

2010 WL 2091263 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

AOF/SHADYBROOK AFFORDABLE HOUSING CORPORATION,
an Oklahoma not-for-profit corporation, Plaintiff/Appellee,
v.
Ken YAZEL, Tulsa County Assessor, Defendant/Appellant,
and
Tulsa County ex rel. Tulsa County Board of Equalization
and Dennis Semler, Tulsa County Treasurer, Defendants.

No. 107,508.
April 26, 2010.

On Appeal from the Tulsa County District Court for the State of Oklahoma District
Court Cases: CJ-2004-4304, CJ-2005-7578, and CJ-2006-8102 Consolidated
Brief-in-Chief Opposing the Judgment of the Tulsa County District Court, the Honorable P. Thomas Thornbrugh
Presiding, in DE Novo Proceeding to Determine Whether Property is Exempt from AD Valorem Taxation

Appellant's Brief-in-Chief

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***i INDEX**

I. SUMMARY OF RECORD	1
II. ARGUMENT	7
III. STANDARD OF REVIEW	7
<i>K & H Well Service, Inc. v. Tcina, Inc.</i> , 2002 OK 62, 51 P.3d 1219.....	7
IV. PROPOSITION I:	
PLAINTIFF DID NOT MEET ITS BURDEN IN ESTABLISHING THAT IT'S PROPERTY QUALIFIED FOR AN AD VALOREM TAX EXEMPTION	7
A. PLAINTIFF'S EXCLUSIVE USE OF ITS PROPERTY FOR LOW INCOME HOUSING WAS NOT FOR A CHARITABLE PURPOSE BECAUSE ALL TENANTS HAD TO PAY RENT.	7
<i>Austin, Nichols & Co., v. Oklahoma County Board of Tax Roll Corrections</i> , 1978 OK 65, 578 P.2d 1200. ...	11
<i>GDT CGI, LLC v. Oklahoma County Board of Equalization</i> , 2007 OK CIV APP 101, 172 P. 3d 628.	8
<i>London Square Village v. Oklahoma County Equalization and Excise Board</i> , 1976 Okla. 59, 559 P.2d 1224.	8
<i>Title 68 O.S. §2887(8)</i>	7
<i>Okla. Const. Art. X, §6</i>	8
A. PLAINTIFF'S EXCLUSIVE USE OF ITS PROPERTY FOR LOW INCOME HOUSING WAS NOT FOR A CHARITABLE PURPOSE BECAUSE THE OPERATION AND MAINTENANCE EXPENSES AND DEBT SERVICE WERE PAID ALMOST ENTIRELY WITH H.U.D. SUBSIDIES AND TENANT RENT PAYMENTS.	12
V. CONCLUSION	13

***1 SUMMARY OF RECORD**

This is an appeal from the Journal Entry of Judgment of the Honorable P. Thomas Thornburgh, filed on September 22, 2009 in Tulsa District Court case no. CJ-20044304. This matter involves the assessment of ad valorem taxes on the Shadybrook Apartments (“Property”) for three separate years: 2004, 2005, and 2006 (“Assessment Years”). Because the issues are the same for all three years, the parties requested, and the court ordered, both the 2005 assessment appeal (CJ-20057578) and the 2006 assessment appeal (CJ-2006-8102) consolidated with the 2004 appeal (CJ-2004-4304).

A brief synopsis of the procedural history of this case will reveal the issue(s) that have already been addressed at the district court level and at the appellate court level. In 2004, Plaintiff filed an appeal to the Tulsa County Board of Equalization seeking an exemption for the Property pursuant to [Okla. Const. Art. X §6](#). The Board denied Plaintiff's request for an exemption. In 2005 and 2006, Plaintiff filed a Complaint of Erroneous Assessment with the Tulsa County Board of Tax Roll Correction asking that the Board correct the 2005 and 2006 tax roll, respectively, to show that the Property was exempt from taxation pursuant to [Okla. Const. Art. X §6](#). Each board denied Plaintiff's requests for exemption. Plaintiff appealed the decision of each board to district court. After the matters were consolidated at district court level, Plaintiff and Assessor each filed a Motion for Summary Judgment. The crux of both motions was the constitutionality of [Title 68 O.S. §2887\(8\)](#). The Honorable P. Thomas Thornburgh sustained the Plaintiff's Motion for Summary Judgment by finding that taxation of Plaintiff's Shadybrook Apartment complex because it was *2 funded by tax-free bonds was unconstitutional. The Court found that all but a small portion of Plaintiff's property was exempt from taxation and that Plaintiff was entitled to a refund of its taxes. Assessor appealed this decision pursuant to Okla. Sup. Ct. R. 1.36, 12 O.S. Supp. 2007, ch. 1, app.1. The Court of Civil Appeals, Division IV, reversed and remanded the matter for further proceedings (SD-105645) (Appeal Record, p. 531-550). The Appellate Court found that the trial court focused on the exclusivity of use and did not determine whether the use of the property for a subsidized housing program is a use for a charitable purpose so as to overcome the Supreme Court's ruling in [London Square Village v. Oklahoma County Equalization and Excise Board](#), 1976 Okla. 59, 559 P.2d 1224. Because there were questions of fact remaining, the Appellate Court found that summary judgment was not proper for either party. The Court stated that *if* Plaintiff's use of the Property did constitute a charitable purpose, then [Title 68 O.S. §2887\(8\)\(a\)\(2\)\(b\)](#) would impose a greater burden on the receipt of the [Okla. Const. Art. X, §6](#) charitable exemption than does the Constitution which is not permitted. Pursuant to the directive of the Court of Civil Appeals, the Honorable P. Thomas Thornburgh conducted a non-jury trial. At the conclusion of the trial and the submission of findings of fact and conclusions of law, the court found that: Plaintiff's use of the subject property was charitable with the exception of a small number of full-rent tenants. Therefore, the property was not subject to ad valorem taxation during the contested years with the exception of a prorata taxation of the portion not dedicated to charitable use. Assessor has appealed Judge Thornburgh's decision pursuant to [Title 12 O.S. §990A](#). Plaintiff filed a Motion to Retain Jurisdiction which was granted on November 16, 2009. *3 AOF/Shadybrook (“Plaintiff”) is a subordinate entity of the American Opportunity Foundation (“AOF”), a Georgia-based corporation, and it was formed specifically to acquire, rehabilitate and own the Property. [December 18, 2008 Trial Transcript (“Trial tr.”) p. 15, lines 19-22] AOF is a Georgia not-for-profit corporation which has received a 501(C)(3) group exemption. Since, AOF is the central organization whose subordinate entities are recognized as exempt from federal income tax, Plaintiff is also exempt from federal income taxation. (Plaintiff's Trial Ex. A: *Certificate of Incorporation*, page 1; and Trial tr. p. 17, lines 14-18) Plaintiff is registered as an Oklahoma not-for-profit corporation. [Final Order of March 23, 2009 (“Final Order”) p. 2]

In 1998 Plaintiff acquired the Property which consists of 120 one (1) bedroom units located in Tulsa. Plaintiff rented the apartments almost exclusively to persons with low income who were either (i) disabled or (ii) over 62 years of age. The Property was dedicated and devoted to providing low-income housing. (Final Order, Appendix A: “Stipulations”, p. 28, paragraph 9)

Plaintiff acquired the Property using proceeds from the sale of Tulsa County Industrial Revenue Bonds, the income derived these bonds is exempt from federal income tax. The Tulsa County Industrial Authority is an entity organized pursuant to [Title 60 O.S. 176](#). (Final Order, Appendix A: “Stipulations”, p. 28, paragraphs 5-7) From 1998 through 2003, the Property was exempt from ad valorem taxation [pursuant to [Title 68 O.S. §2887\(8\)](#)]. However, [Title 68 O.S. §2887\(8\)](#) was amended effective January 1, 2004 by adding the following language:

*4 no asset consisting of a single-family or multi-family dwelling unit owned by an entity the property of which would otherwise be exempt pursuant to subparagraph a of this paragraph shall be exempt from ad

valorem taxes if any such dwelling unit was improved with or acquired with any portion of proceeds from the sale of obligations issued by any entity organized pursuant to [Section 176 of title 60 of the Oklahoma Statutes](#) if the interest income derived from such obligations is exempt from federal income tax.”.

Because of the change in the law, the Tulsa County Assessor's office assessed ad valorem taxes on the Property for tax year 2004 and for subsequent tax years.

Upon acquisition of the Property, Plaintiff assumed, along with the ownership of the Property, a “project-based assistance” contact with United States Department of Housing and Urban Development (“HUD”) (Trial tr. pg. 40, lines 4-12) The difference between the fair market rent and what the tenant had to pay to Plaintiff for rent was subsidized by the federal government. (Trial tr. pg. 40, lines 17-20) The project-based assistance program guaranteed Plaintiff the receipt of full market rent for each apartment as long as the apartments were rented to qualified individuals. (Trial tr. p. 40, line 25 thru p. 41, line 14)

During the assessment years the tenants at the Property (with the exception of two individuals) paid no more than thirty percent (30%) of their income as their portion of the monthly rent. (Trial tr. p. 8, lines 15-16; Trial tr. p. 100, lines 12-25 thru p. 101, lines 1-2) Plaintiff did not make its apartments available to anyone without charge; in fact, if a person was over the age of 62 y.o.a. or was disabled and had no income, they would still have to pay a minimum of \$25.00 as their portion of the rent. (Trial tr. p. 82, lines 11-12; Trial tr. p. 63, lines 5-7). In addition, each tenant was required to pay a security deposit that was the equivalent of their first month's rent. (Trial tr. p. 122, lines 14-21)

*5 Fair market rent, as set by HUD, was \$525.00/mo. for year 2004 and \$559.00/mo. for years 2005 and 2006. (Trial tr. p. 58, lines 10-18) The fair market rent as set by HUD not only covered the basic rent but also the cost of the utilities that were provided to the tenants at the Property. (Trial tr. p. 59, lines 9-14) The rent payments were used by Plaintiff to pay the debt service and the operations and maintenance costs. (Trial tr. p. 61, lines 21-25 thru p. 62, line 1) If the cost of the utilities increased, Plaintiff could and did apply to HUD for a special rent increase. (Trial tr. p. 59, lines 15-25; Trial tr. p. 58, lines 18-25)

In 2004 and 2005, approximately 97% of Plaintiff's income was derived from HUD payments and the rents paid by the tenants. The remaining income was investment income on various reserves held by a trustee for Plaintiff. (Final Order, p. 9) Some of the money that was held in an income-producing reserve account was from HUD (Trial tr. p. 74, lines 14-25; p. 75, lines 1-11)

Simply put, the Property would not have been in operation without the project-assistance contract from HUD. (Trial tr. p. 47, lines 21-24)

Plaintiff received a federal grant from HUD to pay for a Service coordinator to perform an assessment of willing tenants to evaluate any physical or emotional needs that tenants may have and attempt to resolve them.

All residents occupying the Property received the same treatment, regardless of their ability to pay rent. (Final Order, p. 9)

The Property operated without a profit for the Assessment Years. (Final Order, pg. 9; Trial tr. pg. 36, lines 20-21).

Contrary to Plaintiff's Articles of Incorporation, which states in part:

*6 “The Corporation shall: ... reduce the burden on government through the provision of affordable housing for low-income persons and families, **elderly** persons and/or mentally or physically disabled persons”, the Property would not have been in operation without the housing assistance payment contract from the government. (Trial tr. pg. 47, lines 13-24; (Plaintiff's Trial Exhibit A: Certificate of Incorporation, page 2)

The Plaintiff's Articles of Incorporation make provision for Plaintiff's Trustees to distribute all of the assets of the corporation to the Parent [AOF] (if it is then in existence as an Exempt Organization), and/or to one or more other Exempt Organizations (which may include other subordinates of the Parent [AOF]). In the event that the Trustees shall fail to act in the manner provided within a reasonable time, an Oklahoma court of competent jurisdiction shall make the distribution, exclusively for the exempt charitable purposes of the Corporation. (Final Order, pg. 9; Plaintiff's Trial Exhibit A: Certificate of Incorporation, page 4)

Plaintiff did not solicit or receive any charitable contributions during the Assessment Years. Furthermore, Plaintiff did not have a plan for soliciting charitable contributions. (Trial tr. pg. 45, lines 6-25 thru pg. 46, lines 1-15)

During the Assessment Years, the Property was managed by HSI Management Company, a company located in Atlanta, Georgia. HSI Management Company's President and majority stockholder is Jack T. Hammer, one of the Trustee of Plaintiff's Board of Trustees. Plaintiff paid HSI Management Company to manage *7 its Property, therefore, allowing a private benefit to inure to one of its trustees or trustees' company. (Trial tr. pg. 49, lines 13-25 thru pg. 50, lines 1-22)

ARGUMENT

Standard of Review

The judgment before this court is a compilation of both findings of facts and conclusions of law. Issues of law are reviewed de novo which necessitates a plenary, independent and non-deferential authority to examination a trial court's legal rulings. (*K & H Well Service, Inc. v. Tcina, Inc.*, 2002 OK 62, ¶9, 51 P.3d 1219). On review, the trial court's findings of fact will not be disturbed if there is any competent evidence to support them. (*Id.*)

PROPOSITION I:

PLAINTIFF DID NOT MEET ITS BURDEN IN ESTABLISHING THAT ITS PROPERTY QUALIFIED FOR AN AD VALOREM TAX EXEMPTION.

A.

PLAINTIFF'S EXCLUSIVE USE OF ITS PROPERTY FOR LOW INCOME HOUSING WAS NOT FOR A CHARITABLE PURPOSE BECAUSE ALL TENANTS HAD TO PAY RENT.

As stated in the Summary of Record, this case has been up on an Accelerated Appeal on the issue of whether Plaintiff was prohibited from receiving an exemption from ad valorem taxation on the Property under [Title 68 O.S. §2887\(8\)](#) because it acquired the Property with the revenue from tax exempt bonds issued by a public trust. At the District Court level, the Honorable P. Thomas Thornbrugh in granting the Plaintiff's Motion for Summary Judgment found that the taxation of the Property because it was funded by tax-exempt bonds was *8 unconstitutional. On an appeal of the District Court's decision, the Court of Civil Appeals, although finding that summary judgment was not proper for either party, stated that if Plaintiff's use of the Property did constitute a charitable purpose, then [Title 68 O.S. §2887\(8\)\(a\)\(2\)\(b\)](#) would impose a greater burden on the receipt of the [Okla. Const. Art. X, §6](#) charitable exemption than does the Constitution which is not permitted. Upon remand of the case from the Court of Civil Appeals, the District Court conducted a non-jury trial and at the conclusion found that the Property was exempt from taxation because it was used exclusively for charitable purposes under [Oklahoma Constitution Art. X, §6](#).

Whether property is exempt from ad valorem taxation depends on the purpose for which it is used and is a question of fact to be determined from the evidence. (*London Square Village, Inc v. Oklahoma County Equalization and Excise Board*, 1976 Okla. 59, ¶10, 559 P.2d 1224) The burden is on the party claiming an exemption to prove the property is exempt from ad valorem taxation. (*GDT CGI, LLC v. Oklahoma County Board of Equalization*, 2007 OK CIV APP 101, 172 P.3d 628)

In *London Square*, the plaintiff was the owner of an apartment complex that provided housing to low income families. In that case, the court addressed a case very similar to the facts that are before this Court today. The material similarities between these two cases are:

1. Both Plaintiff's are a non-profit corporation organized and chartered under Oklahoma law. (*London Square* at ¶2; *Journal Order of Judgment*, Appendix A: Stipulations p. 27);

2. Both Plaintiff's are a subordinate of a parent organization that is a tax exempt organization. (*London Square* at ¶2; *Journal Order of Judgment*, Appendix A: Stipulations pp. 27-28);

*9 3. Both Plaintiffs; Articles of Incorporation state that the main purpose of the organization is to provide housing for low-income families (*Id.*)

4. Both Plaintiff's are dedicated to and operated exclusively for tax exempt or nonprofit purposes; and no part of their income or assets shall be distributed to, nor inure to the benefit of, any individual. However, Shadybrook provided for an exception to in Section 3.1 of its Articles of Incorporation: "... except that the corporation shall be authorized to pay reasonable compensation to the Trustees and officers of the Corporation and to others for services rendered or goods, assets or other consideration received and to make payments and distributions in furtherance of the (tax exempt) purposes." (*London Square* at ¶3;)

5. London Square Village constructed an apartment complex to provide low cost public housing with assistance of United States Department of Housing and Urban Development [HUD] and Federal Housing Administration [F.H.A.] through federally guaranteed loans and rent supplements. Apartments were rented to members of public who could make application for financial assistance through "rent supplements." Prospective renters apply to HUD for supplements which are granted on basis of applicant's ability to pay. Those who are eligible to receive rent supplements are enumerated in 24 C.F.R. § 215.20 and include among others those with limited income who are **elderly**, physically handicapped, displaced from their homes by urban renewal or disaster, and military personnel on active duty. (*London Square* at ¶4)

6. Shadybrook acquired an apartment complex with the issuance of tax exempt bonds by the Tulsa County Industrial Authority to provide low income public housing *10 with the assistance of HUD through a project-based assistance program. Apartments were rented to members of the public who fell in the low-income and very-low income categories as established by HUD. The tenants did not have to apply for financial assistance because the assistance program between HUD and Shadybrook was project-based. As long as an apartment was rented to a qualified individual (over the age of 62 or disabled and with low income), HUD would subsidize the tenant's rent. (*Journal Order of Judgment*, Appendix A: "Stipulations", p. 28, paragraph 9; Trial tr. p. 40, line 25 thru p. 41, line 14)

7. Both Plaintiff's collected rents from each tenant in addition to the subsidy received from HUD and from this paid the operating expenses and mortgage (debt service) payments. (*London Square* at ¶5; Trial tr. p. 61, lines 21-25 thru p. 62, line 1)

8. Since beginning operation there has been no excess of income over expenses, but in event profit might be shown at end of year, under terms of contract between Village and HUD any surplus must be returned to HUD as credit against rent supplements. (*London Square* at ¶5)

9. Shadybrook did not make a profit during the Assessment Years. (Trial tr. pg. 36, lines 20-21)

10. London Square Village claimed that because of its purpose and operation, its property fell directly within purview of [68 O.S. 1971 § 2405 \(h\) or \(T\)](#) as being "used exclusively and directly for charitable purposes within this State," and as such should be exempt from taxation. (Title [68 O.S. §2405](#) was repealed effective January 1, 1992 when the entire Ad Valorem Tax Code was renumbered; as a result. *11 [§2405](#) became [§2887](#). [Section 2887\(8\)](#) was amended three times prior to the January 1, 2004 amendment that is at issue in the present case.)

In *London Square*, the court noted that all persons who live at the apartment complex were required to pay rent, rich and poor alike; however, those people who qualify might receive rent supplements from HUD. The court went on to state, “we are of opinion that such housing is not used exclusively for charitable purposes as required by 68 O.S. §2405(h), (i) when each and every occupant is required to pay for accommodations. (*London Square* at ¶ 12)

Constitutional provisions and statutory provisions are strictly construed against those claiming an exemption. (*Austin, Nichols & Co. v. Oklahoma County Board of Tax Roll Corrections*, 1978 OK 65, ¶19, 578 P.2d; *London Square Village* at ¶15) The Court in *London Square* clearly took issue with the fact that tenants at the low-income apartment complex had to pay rent, rich and poor alike. There is little doubt that the *London Square* court would have made the same ruling on the facts in the case at bar because all of the tenants at the Shadybrook complex had to pay rent, even though they fell into the low and very low income brackets according to HUD.

As stated before in the Summary of the Case, the tenants of Shadybrook paid no more than 30% of their income as their portion of the rent, however, they all had to pay some amount of rent, even if they had no income.

There was no charitable purpose that is being put forth by Plaintiff - no charity was being offered by Plaintiff to the low-income residents. Plaintiff did nothing to assist in the *12 payment of rent by way of charitable donations to the tenants nor did the Plaintiff allow anyone to stay at the Property for free, regardless of their ability to pay. In fact, the Property was maintained almost solely by the HUD subsidies and the rent money from the tenants. The Plaintiff was providing nothing. No charity. Nothing.

There is no competent evidence in the record that supports the District Court's finding of fact that the Property was used exclusively for charitable purposes under Art. X, §6 of the Okla. Const, as set forth on page 11 of the Journal Entry of Judgment.

B.

PLAINTIFF'S EXCLUSIVE USE OF ITS PROPERTY FOR LOW INCOME HOUSING WAS NOT FOR A CHARITABLE PURPOSE BECAUSE THE OPERATION AND MAINTENANCE EXPENSES AND DEBT SERVICE WERE PAID ALMOST ENTIRELY WITH H.U.D. SUBSIDIES AND TENANT RENT PAYMENTS.

As stated previously, the Property was part of a “project-based assistance” contract when it was purchased by Plaintiff. As part of the assistance contract, HUD paid Plaintiff the difference between the fair market rent as established by HUD and what each resident could afford (no more than 30% of their income). The HUD funding was specific to the Apartments (i.e. “project based assistance program”); therefore, Shadybrook was guaranteed receipt of market rent for each apartment for as long as it was rented to a HUD-qualifying individual. The President of the corporation agreed that the property would not have been in operation without the project-assistance contract from HUD.

***13 CONCLUSION**

Wherefore, all of the above stated reasons and argument, Assessor respectfully requests that this Court find that Plaintiff has failed to meet its burden of establishing that the Property was used exclusively for charitable purposes during the Assessment Years.