

1 STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY  
2 BRANCH 12  
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5 WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,  
6 Plaintiff,

7  
8 v. CASE NO.: 2022-CV-3955

9 CITY OF MILWAUKEE,  
10 Defendant.  
11 \_\_\_\_\_

12 RULING ON SUMMARY JUDGMENT  
13 \_\_\_\_\_

14 FEBRUARY 2, 2023

15  
16 HONORABLE DAVID L. BOROWSKI  
17 CIRCUIT COURT JUDGE PRESIDING

18  
19 APPEARANCES:

20 MS. KATHERINE SPITZ, MR. DAVID BAACKE, Attorneys at  
21 Law, appeared on behalf of the Plaintiff.

22 MS. HANNAH JAHN, MR. KYLE BAILEY, Attorneys at  
23 Law, appeared on behalf of the Defendant.

24  
25 CAROLE SEROTA-BODI, RPR  
OFFICIAL COURT REPORTER, BRANCH 12

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INDEX

EXAMINATION:

(NONE)

PAGE:

EXHIBITS:

(NONE)

RECEIVED:



1 city of Milwaukee, arguably close to identical to a case  
2 that I ruled on, approximately, five years ago.

3           However, as Wisconsin Lutheran has pointed  
4 out with their submissions and in their briefing, there  
5 are significant differences between the facts that are  
6 presented today and the facts that were presented on the  
7 similar case about five years ago. The similarities, of  
8 course, that the plaintiff and the defendant are exactly  
9 the same. We're discussing property that, for the most  
10 part, is the same and, obviously, we're again discussing  
11 a tax exemption or lack of exemption for a portion of the  
12 property, a portion of the parcel that Wisconsin Lutheran  
13 High School owns in the city of Milwaukee.

14           Both sides discussed in their briefing  
15 the -- and I think accurately discussed, particularly  
16 Wisconsin Lutheran, in their briefing the legal criteria  
17 related to tax exemptions, the burden related to tax  
18 exemptions and, frankly, the fact that the taxpayer in  
19 this case, the plaintiff, Wisconsin Lutheran, has the  
20 burden related to demonstrating that the property does  
21 fall within an exemption.

22           Both sides cite to, I believe, and, again,  
23 certainly Wisconsin Lutheran did, the criteria from prior  
24 case law that the exemption statutes are to be strictly  
25 but "reasonably construed" by the courts. As I said at

1 the oral argument, Wisconsin Lutheran had the — or has  
2 the — maybe delicate situation of telling the court, the  
3 same judge, the same exact person that, at least,  
4 arguably, the prior decision from seven years ago —  
5 strike that. The prior decision from five years ago,  
6 approximately, was incorrect.

7 Wisconsin Lutheran did not say that exactly,  
8 but in their briefing and at oral argument certainly  
9 indicated some differences, and notably indicated a  
10 difference or a distinction that this court and the prior  
11 parties — and when I say "parties," I really mean the  
12 attorneys on both sides — either did not address or  
13 barely addressed in the prior case.

14 And I think one of those arguments made by  
15 Wisconsin Lutheran is particularly persuasive and that is  
16 that I do believe and I'm finding that Wisconsin Lutheran  
17 High School is an educational institution. The decision  
18 from about five years ago discussed educational  
19 associations, and I think largely this case can be cited  
20 only on that criteria and that fact alone related to the  
21 statutory definition of educational institution.

22 There's no dispute from the parties at  
23 Wisconsin Lutheran this is an educational institution.  
24 They've been providing education in the city of Milwaukee  
25 upon decades upon decades. They have a regular

1 nine-month school year. They're registered and qualified  
2 with the Department of Public Instruction. I think —  
3 plaintiff's counsel can correct me if I'm wrong — that  
4 they participate in some form of the choice program,  
5 correct?

6 **MS. SPITZ:** Correct, Your Honor.

7 **THE COURT:** So it's clear to me, and I'm  
8 finding specifically that they are an educational  
9 institution. I believe that that alone is enough to  
10 allow for the exemption. As the high school points out  
11 in their briefing and in affidavits many other high  
12 schools, many other properties, I believe, rightly as  
13 part of a school situation — I use the example it's  
14 conjecture. I don't know this for a fact, but during  
15 oral arguments I think I mentioned Marquette High School.  
16 They have a parking lot and green space and other things  
17 that are directly south of the high school which is  
18 located at about 35th and Wisconsin Avenue.

19 As Wisconsin Lutheran points out the  
20 property of an educational institution, including parking  
21 lots, green space, maybe an outlot, a garage that are on  
22 the property of an educational institution I believe is a  
23 property that's tax exempt.

24 So on that ground alone, I think that's,  
25 frankly, enough for me to rule in the favor of Wisconsin

1 Lutheran. That's a significant distinction that was  
2 either not pointed out to me five years ago or at least  
3 not addressed adequately by the parties, meaning the  
4 attorneys and the court. There's really no dispute that  
5 it's an educational institution as opposed to an  
6 educational association.

7 So that's reason No. 1, that, ultimately,  
8 I'm granting the request for summary judgment as  
9 requested by Wisconsin Lutheran High School. I'm denying  
10 the request for summary judgment requested by the city of  
11 Milwaukee. And, ultimately, though I'm going to make a  
12 bit more of a record, I'm finding that the property at  
13 issue in this case, the property owned by Wisconsin  
14 Lutheran is exempt as a matter of law, and I'm ordering  
15 the city to refund the 2021 tax payment, plus applicable  
16 interest and the court will be entering a judgment  
17 accordingly.

18 Secondly, in the event of any appeal, and  
19 this will be a final order subject to appeal, obviously,  
20 if the Court of Appeals or anyone else were to recognize  
21 the situation as not a situation as I do where Wisconsin  
22 Lutheran is an educational institution but rather an  
23 educational association, as Wisconsin Lutheran points out  
24 in my original decision, again, the decision from,  
25 approximately, five years ago, I indicated that even

1 looking at the facts and circumstances then compared to  
2 the facts and circumstances today, that the facts and  
3 circumstances previously were, from my view, a very, very  
4 close call looking at it as an educational association.

5 Even if I were to look at this as an  
6 educational association as opposed to an institution or  
7 if an appellate court were to deem that it's more  
8 appropriately looked at as an educational association for  
9 purposes of a property tax exemption, I believe clearly  
10 there's been enough differences between the facts and  
11 circumstances five years ago and the facts and  
12 circumstances today. Those are laid out in the briefing  
13 from Wisconsin Lutheran.

14 This I'm sure is not an exhaustive list and,  
15 again, I've read all the briefings and submissions from  
16 both sides, and the litigation from five or six years  
17 ago. It was filed originally in 2015, and I think the  
18 decision was in 2017. At that point in time, the  
19 property in question was a home or being rented to both  
20 students and commercial renters. At this point in time  
21 that same property -- and it's not the exact same  
22 property because as both sides discussed and as Wisconsin  
23 Lutheran discussed the old property was torn down and a  
24 new building was built. That new property which is on  
25 the same land, but the new building houses only Wisconsin



1 Lutheran high school students and staff. At that point  
2 in time, and I mentioned this I believe in the decision  
3 from a number of years ago, the housing was not  
4 contiguous to the high school.

5 At this point in time the high school and  
6 Honey Creek Hall, that's the building that's referred to  
7 by both sides in their briefing and the building for  
8 which Wisconsin Lutheran is seeking the property tax  
9 exemption are and is, I guess, on an adjoining parcel,  
10 they're connected, so it's all one property. Previously  
11 the public could access the property. Currently this  
12 property is only available to Wisconsin Lutheran students  
13 and staff as part of that building.

14 There are certainly other differences and  
15 distinctions, but I think it's notable that based on the  
16 affidavits and the briefing that there is more  
17 educational usage for the Honey Creek Hall than there  
18 would have been a number of years ago; that includes  
19 things, again, this is not an exhaustive list, but  
20 classroom learning, study halls, literacy classes,  
21 extracurricular practices, among other activities.

22 Finally, I agree that, candidly, the city  
23 has taken an overly simplistic view of this litigation.  
24 There are significant, significant differences. I'm  
25 certainly not going to hold the city attorneys who are

1 present in front of me responsible for the decision made  
2 by other city employees, but, for what it's worth, I,  
3 candidly, think that this was sort of a pro forma  
4 decision made by the city. Again, not the attorneys that  
5 are here in court, but I believe there was sort of a pro  
6 forma decision made.

7 I will also say while it's probably not  
8 legally persuasive, it's at least partially persuasive to  
9 me that other similarly situated properties, other  
10 schools with very similar buildings and similar housing,  
11 including another Lutheran school that's within miles,  
12 maybe eight to ten miles of Wisconsin Lutheran, has been  
13 allowed an exemption in a neighboring city within the  
14 same county. Is that persuasive to me? Yes.

15 Among the other types of activities that are  
16 being, I guess, held or completed in the Honey Creek Hall  
17 building there's based on the briefing, based on the  
18 affidavits, outdoor class space, spaces for students to  
19 do educational activities, Bible study, English learning  
20 classes, English proficiency, financial proficiency and  
21 literacy classes.

22 And while this is the least important of the  
23 arguments from my standpoint, again, the most important,  
24 and my decision rests first and foremost on the  
25 difference between educational institution, which I'm

1 finding Wisconsin Lutheran High School clearly is, as  
2 opposed to potentially an educational association, I  
3 think Wisconsin Lutheran is also correct that when the  
4 city argues basically that in this case there's at least  
5 arguably issue preclusion or collateral estoppel, they  
6 argue that again arguably this matter is res judicata,  
7 those defenses were not pled nor were they initially in  
8 lieu of a pleading filed as a motion, the res judicata  
9 and/or issue preclusion.

10 So I would agree with Wisconsin Lutheran  
11 that given the state of the law in Wisconsin, given the  
12 dictates of section 802, specifically 802.06, those  
13 defenses are at least arguably waived by the city not  
14 raising them initially in their affirmative defenses or  
15 raising them initially in their pleadings.

16 So that's the court's decision. I'm  
17 granting the Wisconsin Lutheran High School motion for  
18 summary judgment. I'm going to ask Wisconsin Lutheran,  
19 as the prevailing party, to draft an order to that  
20 effect. I'm ordering a refund of the 2021 tax payment  
21 plus applicable interest. I'll enter a judgment  
22 accordingly. Obviously, it will be a final order subject  
23 to appeal.

24 I'll ask if there's anything else from  
25 plaintiff's counsel?

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**MS. SPITZ:** No, Your Honor, thank you.

**THE COURT:** Defense counsel, anything?

**MS. JAHN:** No, thank you, Your Honor.

**THE COURT:** Thank you.

We're adjourned.

Have a good week, everybody.

(proceedings concluded)

1 STATE OF WISCONSIN )  
 )  
2 COUNTY OF MILWAUKEE )

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4 I, CAROLE SEROTA-BODI, an Official  
5 Court Reporter for the circuit court of Milwaukee County,  
6 Branch 12, do hereby certify that the foregoing is a true  
7 and accurate transcript of my original Stenographic notes  
8 taken on the proceedings in the above-entitled matter.

9 Dated this 8th day of May,  
10 2023, at Milwaukee, Wisconsin.

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Carole Serota-Bodi, RPR  
Official Court Reporter, Branch 12

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