

2010 WL 3022371 (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.  
June 28, 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, Appeal of 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 Reply Brief**

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**\*1 SUMMARY OF THE CASE**

A brief note of the history of §2887(8) and §2887(9) is important because of the changes that were made to it since the *London Square Village*<sup>1</sup> case was decided in 1976.

- At the time *London Square Village* was heard, the predecessor to Title 68 O.S. §2887(8) and (9), Title 68 O.S. 1971 §§2405 (h) and (i), read as follows, respectively:

h) All property of any charitable institution organized or chartered under the laws of this state as a nonprofit or charitable institution, provided the net income from such property is used exclusively within this state for charitable purposes and no part of such income inures to the benefit of any private stockholder and provided further that its facilities are available to any person regardless of his ability to pay.

i) All property used exclusively and directly for charitable purposes within this state, provided the charity using said property does not pay any rent or remuneration to the owner thereof, and its facilities are open to any person regardless of his ability to pay.

- At the time Plaintiff acquired the subject property in 1998, the statutes, §§2405(h) and (i), had been amended to read:

h) All property of any charitable institution organized or chartered under the laws of this state as a nonprofit or charitable institution, provided the net income from such property is used exclusively within this state for charitable purposes and no part of such income inures to the benefit of any private.

i) All property used exclusively and directly for charitable purposes within this state, provided the charity using said property does not pay any rent or remuneration to the owner thereof, unless the owner is a charitable institution described in *Section 501(c)(3) of the Internal Revenue Code. 26 U.S.C., Section 501(c)(3)*, or a veterans' organization described in *Section 501(c)(19) of the Internal Revenue Code. 26 U.S.C., Section 501(c)(19)*.

\*2 • In 1992, the entire Ad Valorem Tax Code was recodified. Section 2405(h) and (i) became Section 2887(8) and (9) respectively. The wording did not change in either section at the time.

- In 2000, §2887(8) was amended to include, among other things, the income standards in *IRS Rev. Proc. 96-32* for residential rental accommodations.

- In 2002, §2887(8) was drastically amended and the language excluding properties that had been acquired by funding from tax-exempt bonds from the exemption was added; however, there were (5) criteria added that, if satisfied, would allow the exemption even if the property had been acquired with tax exempt bonds. Plaintiff met those criteria and maintained its tax exemption.

- The following year §2887(8) was amended yet again (effective January 1, 2004). The Legislature removed the 5 criteria that, if met, allowed property owners to qualify for the exemption even though they received proceeds from the sale of tax-exempt bonds. It was this change in the law that impacted Plaintiff and caused it to lose its tax exemption under §2887(8).

**\*3 INTRODUCTION:**

Comes now Appellant, Tulsa County Assessor, and submits the following Reply Brief in response to the Answer Brief filed by Plaintiff/Appellee in this matter.

**PROPOSITION I:****PLAINTIFF HAS NOT MET ITS BURDEN IN ESTABLISHING THAT IT'S PROPERTY QUALIFIES FOR AN AD VALOREM TAX EXEMPTION UNDER OKLAHOMA LAW.**

As noted by Plaintiff, the Court in the *Integris* case stated that Okla. Const. art. X, §6) simply requires that the property be used exclusively for charitable purposes.<sup>2</sup> The term “used exclusively” as is appears in Okla. Const. art. X, §6 means the physical use to which the property is dedicated and devoted.<sup>3</sup> Assessor contends that in order to determine whether the property was used exclusively for a charitable purpose, the court must not only look at the physical use for which the property is dedicated and devoted, but the court must also look at the actual manner in which the property owner conducted or operated its property.<sup>4</sup>

In the case at bar, the Plaintiff used the proceeds from tax-exempt bonds that were issued by the Tulsa County Industrial Authority to acquire the Shadybrook apartment complex. Assessor does not dispute that Plaintiff operated the Shadybrook apartment complex as a low-income housing complex for the benefit of individuals who were disabled \*4 and/or over 62 years old and had very little income. However, but for the rent receipts from the elderly and disabled tenants, along with the subsidies from the United States Department of Housing and Urban Development (HUD), Plaintiff would not have been able to keep the doors open to the Shadybrook complex. Instead, the operating expenses and maintenance costs for the complex, as well as the debt service, were borne by the tenants and the federal government. In 2004 and 2005, 97% of Plaintiff's income was derived from HUD subsidies and rent receipts from the tenants. (*Journal Entry of Judgment*. “Appendix A” *Final Order*, page 9). Tellingly, Plaintiff presented no evidence to show that it donated or provided housing without charge to those in need. In addition, the record is silent as to how much money, if any, Plaintiff contributed to the subsidized housing project that it owned and operated. One thing we do know is that Plaintiff did not solicit or receive any charitable contributions nor did it have a plan for soliciting charitable contributions. (Trial tr. p. 45, lines 6-25; p. 46, lines 1-15) Clearly, Plaintiff's low-income housing complex would not have been in operation without the subsidies from the federal government. (Trial tr. p. 47, lines 21-24).

The Court in *In re Farmers' Union Hospital Association of Elk City* noted, that “there is a wealth of these cases, and a variety of schemes of organizations and methods of operation, and many are held exempt and others not. In all of them there is one factor the presence or absence of which means almost more than anything else in determining the issue. That is this: Are the doors of the hospital open to all, poor patients and pay patients alike? If the answer is yes, it is a charitable hospital and its property is entitled to the exemption from taxation provided; if the answer is no, it is not a charitable hospital and is not entitled to the exemption (*citations omitted*)” *Id* Although the Shadybrook apartment complex is not a \*5 hospital, Assessor believes that this factor should be one of many to be considered in determining whether Plaintiff's property was used exclusively for charitable purposes: “whether the housing complex was open or available to all, poor tenants and pay tenants alike”. Gail Wright, the Manager of the Shadybrook complex, stated that every tenant was required to pay some rent; if the tenant did not have income, they had to pay a minimum of \$25.00. (Trial tr. p. 82, lines 11-12; Trial tr. p.63, lines 5-7) In addition, every tenant was required to give a security deposit to Plaintiff that was the equivalent of their first month's rent. (Trial tr. p. 122, lines 14-21) Clearly, Plaintiff did not offer its housing to all persons, poor or pay alike. In order to live at the Shadybrook complex, each tenant had to pay some amount of rent.

This factor (or one very similar) was considered by the Trial Court as it analyzed three (3) factors of the seven-part “charitable use” test.<sup>5</sup> The Trial Court only addressed three factors because it felt that they were the only ones truly in dispute in the case. The first factor considered by the Trial Court was: “Whether [residents] receive the same treatment, regardless of their ability

to pay, e.g. whether charges are made to all [tenants] and, if made, are lesser charges made to the poor or are any charges made to the indigent?" The Trial Court found that, "in the absence of any definitive precedent to the contrary, the Court finds that a *de minimus* exception applies to the collection of very limited contributions from charitable clients for the purpose of the *Glass* test and that the approximately 4% contribution required by HUD rules falls within this exception." The Court concluded that this \*6 "charitable use" factor had been satisfied. (*Journal Entry of Judgment*. "Appendix A" *Final Order*, page 18).

Assessor contends that the court's ruling is contrary to the evidence presented at trial; in fact, there is no competent evidence to support this finding. The record clearly showed that everyone was required to pay rent without exception. HUD would not provide subsidies for an individual who did not meet this requirement. (Trial tr. p. 40, lines 25; Trial tr. p.41, lines 1-14) Although lesser charges were made to the poor (qualified tenants had to pay 30% of their income as their portion of the monthly rent), no one got to stay in the apartment complex rent-free. (Trial tr. p. 8, lines 15-16; Trial tr. p.100, lines 12-25; p. 101, lines 1-2) (Trial tr. p. 82, lines 11-12; Trial tr. p.63, lines 5-7). The Shadybrook apartment complex was not available to all regardless of their ability to pay, therefore, the property was not used "exclusively for a religious or charitable purpose".<sup>6</sup>

The second "disputed" factor, addressed by the Trial Court was: is there present a charitable trust fund created by benevolent and charitably minded persons for the needy or are there donations made for the use of such person. In addressing this factor, the Trial Court correctly noted that "the record did not reflect any substantial outside private donations or benevolent trust fund supporting Shadybrook". (*Journal Entry of Judgment*. "Appendix A" *Final Order*, page 19). Unfortunately, the Trial Court went on to conclude that federal funding for charitable purposes is the equivalent of outside private donations or a benevolent trust fund for the purpose of the *Glass* test. In reaching this conclusion, the Trial Court \*7 reasoned that an ad valorem tax exemption for federally funded housing is consistent with the intent of Okla. Const. art. X, §6, based upon the broad principle set forth in *Integrus*, where the Supreme court noted, "that in crafting the constitutional tax-exemption to foster charitable acts, the founders intended to encourage the provision of services which relieve the State (of Oklahoma) of burdens which it would otherwise have to bear". (*Journal Entry of Judgment* "Appendix A" *Final Order*, page 20). The Trial Court has failed to see or acknowledge that which is glaringly clear from the record in this case: Plaintiff did nothing to relieve the government of its burden. Ironically, Plaintiff's Articles of Incorporation state:

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".

However, the Plaintiff never complied with its purpose for incorporation. As stated before, Plaintiff's low-income housing project would not have been in operation but for the housing assistance payment contract from HUD. (Trial tr. p.46, lines 13-24; Plaintiff's Trial Exhibit A: Certificate of Incorporation, page 2)

Furthermore, there is no precedent in Oklahoma to support the Trial Court's legal ruling that HUD subsidies are the equivalent of an outside private donation or a benevolent trust. Funding from the government, regardless of whether it's the federal, state or local government, has never been deemed a "charitable donation" or "benevolent trust", for the purpose of establishing entitlement to an exemption from ad valorem taxation. To sanction such a conclusion could cause wide-spread ramifications in every single county that has property that is either rented or leased to an individual who is receiving HUD subsidies. If a HUD subsidy is considered a "charitable donation", whether in the form of a project-based \*8 contract given to the property owner or in the form of a voucher that is issued to an individual, then many property owners, non-profit and for-profit alike, could make the claim that they are exempt from taxation because they are using their property for a charitable purpose, in that they receive "outside private donations" (i.e. subsidies) to provide low-income housing (either a single-family house or an apartment). This would be the beginning of a slippery slope.

Other jurisdictions have denied tax exemptions for low income housing programs because "the existence of a purpose that can be characterized as charitable does not in itself render a corporation charitable and tax-exempt; it must be exclusively charitable, not only in the purposes for which it is formed and to which its property is dedicated, but also in the manner and means it adopts for the accomplishment of those purposes". The factor that led to the court denying the exemption was that the

program provider's funds were not derived from charitable contributions, but instead from the federal government. *Waterbury First Church Housing, Inc v. Brown*, 367 A.2d 1386 (Conn. 1976).

The third factor addressed by the Trial Court was: “Does Shadybrook operate without a profit or private advantage to its founders and officials in charge”. (*Journal Entry of Judgment “Appendix A” Final Order*, page 20) It is undisputed that during the Assessment Years, Jack T. Hammer, a trustee on the Plaintiff's Board of Trustees, was the President and majority stockholder in HSI Management Company. Mr. Hammer's company was paid to manage the Plaintiffs property. Assessor submits that a private advantage inured to Mr. Hammer, however, Assessor was not able to prove to what extent he benefited. The Court found that no private gain was realized by Mr. Hammer. (*Journal Entry of Judgment. “Appendix A” Final Order*, page 21)

#### \*9 IV. ASSESSOR'S REPLY TO

##### PLAINTIFF'S ANSWER BRIEF, PARAGRAPH G:

##### ASSESSOR CORRECTLY CONTENTS THAT PLAINTIFFS BURDEN OF PROOF IS ESTABLISHED BY *LONDON SQUARE VILLAGE* RATHER THAN *INTEGRIS*.

Plaintiff states that Assessor is wrong to rely on the *London Square Village* case to determine whether Plaintiffs use of its property was for a charitable purpose. Plaintiff bases its argument on the fact that the Court in the *London Square Village* case was asked to rule on the applicability of a statutory exemption [Title 68 O.S. §2405(h) and (i)] and not the constitutional exemption that Plaintiff is seeking.

In, *London Square Village*, the property owner, a non-profit entity, built a housing complex to provide low cost housing with assistance from HUD. The tenants applied for financial assistance (rent supplement) through HUD. The apartment complex owner collected rent from each tenant less the amount of supplement received from HUD. From the left over money, the owner paid its operating expense and mortgage payments. The *London Square Village* court found that because all persons were required to rent, rich and poor alike, that such housing was not used exclusively for charitable purposes. The Court apparently found that the property was not being used exclusively for a charitable purpose because the property owner did not give “charity” to anyone - everyone was required to pay rent even if they qualified for a rent supplement.

What Plaintiff fails to note is that in *London Square Village*, the Court examined §2405(h) and (i) and Okla.Const. art. X, §6 and determined upfront that whether property is exempt from ad valorem taxation depends on purpose for which it is used and such is a question of \*10 fact;<sup>7</sup> just as Plaintiff is arguing in this case. After determining that the Constitution and the statutes require that the property must be used for a charitable purpose, the *London Square Village* Court went on to find that,

“In present case all persons are required to pay rent, rich and poor alike. However, those persons who qualify may receive rent supplements from HUD. Those who are eligible to receive rent supplements are enumerated in 24 C.F.R. s 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. We agree that low-rent housing for such persons is a worthwhile cause of beneficial interest to society. **However, we are of opinion that such housing is not used exclusively for charitable purposes as required by 68 O.S.1971 s 2405(h). (i) when each and every occupant is required to pay for accommodations.**<sup>8</sup>

(emphasis added)

Assessor contends that the Court's decision in *London Square Village*, which has never been overruled, is right on point with the case at bar. The Court in *London Square Village* addressed the legality of tax exemption for a low-income apartment complex.

Plaintiff, on the other hand, argues that the applicable case is *Integrus Realty Corporation*, where the Court addressed a request for an ad valorem exemption for approximately one-third of an office building that was owned by a for profit entity. At issue

was the taxable status of space in an office building that was used by various non-profit entities. In this case, the Court examined §2887(9) and compared it to the provisions in *Okla. Const. art. X, § 6*. In *Integrus* the Court stated,

“The framers of Oklahoma's Constitution no doubt were mindful that charitable institutions such as the Integrus-related entities provide services which relieve the \*11 State of burdens which it would otherwise have to bear and in crafting the *art. 10. § 6* tax-exemption intended to foster such charitable acts.

Like *Integrus* the Court in *London Square Village* examined not only the Constitution but also the statutory provisions in [Title 68. §2887(9); and [§2405(h) and (i); respectively]

Like *Integrus*, the court in *London Square* noted that whether property is exempt from ad valorem taxation depends on the purpose from which it is used.

In a footnote in the *Integrus* case (fn 16), the court stated that the London Square property was “let to tenants in no need of charity who were very capable of paying the rents charged, i.e. the property was not physically used (in several instances) for charitable purposes.” The Court specifically did not overturn the decision in *London Square Village*. It appears that Plaintiff has taken this to mean that all tenants in London Square were able to pay rent. Assessor cannot find this conclusion either in the *London Square Village* case, or in Footnote 16 of the *Integrus* case. Unless Plaintiff is stating that tenants living in London Square Village were all able to pay rent because they received rent supplements from HUD and therefore the Court should have denied the exemption. If this is the case, then all tenants at the Shadybrook complex were able to pay rent as well because of the HUD subsidies paid to Plaintiff and this Court should find that Plaintiff is not entitled to a tax exemption because no charity was extended to the tenants, or there was no need to extend charity to the tenants because the federal government was paying their rent.

Assessor urges this Court to follow the *London Square Village* case and to find that Plaintiffs use of its subsidized housing was not for an exclusive charitable use because all persons were required to pay rent. Furthermore, Plaintiff operated the low-income housing, not with its own contributions to the project, but instead with the money from the tenants \*12 who had little to no income and from the federal government. Plaintiffs purpose of incorporation, although admirable, apparently meant nothing because it did not “relieve the burden on government”, quite the contrary, it could not operate its facility without the federal subsidies.

Constitutional provisions are strictly construed against the claimant of an exemption.<sup>9</sup> Assessor urges this Court to strictly construe tax exemptions because exemptions undermine equality and uniformity by placing a greater burden on some taxpaying businesses and individuals rather than placing the burden on all taxpayers equally.

## CONCLUSION

Wherefore, all of the above state reasons and argument and those in Assessor's Brief-in-Chief, Assessor respectfully requests that this Court reverse the trial court's judgment and find that Plaintiff does not qualify for an exemption from ad valorem taxation under *Okla. Const. art. X, §6*.

### Footnotes

- 1 [London Square Village., Inc. v. Oklahoma County Equalization & Excise Bd., 1976 OK 159, 559 P.2d 1224](#)
- 2 [In re Real Property of Integrus Realty Corporation, 2002 OK 85 at ¶13, 58 P.3d 200, 205.](#)
- 3 [Id., 2002 OK 85 at ¶ 11, 58 P.3d 200 at 203.](#)
- 4 [In re Farmers' Union Hospital Association of Elk City, 1942 OK 128, 190 Okla. 661, 126 P.2d 244, 246](#) (It is generally said, “The character of the institution is to be determined, not alone by the powers of the corporation as defined in its charter, but also by the

manner of conducting the hospital.” *Steward v. California Med., etc., Ass’n*. 178 Cal. 418, 176 P. 46, 47. and other cases found in Am.Dig., supra.

5 First recognized in *Glass v. Oklahoma Methodist Home for the Aged, Inc.*, 1972 OK 135, 502 P.2d 1268, and *Baptist Health Care Corp v. Okmulgee County Bd. Of Equalization*, 1988 OK 11, 750 P.2d 127.

6 The Oklahoma Supreme Court has ruled that property which produces income for private profit, or which is not available to all regardless of ability to pay, or which itself is income property, cannot be property which is used “exclusively for religious or charitable purpose. *Baptist Health Care Corp v. Okmulgee County Bd. Of Equalization*, 1988 OK 11 at ¶9, 750 P.2d 127, 129.

7 **London Square Villae. Inc. v. Oklahoma County Equalization & Excise Bd**, 1976 OK 159, 559 P.2d 1224, 1225-1226; *Tulsa County v. St. John's Hospital*, 200 Okl. 176. 191 P.2d 983; *Oklahoma County v. Queen City Lodge No. 197.I.O.O.F.*, 195 Okl. 131, 156 P.2d 340; *Phi Delta Theta v. State*, 175 Okl. 608. 53 P.2d 1129; *Cox v. Dillingham*, 199 Okl. 161. 184 P.2d 976.

8 Id.

9 *Austin, Nichols & Co. v. Oklahoma County Bd. Of Tax Roll Corrections*, 1978 OK 65, ¶19, 578 P.2d 1200, 1203-1204. *GDT CGI LLC v. Oklahoma Co. Bd. Of Equalization*, 2007 OK CIV APP 101, ¶12, 172 P.3d 628, 633.

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