelism opportunity; weekly outdoor bible study during the summer; two annual health fairs providing free professional medical advice and care to

[2] Any argument that the City should prevail because statutes conferring tax exemption should be strictly construed is put to rest by the court of appeal's discussion of this issue in *Friendship Village*. That litigation involved two separate appeals to the court of appeals regarding Section 70.11(4). In the first appeal, the court of appeals held that the rule is that tax-exemption statutes must be given a "strict but reasonable" construction. *Friendship Vill. of Greater Milwaukee, Inc. v. City of Milwaukee*, 181 Wis. 2d 207, 220, 511 N.W.2d 345, 350-51 (Ct. App. 1993). In the second appeal, discussed above, the court of appeals gave the reasonable construction of the relevant language of the statute.

hundreds of low-income members of the community; an annual community youth crime awareness and prevention program; football and soccer practice; a Graduation Ceremony for individuals who have graduated and their families and friends; a community rummage sale (as a fundraiser for the Church) and an annual back-to-school supply drive that provides free school supplies to hundreds of low-income children in the community. (Banks Aff. ¶9.) Each of these uses is favorable to achieving the evangelistic and social development purposes of the Church.

In fact, as demonstrated by the eight comparable properties in the assessment report written by the City's own assessors, it is typical for churches in this geographic area to have extra land to help the church fulfill its purposes. (Sherman Dep. Ex. 1.)

The City may point to *Deutsches Land Inc. v. City of Glendale*, 225 Wis. 2d 70, 591 N.W2d. 583 (1999), as asserted support for the City's position but the facts in that case are nothing like this one. In *Deutsches Land*, the court found that two soccer fields were not necessary for the location and convenience of buildings but it did so because the land had no buildings. *Id.*, ¶¶53-55. The court stated that "[t]he exemption of land is tied to, and follows from, the exemption of buildings. This means that land devoid of buildings cannot qualify for an exemption under Wis. Stat. § 70.11(4)." *Id.*, ¶52. That holding has no application to this case, where the land has a building (a church) on it, and the 2-acre field is used to further the purposes of the church.

II. JEAMEC IS ENTITLED TO ITS DAY IN COURT

The City argues that two subsections of § 74.35 prohibit JEAMEC from even bringing this action. First, Wis. Stat. § 74.35(2m) states, "[a] claim that property is exempt . . . may be made only in an action under [Section 74.35]. Such a claim may not be made by means of an action under s. 74.33 or an action for a declaratory judgment under s. 806.04." Second, under § 74.35(5)(c), "[n]o claim may be filed or maintained unless the tax for which the claim is filed, or any authorized installment payment of the tax, is timely paid under s. 74.11." According to the City, the combination of Wis. Stat. §§ 74.35(2m) and 74.35(5)(c) create a procedural framework under which the only way to challenge an exemption denial is to pay the disputed tax first, even if the owner cannot afford to pay.

This statutory framework, as applied to JEAMEC, violates the Church's constitutional rights. First, it violates the Church's right to due process and its right to a remedy by conditioning its access to court on its ability to pay a disputed tax. Second, it violates the Church's right to equal protection because it creates a system where certain taxpayers are given more options – and more favorable options – for challenging a disputed tax than others.

A. § 74.35(2m), as Applied to JEAMEC, Violates JEAMEC's Rights to Due Process and a Remedy

Under the Constitution it would be a denial of due process if JEAMEC is denied the ability to have its day in court based upon its inability to pay the property taxes demanded by the City. *See Boddie v. Connecticut*, 401 U.S. 371 (1971).

Here, it is undisputed that JEAMEC did not have enough money to pay the taxes when the City claimed that they were due. (Banks Aff. ¶16; Answer to Amended Complaint ¶9.) JEAMEC is and was unable to obtain a loan to pay the taxes. (*Id*.) JEAMEC's cash flow is negative and, as a result, the Church has no room in its budget to pay the taxes. (*Id*.)

Placing the Church in a position where it is denied access to the court to protect its rights based upon its inability to pay violates JEAMEC's right to due process of law and the Wisconsin Constitution's "right to a remedy" clause. The United States Constitution mandates that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Under the Wisconsin Constitution Art. I, section 1, "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The Wisconsin Supreme Court has interpreted Article I, Section 1 as a protection of due process and has held that "[w]hile the language used in the two constitutions [Wisconsin's and the United States'] is not identical . . . the two provide identical procedural due process protections." *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

In *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 473-74, 565 N.W.2d 521, 530 (1997) the supreme court described the right of access to the courts as follows:

> It entitles the individual to a fair opportunity to present his or her claim. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 ([7th Cir.] 1984) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)). Such a right exists where the claim has a "reasonable basis in fact or law." *Bell*, 746 F.2d at 1261 (citing *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)). Judicial access must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 1495, 52 L. Ed. 2d 72 (1977).

In addition, Article I, Section 9 of the Wisconsin Constitution states that "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely and without denial, promptly and without delay, conformably to the laws."

These constitutional protections contradict the City's contention that JEAMEC is not entitled to its day in court in this matter based upon JEAMEC's inability and resulting failure to pay the taxes for the Property.

This case involves a particularly inequitable situation because these statutes not only condition a lawsuit on the plaintiff's ability to pay, but more specifically on the plaintiff's ability to pay in a narrow window of time. The taxpayer has to be able to pay between when they get the tax bill and the following January 31st. Wis. Stat. § 74.35(5)(a).[3] Thus, even if JEAMEC could pay the disputed taxes for 2010, 2011, and 2012 today, under the City's view the Church still could not challenge the tax exemption denial in court. JEAMEC is, under the City's theory, forever barred from challenging its tax exemption denial because its financial condition caused it to miss the window.

The City is not and cannot be correct. Meaningful access to the courts is a fundamental right. *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996). Denying access to courts based on a litigant's inability to pay violates the Due Process Clause. *Boddie v. Connecticut*, 401 U.S. 371, 381-83 (1971).

JEAMEC's right to due process is buttressed by its right to a remedy under Article I, Section 9. This portion of the Wisconsin Constitution "preserves access to the courts for redress of rights as those rights may . . . be created by the legislature." *Guzman v. St. Francis Hosp., Inc.*, 2001 WI App 21, ¶18, 240 Wis. 2d 559, 623 N.W.2d 776.

The legislature created a statutory right to a property tax exemption if the use of real property meets certain criteria. *See* Wis. Stat. § 70.11. Once this right was created, Article I, Section 9 guarantees the provision of a remedy in court for an abrogation of that right. *In re D. H.*, 76 Wis. 2d 286, 294, 251 N.W.2d 196, 201 (1977) ("When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution, can fashion an adequate remedy.").

If the City's argument is correct, the legislature has unconstitutionally limited access to the courts for redress of that right. By limiting the § 74.35 procedures to those litigants rich enough to be able to pay the disputed tax first, the legislature has precluded the redress of grievances for those who lack the funds to pay a disputed tax.

[3] Or, if the municipality permits payment plans (under Section 74.12), at least half of the tax by January 31st -and the remainder under the installment plan no later than July 31st.

This conclusion is supported by *Whittaker v. City of Janesville*, 33 Wis. 76 (1873). The court there upheld a statute requiring the prepayment of disputed taxes against an Article I, Section 9 challenge, but *only* in cases challenging an irregular assessment of the land, not attacking the underlying lawfulness of the tax. *Id.* at 90. The court noted that if the statute were to be read to apply to all challenges to taxes, it "would undoubtedly be obnoxious to the constitutional objection raised by counsel." *Id.* In particular, the supreme court said that if a statute is intended to deny a remedy to challenge a tax when such result would be against the equitable rights of the property owner, the statute would be constitutionally obnoxious under the Right to a Remedy provision of the Constitution. *Id*. *Whittaker* provides support for JEAMEC's position, because JEAMEC is not challenging an irregular assessment, but the fundamental unlawfulness of the tax, and if JEAMEC is not allowed to make that challenge it would defeat JEAMEC's equitable right to benefit from a tax exemption provided to all other similarly situated churches.

In *State ex rel. Lindell v. Litscher*, 2003 WI App 36, 260 Wis. 2d 454, 460, 659 N.W.2d 413, 416, the Wisconsin Court of Appeals agreed that conditioning access to the courts based on ability to pay would be unconstitutional if it prevented a party from advancing a matter in which some constitutionally recognized fundamental interest is implicated (citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that a state may not condition appeals from the termination of a person's parental rights on the ability to pay record preparation fees) and *Boddie v. Connecticut*, 401 U.S. 371 (1971) (mandating the waiver of filing fees for indigent persons seeking divorce).

Here, JEAMEC has a fundamental right to its property. U.S. Const. Amends. V, XIV; *see West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (noting that the right to property is a fundamental right); *Buchanan v. Warley*, 245 U.S. 60, 79 (1917) (same); *New York Cent. R. Co. v. White*, 243 U.S. 188, 197-98 (1917) (same). The City is seeking to deprive JEAMEC of that right by encumbering the Church's Property with tax liens. As a matter of due process and JEAMEC's constitutional right to a remedy, JEAMEC is entitled to its day in court on that issue.

Section 74.35(2m) is therefore unconstitutional as applied to JEAMEC because it denies JEAMEC the fundamental right of access to the courts under the Due Process Clauses of the U.S. and Wisconsin Constitutions and the Right to Remedy Clause of the Wisconsin Constitution. JEAMEC does not have the resources to pay its taxes first, and § 74.35(2m) prevents JEAMEC from challenging the denial of its property tax exemption request by any other method.

B. Section 74.35(2m), as Applied to JEAMEC, Violates JEAMEC's Right to Equal Protection of the Law

The United States Constitution mandates that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. Wisconsin courts apply the same interpretation to the Wisconsin Constitution's Equal Protection Clause as the United States Constitution's Equal Protection Clause. *Castellani v. Bailey*, 218 Wis. 2d 245, 261, 578 N.W.2d 166 (1998).

The Wisconsin Supreme Court has twice held in recent years that providing methods of challenging property taxes to some classes of property owners but denying those methods to others violates equal protection. *See Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717; *Nankin v. Vill. of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141. The current system of tax challenges creates such an unconstitutionally disparate system. It creates two categories of property owners and discriminates against the second class: (1) those who wish to challenge a tax as unlawful because it is excessive; and (2) those who wish to challenge a tax as unlawful because they should be exempt from the tax. The first category of property owners is provided with a variety of remedies not available to the second category; among other things, they may bring their challenge without paying the tax first. This unlawfully discriminates against the second category of property tax owners.

1) § 74.35(2m) discriminates against property owners who wish to challenge an unlawful tax because the property should be exempt from tax

Property owners who wish to challenge an unlawful tax as excessive have three distinct methods of proceeding. First, they may challenge it before their local Board of Review and then in circuit court as a *certiorari* review of the Board of Review decision, without having to first pay the disputed tax. Wis. Stat. § 70.47(13). Second, they may challenge the Board of Review's decision with the Department of Revenue, whose decision would then be reviewable in the circuit court as a *certiorari* review, without having to first pay the disputed tax. Wis. Stat. § 70.85. Third, they may challenge it before their local Board of Review and then in circuit court as a *de novo* review of a Board of Review decision, if they first pay the disputed tax. Wis. Stat. § 74.37; *see generally Metro. Assocs.*, 2011 WI 20, ¶¶6-11 (describing the three-method system in more detail).

In contrast, property owners, such as JEAMEC, who wish to challenge an unlawful tax because they should be exempt from the tax have just one method of challenging taxes – pay the

disputed tax (before January 31st), file a claim with the taxing authority and then an action to recover the tax in circuit court. Wis. Stat. § 74.35.

Wisconsin courts apply a three-step test as to whether laws that treat people different but do not implicate a suspect class violate equal protection: (1) determine whether the law creates distinct classes of citizens; (2) determine whether the law treats members of those classes in significantly different ways; and (3) determine whether a rational basis exists for the difference. *Metro. Assocs.*, 2011 WI 20, ¶23.

The first step is very simple. In both *Metropolitan Associates* and *Nankin*, the Wisconsin Supreme Court took a single sentence to conclude that the tax schemes at issue in those cases created distinct classes. *Metro. Assocs.*, 2011 WI 20, ¶24 ("[W]e have conducted our own review, and after doing so, hold that Act 86 did create a distinct class of citizens: taxpayers living in opt out municipalities."); *Nankin*, 2001 WI 92, ¶13 ("[T]he first determination [of the court] is that, in enacting § 74.37(6), the legislature created a distinct classification of citizens, that is, owners of property located in counties with a population of 500,000 people or more."). Likewise here, the legislature created two distinct classes of citizens: (1) those that own property and challenge the tax as excessive, and (2) those that own property and challenge the tax based upon an exemption.

The second step looks at whether those who are similarly situated are treated significantly differently than those in the disfavored class. *Metro. Assocs*., 2011 WI 20, ¶23. In both *Nankin* and *Metropolitan Associates*, the Wisconsin Supreme Court compared the disfavored class to all other taxpayers. *Id.*, ¶25 ("Act 86 Treats Taxpayers Living in Opt Out Municipalities Significantly Different Than All Other Taxpayers."); *Nankin*, 2001 WI 92, ¶14 ("[T]he statute treats the class differently by prohibiting it from filing a circuit court action under Wis. Stat. § 74.37(3)(d) to challenge the excessiveness of their property assessment. *All other owners of property* located in counties with a population of less than 500,000 are entitled to proceed under this statute.") (emphasis added).

Therefore, here, we must look at whether the class that includes JEAMEC – those who challenge a tax based upon the exemption – is treated significantly differently than all other taxpayers, meaning those who challenge a tax based upon the excessive assessment. It is.

Members of JEAMEC's class who wish to challenge the taxation of their property as unlawful must pay the disputed tax first and proceed via § 74.35. Members of the other class who wish to challenge the taxation of their property as unlawful not only have three options to choose from, two of those options do not require the owner to pay the disputed tax first.

This is not a trivial difference. We are not talking about a small filing fee, but rather a significant sum that in this case is four figures for one year of taxes, and well beyond the capacity of many tax exempt charities or churches to pay. Even if such a property owner could pay the disputed tax, the loss of that amount of money for the length of an entire lawsuit (which, as demonstrated by this case can span multiple tax years) is a serious injury. That holds doubly true for a tax-exempt organization, which would rightfully expect to have no reason to budget for property taxes.

The final question asks, essentially, whether there is a "good enough" reason for the disparate treatment. As the courts in *Nankin* and *Metropolitan Associates* concluded, so too should this Court conclude that there is no such reason. *Metro. Assocs.*, 2011 WI 20, ¶74 ("Act 86's irrational denial of de novo review to a distinct class of citizens violates the equal protection provisions of the Wisconsin and the United States Constitutions."); *Nankin*, 2001 WI 92, ¶13 ([T]he statute's disparate treatment of Nankin and other owners of property located in populous counties is without a rational basis, and as a result, the statute violates equal protection."). To satisfy this question, a statute must satisfy all five of the following criteria:

> (1) All classification[s] must be based upon substantial distinctions which make one class really different from another;
> (2) The classification adopted must be germane to the purpose of the law;
> (3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within the class];
> (4) To whatever class a law may apply, it must apply equally to each member thereof;
> (5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation

Metro. Assocs., 2011 WI 20, ¶64. The statutes here fail, at the very least, criteria 2, 4, and 5.[4]

Under the second criterion, the classification between those challenging an unlawful tax based upon an exemption and those challenging an unlawful tax as excessive is not germane to any purpose of the law. The purpose of requiring property owners to pay a disputed tax first is to preserve the government's financial security. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Florida*, 496 U.S. 18, 38 (1990). That purpose is not at all served by requiring only *some* property owners to pay the disputed tax first. Similarly, a purpose to ensure uniform taxation is not served by this disparate treatment, nor is any purpose to give property owners a fair and equitable means of challenging unlawful taxation.

[4] Admittedly, there are real differences in circumstances between those seeking a property tax exemption and those seeking a lowered assessment under the first criterion. Also, neither class is static, as each expands or contracts on a regular basis with the sale and changing use of properties.

Under the fourth criterion, the law does not apply equally to all the members of JEAMEC's class of property owners claiming tax exemption. Some large or financially secure members of that class will, undoubtedly, be capable of paying that disputed tax. They can proceed to court and have their dispute adjudicated. Others, like JEAMEC, are unable to pay a disputed tax, and are therefore prohibited by § 74.35(5)(c) from bringing a claim in circuit court.

Under the fifth criterion, while there are non-trivial differences between the situations of those who challenge a tax as unlawful because the property should be exempt and those who challenge a tax as unlawful because the property is taxable to be assessed at an unreasonably assessed value, those differences do not justify legislation treating them differently in this manner. Why should the latter be given three choices on how to proceed and the former only one? Why should the latter be able to proceed without being forced to pay an unlawful tax before raising a challenge in court, but not the other? Both classes are seeking the same thing – a declaration that they have been unlawfully taxed and a reduction of taxes. Both classes have the burden of proving their case. Both classes may contain individuals bringing spurious claims. The substantive legal reasoning behind each claim will differ, but that does not justify placing the exemption-claimer under a *procedural* handicap.

Because the statute cannot satisfy all five requirements of the test, it, has no rational basis. *See Metro. Assocs.*, 2011 WI 20, ¶74 (noting that the statute at issue failed criteria one, two, and five) Because the statute creates a distinct classification, treats that class significantly differently than all others, and does so without a rational basis, it violates the equal protection provisions of the Constitutions.

2) Section 74.35(2m) discriminates against property owners who lacks the funds to pay a disputed tax

The statute creates a second classification that also violates equal protection. Under the first step of the three-step test, it creates a class of property owners who do not have the funds sufficient to pay a disputed tax during the narrow window of time.

Under the second step, this class is treated significantly differently than those who *do* have sufficient funds. The favored group can proceed under § 74.35 and obtain a declaration immediately from circuit court that their property is tax exempt. They can remove any stain or potential stain on their title with alacrity. In contrast, the disfavored group is barred by § 74.35(2m) from raising its tax exemption claim, because their inability to pay forecloses their bringing a § 74.35 action (even if they later obtain the funds to pay the disputed tax).

Under the third step, there is no rational basis for this disparate treatment. Here, the statute again fails three of the five criteria that must be met in order to survive.

The statue fails the first criterion because classifying people based on their available cash during a narrow window of time has no basis in a real and substantial difference between people. Aside from the invidiousness of favorable courtroom treatment for the wealthy, there is no real difference between a person who can pay $5,000 on January 31st and one who can pay the same on February 1st.

The statute fails the second criterion as well. Discriminating by income in such a manner serves absolutely no legitimate state purpose of any kind, much less the specific purpose of the tax law at issue here. If a person cannot pay (and here there is no factual dispute on that issue) then they cannot pay, and imposing this penalty leads to no benefit.

Finally, the statute fails the fifth criterion abysmally. The legally irrelevant differences between the rich and the poor cannot in a just society permit the former to raise and have decided a legal issue while the latter may not. The rule of law is betrayed where disfavored citizens must endure such uncertainty and are unable to commence an action to resolve a legal dispute and end a legal handicap.

CONCLUSION

JEAMEC is entitled to its day in court and, as a church, JEAMEC is entitled to have its real property treated as tax exempt. JEAMEC requests that the Court grant its motion for summary judgment and issue a declaration to that effect.

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