

Opinion No. 65-108

June 23, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Alexander F. Sceresse, District Attorney, Second Judicial District, Bernalillo County Courthouse, Albuquerque, New Mexico

QUESTION

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Is the Mountain View Home Project in Albuquerque exempt from ad valorem taxes?

CONCLUSION

No.

OPINION

{*183} ANALYSIS

Mountain View Homes, Incorporated is a non-profit corporation organized under the laws of this State. It is the owner of approximately 300 apartments located at 2323 Kathryn, S.E., Albuquerque. The property has been assigned an assessed valuation for ad valorem tax purposes of \$ 149,681 by the County Assessor.

The project was built with funds advanced from a private source but the loan is guaranteed by the Federal Housing Administration, under the provisions of Section 221-B of the Federal Housing Act.

The preamble of the Articles of Incorporation provides as follows:

"That we, the undersigned, have this day associated ourselves together for the purpose of forming a nonprofit corporation under and by virtue of the laws of the state of New Mexico with the intention to provide housing for the use and occupancy by families displaced from renewal areas, or by governmental action, and families of low or moderate income, and also for purposes other than for making profit or gain for itself and other persons identified therewith."

Further Article IV of the Articles of Incorporation provides as follows:

"The purpose for which the corporation is formed is charitable, and the business and objects to be carried on and promoted by it, on an exclusively non-profit basis, are as follows:

(a) To provide dwelling accommodations for families displaced from urban renewal areas or as a result of governmental action and to assist further the provisions of housing for moderate and low income families.

(b) To construct, operate, maintain, and improve, and to buy, own, sell, convey, assign, mortgage, or lease any real {*184} estate and any personal property necessary or incidental to the provision of such housing.

(c) To borrow money and issue evidences of indebtedness in furtherance of any or all of the objects of its business; to secure the same by mortgage, pledge, or other lien.

(d) To apply for and obtain or cause to be obtained from the Federal Housing Commissioner, hereinafter called the "Commissioner," a contract or contracts of mortgage insurance pursuant to the provisions of Section 221 (d) (3) of the National Housing Act, as amended, as it applies to housing, for families displaced from urban renewal areas or as a result of governmental action and families of low or moderate income as determined by the Commissioner.

(e) To perform and carry out contracts or enter into activity of any kind necessary to, or in connection with, or incidental to the accomplishment of the non-profit, charitable purposes of the corporation.

Article VII of the Articles of Incorporation provides as follows:

"No part of the net earnings of the corporation shall be distributed to or inure to the benefit of any private shareholder, member, private individual, or the officers of the corporation, and no part of the activities of the corporation shall carry on propaganda, or otherwise attempt to influence legislation, nor shall it participate in or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office."

And further, Article VIII provides as follows:

"In the event of the dissolution, winding up, or other liquidation of the assets of the corporation, the corporation's property shall be conveyed and distributed only to such non-profit and charitable corporation or institution as may be designated by the corporation, and shall not be conveyed to any private individual, firm, organization, or corporation organized for profit, or to any member, sponsor, contributor, private individual, trustee, or the officers of the corporation; PROVIDED, however, that the corporation shall at all times have the power to convey any or all of its property to the Federal Housing Commissioner or his nominee."

It may be seen from these provisions that the stated purpose of the corporation is quite laudable and commendable and has, in fact, served a useful purpose in Albuquerque in accordance with its stated purpose in providing lowcost housing.

The By-Laws of the corporation have been examined but no provision therein has been found relevant to this problem.

The provision of the New Mexico Constitution providing for exemption from taxation is Article VIII, Section 3 which provides:

"The property of the United States, the state and all counties, towns, cities and school districts, and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit, and all bonds of the state of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation."

This section provides two classes ^{*185} of exemptions. One dependent upon ownership and the other upon use. **Church of The Holy Faith v. State Tax Commission**, 39 N.M. 403, It is obvious that Mountain View cannot qualify under that class of ownership in the section since that portion relates to publicly owned land. The only provision that can possibly be applicable is that portion dependent upon use, to wit:

". . . all property used for educational or charitable purposes . . ." (Art. VIII, § 3 N.M. Const.)

Admittedly, the stated purpose of the corporation by its own articles of incorporation is a charitable one. (See Article IV thereof, set forth above) However, the test required by the constitutional provision above is **use** not **purpose**. This is the general rule in any event in determining exemption for charitable corporations from taxation under general law. **Church of The Holy Faith v. State Tax Commission**, supra.

Any discussion of exemption from ad valorem taxes must begin with two cardinal principles of the law. First, tax exemption provisions must be strictly construed. **Flaska v. State**, 51 N.M., 13, 177 P. 2d 174, and secondly, that the burden is upon the taxpayer to establish an exemption from taxation. **Boston Symphony Orchestra, Inc., v. Bd. of Assessors** (Mass.) 1 N.E. 2d 6.

This is a case of first impression in New Mexico in that our Supreme Court has never considered this constitutional provision in relation to this specific set of facts. Case law in other jurisdictions is scant. However, several decisions from these jurisdictions are relevant here. The case most nearly paralleling the facts here is **Youngstown Metropolitan Housing Authority v. Evatt**, 143 Ohio State 288, 55 N.E. 2d 122 (1944). In that case the Ohio Legislature created a State Board of Housing Authority in a portion of the State. Subsequently the Housing Authority was created and it entered into a contract with the City of Youngstown to eliminate unsafe and unsanitary dwellings within the city and to build an equal number of new dwellings to provide a low rent housing project. The project was financed by the sale of bonds to the United States Housing Authority. The rental values were determined by the Authority so as to make provision for a reserve fund to pay for the bonds. The Authority rented only to those it was

reasonably certain were able to pay the rent. If the tenant failed to pay the rent he was evicted from the premises. Not a single family was granted free rent. The Court, in holding that the property was not used for charitable purposes said:

"The property comprising the project here in question is purely a commercial operation wherein a sufficient rental is charged not only to pay maintenance and repairs but to provide a reserve fund to pay the interest and retire the bonds . . ."

The Court concluded by saying:

"If this property is used exclusively for charitable purposes, then all of the decisions of this court upon this subject over a period of more than 70 years have been wrong and the English language has changed its meaning."

See also **Charles Bank Homes v. The City of Boston**, 218 Mass. 14, 105 N.E. 459; **Cleveland Branch Guild v. St. Barnabas, et al., v. Ed of Tax Appraisers, et al.**, 150 Ohio State 484, 83 N.E. 2d 329; **City Temple Institutional Society of Denver v. McGuire** (Colo.) 87 P.2d 716.

How similar the facts are here. While Mountain Home was not created by a State Housing Authority it is organized to provide low rent housing for persons displaced {**186*} by urban renewal -- a purpose not unlike the one in the **Youngtown case**. Its rent schedule is established to pay off the indebtedness incurred in building the project - as in the **Youngstown** case, and its rental methods are similar. All of these things taken together lead us to the conclusion that the property is not used for a charitable purpose and, therefore, not exempt from taxation. Article VIII, Section 3 of the New Mexico Constitution.

The purpose of the project is, of course, laudable and can only benefit the low income groups of Albuquerque. In addition, the organizers of the project are to be commended for their efforts in assisting these low income groups, but unfortunately what is good, laudable and beneficial to the public is not always a charitable use within the meaning of our Constitution. As was stated in **Benjamin Rose Inst. v. Myers**, LRA 1916 D at 1175:

". . . The small home owner, struggling amidst adverse surroundings deserves consideration at our hands. His burden of taxation is made heavier whenever property of any kind is withdrawn from the field of taxation. The competitors of the trustee . . . together with the small home owner pay their share of the public burden for fire protection, police protection, the maintenance of courts of justice, and any other instrumentality society employs to make ownership of private property possible . . ."