

IN THE MAGISTRATE DIVISION
OF THE OREGON TAX COURT
Property Tax

ASPEN FOUNDATION, an Oregon nonprofit corporation,)	
)	
Plaintiff,)	No. 991253B
)	
v.)	
)	
DOUGLAS COUNTY ASSESSOR,)	
)	
Defendant.)	DECISION

Plaintiff is a nonprofit corporation seeking exemption from property taxes for its Forest Glen Senior Residence under ORS 307.130¹ as a charitable organization. Trial was held at the Oregon Tax Court on November 2, 2000. Leslie R. Pesterfield, Attorney, represented plaintiff. Paul E. Meyer, Douglas County Counsel, represented defendant.

STATEMENT OF FACTS

The subject property is an assisted living facility in Canyonville, Oregon. The structure is an old six-story concrete building with a full basement constructed in 1962 and purchased by plaintiff, a 501(c)(3) corporation, from the Federal Deposit Insurance Corporation in September 1997. The building was remodeled after the purchase, including an extensive remodel of the second floor, which is now run as a licensed Residential Care Facility (RCF) with 18 or 19 units.² In addition to the second floor RCF, there are 88 studio and one-bedroom apartments rented to the elderly on the other five floors. The apartments are quite small. The studios are 21 feet by 13 feet or 21 feet by 14

¹All references to the Oregon Revised Statutes are to 1999.

²There was considerable deferred maintenance when plaintiff bought the property in 1997. The second floor remodel cost \$150,000.

feet. The one-bedroom apartments are 21 feet by 26 feet and 21 feet by 28 feet. The one-bedroom units were created by removing a partitioning wall between two adjoining studios.³

The rent structure at Forest Glen is month-to-month. Forest Glen does not charge first and last month rent to new residents. The residents pay a \$100 deposit and a \$100 cleaning fee. There are four different rates charged for the apartments. The studio apartments rent for \$695 or \$745 (deluxe #1 and #2), the one-bedroom units rent for \$1,045, and the two-bedroom units rent for \$1,145. (Ptf's Ex 9.) The base rate for assisted living at the RCF is \$1,475. There are additional charges for personal assistance up to \$800, depending upon the service level needed, and an additional \$400 charge for double occupancy. The rental charge includes services such as three daily meals, transportation to town, and weekly cleaning of the rooms including the laundering of linens. Plaintiff does not obtain a credit report on applicants or require a third party payment guarantee. The rental agreement provides that the agreement may be terminated with notice if a resident is unable to pay.⁴ (Def's Ex E at 1.) At the same time, there was no report that anyone had not paid their rent.

When plaintiff acquired the property in 1997 the rent for the studios varied among the tenants. According to Melvin Philips, Resident Manager at Forest Glen since Aspen Foundation purchased it, the differing rates existed because some of the long-time tenants were paying lower rates that had never been raised while new tenants had come in at higher rates. He testified that as of July 1999, Forest Glen raised the lower rates to the

³As a result, the one-bedroom units have two bathrooms.

⁴Mr. Philips, Resident Manager, testified that no one has ever been evicted for failure to pay rent.

level of what newer tenants were paying in order to equalize that disparity.

Forest Glen has provided reduced rates in two instances. Grace Edwards has lived at Forest Glen prior to its acquisition by Aspen Foundation. At some point, Mr. Philips became aware that Ms. Edwards could no longer afford the rates. Aspen Foundation reduced Ms. Edwards' monthly rental rate by \$75, from \$695 to \$620, so that she could stay. (Ptf's Ex 2.) In 1999, Bob Mitchell, who had been badly injured in an auto accident, came to live at Forest Glen. Although he needed the level of care provided in the RCF, Mr. Mitchell could only afford to pay the studio rate of \$695 per month. Aspen Foundation allowed Mr. Mitchell to stay in the RCF, which would normally cost \$1,475 per month, for \$695 per month. Once Mr. Mitchell's condition allowed for his removal from the RCF, he moved into a small studio. (Ptf's Ex 3.) Mr. Mitchell was in the care unit for roughly six months.

Mr. Philips testified that the occupancy rates at Forest Glen are consistently better than 98 percent, usually 100 percent. When questioned under cross examination, Mr. Philips explained that dips in the occupancy rate occur only at times of turnover due to the time taken to prepare a room for a new tenant.⁵ He stated that turnover is otherwise instantaneous because there is a waiting list. He admitted, however, that there was about a six to seven percent dip in occupancy in March and April 2000 when a new facility opened in Roseburg. (Ptf's Ex 1 at 3.) He also explained that some people who needed more care than Forest Glen provides moved to other facilities.

The average age of the tenants at Forest Glen is 84 years, many of whom are widows with medical problems who are unable to maintain a home. The nearest hospital

⁵Mr. Philips testified that room preparation usually takes about five days.
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is in Roseburg, roughly 25 miles from the subject property over the mountains. There is a larger hospital in Grants Pass, which is 47 miles from Canyonville.

Kristen Harder, President and one of the founders of Aspen Foundation, stated that the purpose of Forest Glen is to provide low-income housing for seniors and jobs for the small community and testified that neither she nor the other directors receive any monetary or other compensation. Ms. Harder testified that all Forest Glen receipts, monthly about \$6,000 in excess of deductions, are used toward debts and improvements to the facility. Plans for future improvements to Forest Glen include buying new carpet and furniture, painting, landscaping, and repaving the parking lot. Ms. Harder testified that Forest Glen is paying down its debt faster than originally scheduled. When asked on cross examination why, at the time of equalization, the rents were not brought down to the lower rates rather than raised, Ms. Harder responded that the business would not be able to function at those rates because Aspen Foundation is providing housing at the least possible cost.

Management services for Forest Glen are provided by Sun West Management,⁶ which is approximately 83 percent owned by Ms. Harder's husband, John Harder, also a director of Aspen Foundation. Ms. Harder testified that, rather than market rates, which are usually around seven percent of gross income, Sun West charges Forest Glen a flat monthly fee of \$2,475.⁷

Kelley Hamilton, MAI, Real Estate Analyst and Consultant for Kline Hamilton Realty

⁶Management services provided include marketing, legal advice, paychecks, and accounts payable.

⁷As an example, Ms. Harder testified that if market rates had been charged, Forest Glen would have paid approximately \$6,338 per month in 1998.

Advisors, Inc., prepared a written market rent analysis for plaintiff. Mr. Hamilton's commercial appraisal experience includes over 550 assisted living and residential care facilities, 100 of which are located in Oregon and nine of which are located in Douglas County. He expressed his opinion that the rents charged at Forest Glen are below market.⁸ In preparing his market rent analysis, Mr. Hamilton compared Forest Glen to other assisted living facilities in the general area, making adjustments for size, services, quality, and location. He concluded that the studios are 12.4 percent and 15.8 percent below market, that the one-bedroom apartments are 4.6 percent and 9.2 percent below market, and that the RCF studio is 4.9 percent below market. Ms. Harder explained that, while Ms. Edwards and Mr. Mitchell received substantial breaks on their rent, all of the tenants actually receive a break in their rent because it is lower than market.

Steve Gerlt, Douglas County Deputy Assessor, testified that he believes Mr. Hamilton's adjustments are understated. For instance, Mr. Gerlt more heavily weighed such factors as condition and location, focusing particularly on the distance from Forest Glen to the nearest hospitals. Robert Steudler, Douglas County Deputy Assessor for 25 years (28 years total experience), primarily experienced in appraising commercial property, also expressed the opinion that Mr. Hamilton's adjustments were not accurate. He cited the sizes of the units and the extra bathroom in the one-bedroom apartments, as well as the expected ambulance response time.⁹ Mr. Gerlt and Mr. Steudler expressed their opinions that these factors contribute to functional obsolescence, economic

⁸In Mr. Hamilton's opinion, high occupancy rates indicate that a higher rent can be demanded.

⁹Mr. Hamilton stated that, in his opinion, distance to the hospital did not affect occupancy at Forest Glen.

obsolescence, physical depreciation, and economic life adjustments.¹⁰ Each concluded that Forest Glen's rents are at market, so that there is no element of charity in Forest Glen's rents.

Defendant agreed that plaintiff's rents are low, but accounted for it, among other things, due to the age of the building, the small size of the rooms, and the distance from the hospital. Apparently based on these findings, defendant denied plaintiff's application for exemption as a charitable organization.

COURT'S ANALYSIS

Recognizing that many senior citizens have fixed incomes at relatively low levels, plaintiff's intent is to provide much-needed affordable assisted living to seniors. Aspen Foundation admirably does so out of a desire to provide care to the community, which springs from some sentimental remembrances of Forest Glen. An additional purpose of Forest Glen is to provide jobs for the community.

ORS 307.130 exempts the property of qualifying charitable institutions from property taxation.¹¹ However, an organization is not automatically entitled to a property tax exemption because it provides a benefit to the community. *See SW Oregon Pub. Def. Services v. Dept. of Rev.*, 312 Or 82, 817 P2d 1292 (1991) (citing *Dove Lewis Mem.*

¹⁰Mr. Hamilton rejected Mr. Gerlt and Mr. Steudler's adjustments, stating that such factors are more appropriate for appraisal reports than a rent analysis.

¹¹That statute, in relevant part, provides:

"(1) Upon compliance with ORS 307.162, the following property owned or being purchased by * * * charitable * * * institutions shall be exempt from taxation:

"(a) * * * only such real or personal property, or proportion thereof, as is actually and exclusively occupied or used in the * * * charitable * * * work carried on by such institutions." ORS 307.130.

Emer. Vet. Clinic v. Dept. of Rev., 301 Or 423, 427, 723 P2d 320 (1986)). Moreover, “[t]he mere fact * * * that an organization is a charity does not establish any inherent right to an exemption.” *Id.* at 89 (citing *Dove Lewis*, 301 Or at 427).

An essential element of charity is gift and giving. See *SW Oregon*, 312 Or at 89; *Dove Lewis*, 301 Or at 428; *Rigas Maja, Inc. v. Dept. of Rev.*, 12 OTR 471, 474 (1993); OAR 150-307.130-(A)(3)(d). It is not the only factor. See OAR 150-307.130-(A). The parties have devoted considerable attention to the gift and giving factor.

Plaintiff’s evidence primarily consists of its use of volunteer services, reduced rates to two individuals, and its assertion that it charges below-market rents. Defendant counters that the volunteer services and reduced rates, given to only two out of 100 or more residents, are inconsequential. Defendant also argues that the scheduled rates are generally at or above market, when properly adjusted. While the evidence is not overwhelming, the court is satisfied by a preponderance of the evidence that Forest Glen’s rates are generally below market from a low of 4.5 percent to a high of 15.75 percent. The court reserves comment on the other two elements of plaintiff’s case for discussion below. However, the court flatly rejects plaintiff’s claim that below market rates alone satisfy the element of gift and giving. (Ptf’s Rebuttal To County’s Closing Argument at 1.)

In addressing the gift and giving element, the department’s rule first recognizes that an organization may deliver its product or service “at no cost or at a price below the market price * * *.” OAR 150-307.130-(A)(3)(d). The rule goes on to provide that:

“[t]he fact that an organization charges a fee for its services does not necessarily invalidate its claimed status as charitable. It is a factor to be considered in the context of the organization’s manner of operation.” OAR 150-307.130-(A)(3)(d)(C) (emphasis added).

Thus, while the rule recognizes that an organization can charge a fee for its services and

still be charitable, it does not go so far as to declare that below market prices always equate with gift and giving requirement under the law. The department's regulation sets forth four factors to be considered when reviewing the operations of fee-charging organizations:

“(i) Whether the receipts are applied to the upkeep, maintenance and equipment of the institution or are otherwise employed;

“(ii) Whether patients or patrons receive the same treatment irrespective of their ability to pay;

“(iii) Whether the doors are open to rich and poor alike and without discrimination as to race, color or creed;

“(iv) Whether charges are made to all and, if made, are lesser charges made to the poor or are any charges made to the indigent.” OAR 150-307.130-(A)(3)(d)(C).

The above factors were pronounced over time in various decisions of the Oregon Supreme Court and collectively enumerated in *Methodist Homes, Inc. v. Tax Com.*, 226 Or 298, 309-310, 360 P2d 293 (1961) (citations omitted). In seeking to define gift and giving, the department's rule states:

“This element of gift and giving is giving something of value to a recipient with no expectation of compensation or remuneration.” OAR 150-307.130-(A)(3)(d).

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The Oregon Supreme Court considered the gift and giving requirement in *SW Oregon*, 312 Or at 91-92, stating:

“* * *after a taxpayer has complied with all the requirements of the regulation up to subsection (3)(d), the question becomes, not whether taxpayer gains some kind of remuneration from some source, but whether, *so far as the recipient is concerned*, the taxpayer's services are given to the recipients with strings attached.”

The question, then, is to be decided from the viewpoint of the service recipients, which in

this case are the residents at Forest Glen. And the nature of the gift must be without strings attached. See *id.* at 92. Forest Glen charges a fee for its services.

The court finds it significant that everyone living at Forest Glen pays to live there and that only two of the one hundred or more residents have been allowed to pay a reduced rate. In that regard, the evidence shows one individual pays less than the scheduled rate on an ongoing basis (\$620 versus \$695) and another was allowed to move into the RCF and live there for six months at a rate of less than half the normal charge (\$695 versus \$1,475, which is \$780 less). The other residents all pay the scheduled rates. Thus, two percent of the residents were charged a reduced rent. The relationship of reduced rates (\$6,780) to annual income (\$741,446) is less than one percent. Giving of five to eight percent may not be enough. See *YMCA v. Dept. of Rev.*, 308 Or 644, 654, 784 P2d 1086 (1989). Finally, on top of its basic rates, which vary depending on the size of the unit, Forest Glen has four levels of additional personal assistance covering such items as meal reminders, special diets, range of motion exercises, incontinence care, etc., for which it charges an additional \$200 to \$800 depending on the level of care needed.

In spite of the department's administrative rule provisions and the many judicial pronouncements on the subject, determining what exactly constitutes gift and giving is often a difficult question. Would the majority of the residents living in the small studio and paying \$695 per month instead of a market rate of \$830 view the lesser charge as a gift? Does the resident paying \$620 rather than \$695 feel she is receiving charity? Certainly the resident who was allowed to live in the RCF for six months at a rate of less than half the normal charge (\$695 versus \$1,475, or \$780 less) received a gift. But are those one or two instances sufficient when the other one hundred or so residents pay the going rate?

On balance, the court finds insufficient evidence of gift and giving.

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Plaintiff places primary reliance on *Rigas Maja*, 12 OTR 471 (finding that rents charged at an adult foster care facility were below market). Significant differences exist between the facts in *Rigas Maja* and the present case. In *Rigas Maja*, fees were one of many factors the court considered in determining whether the adult foster care facility met the element of gift or giving. *See id.* The court noted that no additional fees were charged as the level of care required increased. In addition, one of six residents (16 percent) received a substantially reduced rate for lack of ability to pay (\$300-\$400 less than the monthly rate). *See id.* at 474-75. The court also considered the amount of material and furniture donated and the “substantial” donations of labor (1200 hrs.) provided in preparing the home, focusing on the fact that they were applied to providing services. *See id.* at 475. Taking together all the factors, the court found that plaintiff was a charitable organization under ORS 307.130 and therefore exempt from taxation. *See id.*

Forest Glen has little in common with *Rigas Maja* other than slightly reduced rates. Whereas one of the five residents in *Rigas Maja* paid a reduced rate of half, here only two of one hundred residents paid less, and one of those (Edwards) was only slightly below the scheduled rate (\$620 versus \$695). As service needs increase at Forest Glen, so do the charges. The home in *Rigas Maja* was rented from the church at a reduced rate and set up using donated labor and materials. Here, the facility was purchased by Aspen through a bank loan that is being paid off using resident fees. And, plaintiff’s rental agreement, which each resident is required to sign, includes an eviction clause that reads:

“If the Resident fails to pay the Monthly Fee or any other charges promptly when they are due * * *, the Owner, at the Owner’s option, while the default remains unincurred [*sic*], may terminate this Agreement at any time.” (Def’s Post-Trial Brief at 6) (citation omitted).

The existence of volunteers at Forest Glen adds little to plaintiff’s case. In addition

to its paid staff, Forest Glen has (or has had) volunteers working at the facility playing music, reading stories, helping out in the office, giving infrequent medical lectures, staffing the library, and teaching lip reading. (Ptf's Exs 4-8.) These services are no doubt appreciated by the residents. However, they do not appear to "assist [Forest Glen] in performing its activities" and the existence of volunteer labor "is not a standard in determining whether an organization is charitable per se." OAR 150-307.130-(A)(3)(d)(D). The volunteer effort is minimal. Compared to the thirty-five paid staff who put in roughly 720 hours per week at the facility, nine volunteers put in roughly 15 hours. These considerations lead the court to conclude the institution is not involved in gift and giving.

Overall the statute and corresponding administrative rule require that the organization be engaged in charity. Other factors lead the court to conclude plaintiff is not so engaged. There is no evidence plaintiff has "a separate account containing funds and donations committed to charitable use." *Dove Lewis*, 301 Or at 429 (citing *Methodist Homes*, 226 Or at 311). Oregon courts have long considered this to be an important factor.¹² See, e.g., *Dove Lewis*, 301 Or 423; *Methodist Homes*, 226 Or 298. In fact, while it is listed as one of many factors in the administrative rule, the supreme court declared that "the presence of funds and donations for charity use [is one of] two almost universally applied * * * tests of charitable character and * * * the absence of either can overturn any claim to charitable exemption." *Methodist Homes*, 226 Or at 311; see also OAR 150-307.130(1)(a)(c). The court quoted with approval this language from *Methodist Homes* some 25 years later in *Dove Lewis*, 301 Or at 429. The significance of this factor was

¹²Plaintiff's Complaint alleges that Forest Glen heavily relies on donations. However, no evidence to this effect was introduced at trial. The court therefore concludes that Forest Glen relies on little or no donations.

explained by the court as follows:

“* * * the principal and distinctive characteristics of charitable institutions are that they ‘derive their funds mainly from private and public charity and hold them in trust for the object of the institution.’” *Hamilton v. Corvallis Hosp. Ass’n*, 146 Or 168, 186, 30 P2d 9 (1934) (citation omitted).

Added to this is the fact that plaintiff’s articles of incorporation do not provide that upon dissolution its remaining assets will be used for charitable purposes, as provided in OAR 150-307.130-(A)(1)(e). While the court was unwilling to grant defendant’s Motion For Summary Judgment based on the wording of the dissolution clause, it is a factor relevant to the determination of whether an institution is charitable under ORS 307.130. See OAR 150-307.130(1)(e).

As with other exemption statutes, taxation is the rule and exemption is the exception, so that such statutes will be strictly construed against the one petitioning for exemption. See *Methodist Homes*, 226 Or at 307 (citations omitted). The burden of establishing entitlement to the exemption is on the taxpayer. See ORS 305.427; see also *Dove Lewis*, 301 Or at 426-427. Finally, “[e]xemptions are generally denied unless they are so clearly granted as to be free from reasonable doubt.” *Washington County v. Dept. of Rev.*, 11 OTR 251, 254 (1989) (citation omitted).

Plaintiff’s facts are more similar to those in *Dove Lewis*, 301 Or 423, in which the court acknowledged that an emergency veterinary clinic met some of the requirements of a charitable organization, but found that, after considering all of the factors, it did not qualify as a charitable institution under ORS 307.130. The court found that, as opposed to being dependent on donations for survival, as most charities are, the fee schedule was structured to cover the clinic’s costs. In addition, the court noted that “it is only when an individual pet owner says that he or she cannot afford payment that any mention of free or discounted

services * * * occurs.” *Id.* at 431. The court recognized that the clinic’s activities were worthwhile and commendable but, upon examining all the factors, concluded it did not qualify for exemption. *See id.* at 432.

The rates charged at Forest Glen are sufficient to pay employee salaries and other ongoing expenses, including accelerated payment of the acquisition debt, leaving ample reserves for capital improvements (new parking lot, etc.) without dependence on charitable donations. Few recipients receive a gift. There is no doubt that plaintiff has positively affected its community through Forest Glen. However, the court finds that plaintiff is not a charitable organization within the meaning of ORS 307.130.

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CONCLUSION

IT IS THE DECISION OF THE COURT that plaintiff is not a charitable organization within the meaning of ORS 307.130. Accordingly, plaintiff’s property is not exempt from taxation.

Dated this _____ day of May, 2001.

DAN ROBINSON
MAGISTRATE

**DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST.,
SALEM, OR 97301-2563. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60
DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL
AND CANNOT BE CHANGED.**

**THIS DOCUMENT WAS SIGNED BY MAGISTRATE DAN ROBINSON ON MAY 17,
2001. THE COURT FILED THIS DOCUMENT ON MAY 17, 2001.**