

Covenant v. Wauwatosa: Supreme Court Takes a Second Look

Dec 08 2010

Practice Area: Health Law & Nonprofit and Tax Exemption

On Tuesday, December 7, the Wisconsin Supreme Court decided to review the extent to which outpatient hospital departments, including outpatient facilities that are located away from the main hospital campus, are eligible for property tax exemption under Wisconsin law. The case, *Covenant Healthcare System, Inc. v. City of Wauwatosa*, involved the St. Joseph Outpatient Center and the City of Wauwatosa (the "SJOC").

In March 2009, a Milwaukee County trial court judge determined that the SJOC was exempt from property taxes under the non-profit hospital exemption found in §70.11(4m) of the Wisconsin Statutes, but this decision was reversed by the Wisconsin Court of Appeals in August of this year. Covenant filed a petition for review by the Supreme Court. von Briesen & Roper filed an *amicus curiae* brief in support of this petition on behalf of the Wisconsin Hospital Association; the Rural Wisconsin Health Cooperative also filed an amicus brief in support of the petition for review.

The *Covenant* Decision

This promises to be a landmark case. The Wisconsin Supreme Court has the opportunity to provide clarity to nonprofit hospitals and municipal assessors alike regarding the circumstances under which hospital outpatient facilities qualify for a property tax exemption. Previous decisions of the Court of Appeals have muddied the waters somewhat due to language in § 70.11(4m) that excludes property used "as a doctor's office" from the exemption. Prior to its decision in *Covenant*, the Court of Appeals issued two previous decisions that provided conflicting guidance on the line between traditional doctors' offices and traditional outpatient hospital operations. See *St. Elizabeth Hospital, Inc. v. City of Appleton* (1987) and *St. Clare Hosp. of Monroe, Wis., Inc. v. City of Monroe* (1997).

In *Covenant*, the Court of Appeals distilled these previous cases into this simple distinction:

- A doctor's office is a place where doctors see patients, mostly by appointment, during scheduled business hours, and have their offices.
- A hospital, on the other hand, is a place that offers inpatient, overnight care.

As a result, the Court of Appeals in *Covenant* concluded that an outpatient clinic is the functional equivalent of a doctor's office, and therefore taxable. The repercussions of that decision have already been felt by nonprofit hospitals across the state as assessors have begun to scrutinize hospital outpatient departments (particularly off-campus facilities) under the *Covenant* lens.

The Supreme Court has required that Covenant and the City file their briefs within the next two months, which may indicate that a decision could be forthcoming by late spring or early summer 2011. At a minimum, the Supreme Court is expected to provide greater definition to the myriad factors that previously were identified in *St. Elizabeth* and *St. Clare*, as well as *Covenant*. The Supreme Court will also have the opportunity to consider and clarify other aspects of the nonprofit hospital exemption, such as the question of when property is being used for a non-exempt "commercial purpose."

Other Property Tax Considerations

As the year-end approaches, it is a good time for nonprofit hospitals and other exempt entities to plan ahead for the 2011 tax year. Applications for property tax exemption are due by March 1. Exempt entities should consider whether an application will be necessary to cover either newly acquired or developed property that was not previously subject to an exemption, or property that was previously taxable but whose use has changed in a manner that might now qualify for exemption.

The statutory assessment date is January 1. Potentially exempt property should be considered relative to its use on that date. For example, property that is being prepared for an exempt use through ongoing construction activities as of January 1 may qualify for exemption, while property that is lying fallow (in anticipation of future construction activities) may not qualify as an exempt use. Exempt entities should be prepared to document use of the property as of January 1 in order to support an exemption application on March 1.

December is also the month that property tax bills are issued by the assessing municipalities. In order to challenge a property tax bill on the basis of an exemption, the owner must pay the bill in full and request a refund by January 31 of 2011. An owner that elects to pay the tax bill in installments rather than in full by January 31 may lose the right to challenge the tax based on an exemption. Particularly as to outpatient facilities, hospitals should consider preserving their exemption claims through timely objections pending a final decision from the Wisconsin Supreme Court in the *Covenant* case.

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