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August 17, 2012

RECEIVED
8/21/12

VIA MESSENGER

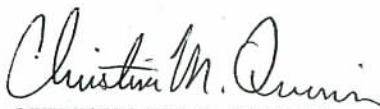
Clerk to the
Honorable Christopher Foley, Branch 14
Milwaukee County Circuit Court
901 North Ninth Street, Room 403
Milwaukee, WI 53233

Re: *Jerusalem Empowered African Methodist Episcopal Church v.
City of Milwaukee*
Case No. 12-CV-008079

Dear Clerk:

Enclosed for filing is the Defendant's Notice of Motion and Motion to Dismiss. By copy of this letter, a copy of the same is being served to plaintiff's attorney. I would appreciate your please returning a file-stamped copy to our waiting representative. Thank you.

Very truly yours,


CHRISTINE M. QUINN
Assistant City Attorney

CMQ:cdr

Enclosure

c: Attorney Rick Esenberg (w/enc.)
Attorney Thomas Kamenick (w/enc.)
Attorney Mike Fischer (w/enc.)

1056-2012-1862/183831

OFFICE OF THE CITY ATTORNEY

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

JERUSALEM EMPOWERED AFRICAN
METHODIST EPISCOPAL CHURCH,

Plaintiff,

v.

Case No. 12CV008079

CITY OF MILWAUKEE,

Defendant.

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS**

TO: Atty. Rick Esenberg
Atty. Thomas C. Kamenick
Atty. Mike Fischer
Wisconsin Institute of Law & Liberty
225 E. Mason Street, Suite 300
Milwaukee, WI 53202

I. NOTICE OF MOTION

PLEASE TAKE NOTICE that as soon as counsel can be heard, the defendant, the City of Milwaukee, by its attorneys, Grant F. Langley, City Attorney, by Assistant City Attorney Christine M. Quinn, will move the court to dismiss, pursuant to Wis. Stats. §806.04(11), §802.06(2)(a)6 and §802.06(2)(a)2, before the Honorable Christopher R. Foley, Milwaukee County Circuit Court, Branch 14, in the Milwaukee County Courthouse, 901 North 9th Street, Room 403, Milwaukee, Wisconsin 53233.

II. MOTION TO DISMISS

The defendant, City of Milwaukee, moves to dismiss this case for the foregoing reasons:

A. Constitutional Claims Barred without service to Attorney General.

Plaintiff alleges that Wis. Stat. §74.35(2m) unconstitutionally deprives them of due process and equal protection of laws, as it prohibits a property tax dispute from being litigated as a declaratory judgment per Wis. Stat. §806.04. (See Paragraphs 28-50, Complaint) These claims must be dismissed, based upon information and belief, as the Wisconsin Attorney General has not been served. (See Exhibit A.) Without serving and providing notice to the Wisconsin Attorney General of a challenge to the constitutionality of a statute, the court lacks subject matter jurisdiction for such a claim. *Bollhoffer v. Wolke*, 66 Wis.2d 141, 143-44, 223 N.W.2d 902 (1974). Therefore, the claims asserting the unconstitutionality of Wis. Stat. §74.35 under both the Federal and State Constitutions must be dismissed as the court lacks subject matter jurisdiction, Wis. Stats. §806.04(11), 802.06(2)(a)2.

B. Declaratory Judgment claims are barred by Wis. Stat. §74.35(2m) in property tax disputes.

Declaratory Judgments are an inappropriate means to challenge a property tax dispute, as Wis. Stat. §74.35(2m) clearly states that it is sole basis to resolve a property tax dispute, including a dispute as to whether property ought to be exempt from taxation. *TOPS Club, Inc. v. City of Milwaukee*, 260 Wis. 2d 563, 567, 659 N.W.2d 102, 2003 WI App 62. This action is concerning a claim for an exemption from property taxation for

years 2010 and 2011 in the City of Milwaukee, pursuant to Wis. Stat. §74.35, and thus §74.35(2m) applies to this case, and declaratory actions regarding the alleged exemption are barred. Therefore the declaratory relief requests made by the Plaintiff must be dismissed and denied, as they fail to state a claim upon which relief may be granted. Wis. Stat. §802.06(2)(a)6.

C. The Plaintiff admits the court lacks competency to proceed under Wis. Stat. §74.35 by admitting they did not pay their taxes.

The complaint in this action freely admits that the plaintiff did not pay their taxes for 2010 and 2011 (See Paragraph 26, Complaint.) Timely payment of taxes first, prior to filing suit, is a condition precedent to proceed pursuant to Wis. Stat. §74.35(5)(c). “Section 74.35(2) clearly states that ‘[a] person aggrieved by the levy and collection of an unlawful tax may file a claim to recover the unlawful tax.’ It is obvious from this language that a prerequisite to the claim is the actual payment of the tax.” *Wauwatosa Ave. United Methodist Church v. City of Wauwatosa*, 321 Wis. 2d 796, 809, 776 N.W.2d 280. (Ct. App. 2009.) By freely admitting that the taxes on this property have not been paid, Plaintiff admits to facts which fail to constitute a condition precedent for the court to have competency to hear the matter. *See Heideman v. Am. Fam. Ins.*, 163 Wis.2d 847, 859-60, 473 N.W.2d 14 (Ct. App. 1991). Therefore, by failing to allege compliance with the condition precedent of timely payment of the taxes, the plaintiffs fail to state a claim upon which relief can be granted. Wis. Stats. § 74.35(5)(c), §802.06(2)(a)6.

D. Plaintiff's Fourth Claim erroneously refers to a tax year not part of its Complaint and should be disregarded.

In its Fourth Claim, the Plaintiffs allege that the City passed a resolution waiving property taxes. (See Complaint, Para. 57.) The city denies this allegation as it grossly misstates the facts. The Defendant notes that the Common Council of the City of Milwaukee granted extraordinary relief to the Plaintiff by waiving their 2009 property taxes in a resolution adopted in January 2011. Thus, the actions taken by the Common Council of the City of Milwaukee in granting extraordinary relief to the Plaintiff regarding 2009 are wholly irrelevant to the 2010 and 2011 tax years. (See Exhibit B, for Resolution text and timeline.)

Actions taken by the Defendant in granting relief for a different tax year do not constitute a "waiver" or "forfeiture" of Wis. Stat. §74.35(5)(c) by the Defendant, and are irrelevant to the questions of whether the property was exempt in the tax years 2010 and 2011. Again, fulfilling the condition precedent of payment of taxes is required for a court to have competence to hear the matter, and has not been waived by the Defendant.

Wauwatosa Ave. United Methodist Church v. City of Wauwatosa, 321 Wis. 2d 796, 809, 776 N.W.2d 280. (Ct. App. 2009.) Thus, in the Fourth Claim, the Plaintiffs fail to state a claim upon which relief can be granted, Wis. Stat. §802.06(2)(a)6.

E. Conclusion

The only basis for subject matter jurisdiction in circuit court on a property tax exemption case is through Wis. Stat. §74.35. Plaintiffs fail the requirement of timely payment of taxes before bringing the case before the court under Wis. Stat. §74.35(5)(c),

so the court lacks competence to proceed under that statutory authority. The requirements of Wis. Stat. §74.35(5)(c) are not subject to waiver by the defendant. The court does not have subject matter jurisdiction on a declaratory judgment theory, as that is prohibited by Wis. Stat. §74.35(2m). There is no properly made constitutional challenge made in this instance, as the Attorney General's office has not been served notice pursuant to Wis. Stat. §806.02(11), so the court cannot hear those portions of the complaint. Thus, there is no basis for the court to hear this case. Therefore, the City moves for dismissal of this case, and the court to award the City costs and fees as the law may deem appropriate.

Dated at Milwaukee, Wisconsin this 17th day of August, 2012.

GRANT F. LANGLEY
City Attorney



CHRISTINE M. QUINN
State Bar No. 1037777
Assistant City Attorney
Attorney for Defendant

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1056-2012-1862/183829



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August 16, 2012

Ms. Christine Quinn
Assistant City Attorney
Milwaukee City Attorney's Office
200 E Wells St Rm 800
Milwaukee, WI 53202-3515

Re: *Jerusalem Empowered African Methodist Episcopal Church vs. Milwaukee City*
Milwaukee County Case Number 2012CV008079

Dear Ms. Quinn:

This letter will confirm that our office has not received a copy of the challenge to the constitutionality of a statute in the above-captioned matter as of August 15, 2012.

If you have other questions on this matter, please contact my office. Thank you.

Sincerely,

Kevin C. Potter
Assistant Attorney General
Administrator, Legal Services Division

KCP:lkw

EXHIBIT A



City of Milwaukee

200 E. Wells Street
Milwaukee, Wisconsin 53202

Legislation Details (With Text)

File #: 100792 **Version:** 1

Type: Resolution **Status:** Passed

File created: 11/3/2010 **In control:** JUDICIARY & LEGISLATION COMMITTEE

On agenda: **Final action:** 1/19/2011

Effective date:

Title: Substitute resolution cancelling real estate taxes levied against a certain parcel, 9524 W. Good Hope Road, on the 2009 tax roll.

Sponsors: ALD. BOHL

Indexes: TAX CANCELLATIONS

Attachments: Revised Fiscal Impact Statement, Fiscal Impact Statement, Assessor's Letter, Hearing Notice List

Date	Ver.	Action By	Action	Result	Tally
11/3/2010	0	COMMON COUNCIL	NOT RETURNED BY COMPTROLLER		
11/9/2010	0	JUDICIARY & LEGISLATION COMMITTEE	HEARING NOTICES SENT		
11/9/2010	0	JUDICIARY & LEGISLATION COMMITTEE	HEARING NOTICES SENT		
11/15/2010	0	JUDICIARY & LEGISLATION COMMITTEE	RECOMMENDED FOR ADOPTION	Pass	3:1
11/23/2010	0	COMMON COUNCIL	NOT ACTED ON	Pass	15:0
1/19/2011	0	COMMON COUNCIL	AMENDED	Pass	15:0
1/19/2011	1	COMMON COUNCIL	ADOPTED	Pass	15:0
1/24/2011	1	MAYOR	SIGNED		

Number
100792
Version
SUBSTITUTE 1
Reference

Sponsor
ALD. BOHL
Title

Substitute resolution cancelling real estate taxes levied against a certain parcel, 9524 W. Good Hope Road, on the 2009 tax roll.

Analysis
This resolution cancels 2009 property taxes, plus delinquent interest and penalties, for the property at 9524 W. Good Hope Road owned by Jerusalem Empowered African Methodist Episcopal Church.

Body
Whereas, On December 3, 2008, Jerusalem Empowered African Methodist Episcopal Church purchased the property at 9524 W. Good Hope Road (tax key no. 1099994210-0) from King of Kings Lutheran Church; and

EXHIBIT B

Whereas, The warranty deed for this transaction was recorded on January 12, 2009; and

Whereas, Because it already had non-profit status with the State of Wisconsin, Jerusalem Empowered was unaware that it needed to file for property-tax-exempt status for this property with the City of Milwaukee and, therefore, failed to meet the statutory deadline (March 1) to obtain tax-exempt status for the 2009 tax year; and

Whereas, The Common Council finds that Jerusalem Empowered African Methodist Episcopal Church 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; now, therefore, be it

Resolved, By the Common Council of the City of Milwaukee, that the proper City officials are directed to cancel the 2009 property taxes, plus delinquent interest and penalties, for tax key no. 10999943210-0 (9524 W. Good Hope Road); and, be it

Further Resolved, That the proper city officers are authorized and directed to reflect the reduction in State Tax Credits as shown in this file by means of journal entries, charging the 2011 Remission of Taxes Fund, 0001 Org 9990 Program 0001 Sub-class S163 Account 006300, and crediting the State Tax Credit Fund.

Requestor

Drafter

LRB122744-1

JDO/LME

1/19/2011

EXHIBIT B