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IN THE SUPREME COURT OF THE STATE OF OREGON

CORVALLIS NEIGHBORHOOD HOUSING SERVICES, INC., dba Willamette Neighborhood Housing Services; and CAROLINA SUNSET DEVELOPMENT, LLC,
Plaintiffs-Appellants,

v.

LINN COUNTY ASSESSOR; and DEPARTMENT OF REVENUE, State of Oregon,
Defendants-Respondents.

Tax Court No. 4996

S061266

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Appeal from a Decision of the Oregon Tax Court
by the Honorable Henry J. Breithaupt

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The arguments put forth by the Department of Revenue (the "Department") in its answering brief might have some merit if ORS 307.130 were being interpreted for the first time. However, neither the Department nor this Court is working on a blank slate and there is a rich history of interpretation to this statute and that history undermines all of the Department's arguments.

The question before the Court in this case is whether several residential structures in Linn County (the "Property") owned by the taxpayers (or "Affordable Housing Providers") are "actually and exclusively occupied or used" in the charitable work carries on by the Affordable Housing Providers. ORS 307.130. The "charitable...work carried on" by the Affordable Housing Providers is to provide "safe, decent, sanitary, affordable housing for persons of low and moderate means." Ex. A to Stipulation of Facts. There is no more direct way for the Affordable Housing Providers to use the Property in their charitable work then to use it to actually provide safe, decent, sanitary, affordable housing for persons of low and moderate income.

The Department never really engages with this argument or explains why the property's use does not comply with the terms of the statute. Instead, the Department focuses on an entirely different question and looks to what the tenant does with the property. The correct focus is not on the tenant, but on the use the taxpayer makes of the property and whether "the primary use of the property is reasonably necessary for the charitable functions of the taxpayer." *German Apost. Christ. Church v. Department of Revenue*, 279 Or 637, 642, 589 P2d 596 (1977). The inquiry is a functional one – does the use further the charitable purpose of the taxpayer? If it does, then it is eligible for exemption. The Tax Court's opinion and the Department's brief ignored that critical inquiry. If the focus urged by the

Department were correct, then a university's tax exemption for dormitories would be lost if the resident students skipped school; a church's exemption would be lost if it rented its community hall for a secular event. The examples could go on, but the point is the same – the Department reads the statute to say "the property cannot be used in any way or other than in the work of the charity," Answering Brief, p. 10, but that reading is inconsistent with the text of the statue and how it has been interpreted.

As the Department recognizes, as a part of the first level of statutory interpretation analysis under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), "this court considers prior case low in interpreting a statute," *State v. Cloutier*, 351 Or 68, 100, 262 P3d 1234 (2011); *State v. Murray*, 343 Or 48, 52, 162 P3d 255 (2007). Several of this Court's decisions directly undercut the department's argument.

For example, in *German Apostolic*, a church appealed the denial of an exemption for an apartment building that rented units to impoverished elderly female church members. This court reversed the determination of the Tax Court and held that the real question was whether the limitation to only church members violated the "charitable purpose." This court found that it did not, and that rental of residential units was within the purposes of the church. The Department's attempt to distinguish the *German Apostolic* case in unavailing; the court's focus on deciding tax exemptions for residential purposes[1] is on "whether the activity

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[1] Footnote 6 on page 6 of the Answering Brief is somewhat misleading. "Low-income housing schemes" have existed since well before 1955 and have been the subject of many decisions by this court and the Oregon Tax Court. Those cases, especially after the "new test" ushered in by the amendment to ORS 307.130 in 955, all agree that occupancy by another party can further the charitable purposes of an organization. To the extent an exemption was denied, it was not because of the occupancy but some other fact. *See e.g., Multnomah School of the Bible*; 218 Or 19, 343 P2d 893 (1959); *German Apost. Christ. Church,* 279 Or 637, 569 P2d

undertaken on the property substantially contributes to the furtherance of the charity's goals." 279 Or at 644. There can be little doubt that the rental of the Property furthers the goal of the Affordable Housing Providers.

The case of *Pacificorp v. Department of Revenue,* 340 Or 204, 131 P3d 725 (2006), provides an example that does not involve residential living, but demonstrates that the term "use" in ORS 307.130 does not require the ability to exclude others. The *Pacificorp* case involved a joint cogeneration project by a power company and the city of Klamath Falls. The Department assessed the power company for its use of the property under a variety of theories, but one aspect this court's decision turned on is whether the power company "used" the project or whether it was "possessed" by the city. The court made clear that "use" does not necessarily equate to "possession":

> "we do not equate 'use' under the central assessment statutes with 'possession' under the municipal property statute, which is shorthand for property 'held under a lease or other interest or estate less than a fee simple,' under ORS 307.110 (2001). The central assessment statutes clearly differentiate between property that is 'used' and property that is 'held by a company as owner, occupant, lessee, or otherwise,' ORS 308.510(1) (2001). See also ORS 308.505(3) (2001) ('owned, leased, used, operated or occupied'), ORS 308.515(1)(a) (2001) ('property used or held for its own future use'). Therefore, if 'absolute control' is not necessary to show a possessory interest under the municipal property statute, absolute control is certainly not required to demonstrate mere 'use' of a property under the central assessment statutes." 340 Or 216-7.

Although *Pacificorp* involved the central assessment statutes, the court relied on the dictionary definition of use to reach its conclusion. In the same way *Pacificorp* "used" the cogeneration facility there, the Affordable Housing Providers "used" the Property at issue here.

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596 (1977); *Rigas Maja v. Dept. of Rev.*, 12 OTR 471 (1993), and other cases cited in the Opening Brief.

Perhaps even more directly on point is *Y.M.C.A. v. Department of Revenue*, 268 Or 633, 522 P2d 464 (1974). In that case, the Y.M.C.A. leased it's a portion of its property to "house Selective Service draftees" and to the Job Corps "for office space and recreation." 268 Or at 633. The Tax Court concluded that taxation was appropriate because The Y.M.C.A. was "'engaged in competition with similar businesses which are subject to taxation.'" *Id.* at 635 (quoting Tax Court opinion). This court disagreed, holding as follows:

> "It is enough if the activity undertaken on the property substantially contributes to the furtherance of the charity's goals. If this test is met, it is immaterial that the charity competes with similar activities by those who are subject to taxation." *Id.* at 465 (footnote omitted).

Using that test, this court found that the portions used to house draftees was entitled to exemption because those services "fell within the general charitable goals of the Y.M.C.A. organization." Perhaps more importantly, the court found that the rental of a portion of its building to the Job Corps was entitled to exemption because "we regard the occupancy of the rented area as an integral part of a charitable enterprise." *Id.* at 639. The rental of safe, decent, sanitary, affordable housing to persons of low and moderate means is the explicit goal of the charitable enterprises in this case. The rental of such housing to people of low and moderate income is "an integral part" of the Affordable Housing Providers enterprise.

The Department also places significant weight on legislative history from the passage of a 1985 bill that provided for another alternative exemption. Answering Brief, pp 16 – 20. That 1985 legislative history plays little role in interpreting the language at issue here. The language at issue was adopted in 1955 and, as this court held in *Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997), later-enacted statutes are not context for what the legislature intended in an earlier-adopted statute. Although later enacted statutes can be useful some purposes, e.g.,

demonstrating consistency of word usage (*Halperin v. Pitts*, 352 Or 482, 490, 287 P3d 1069 (2012), that is not the case here. Instead, the Department suggests that the 1985 statute is the "last word" on what is covered by the earlier statute. This is the type of legislative history use this court disavowed in *Stull v. Hoke.*

Moreover, much of the legislative history is built on the testimony of Debbie Wood, a layperson and not a legislator. What makes this reliance even less appropriate is that the 1985 bill was in response to a specific case, *R.E.A.C.H. Community Development v. Dept of Revenue*, TC No. 2189 (February 25, 1986), in which the Tax Court found that ORS 307.130 did apply to low income housing, but disallowed the exemption for other reasons. The rationale in the *R.E.A.C.H.* case has not been followed by the Tax Court and the 1985 legislation should have no bearing on the resolution of this appeal.

By providing safe, decent, sanitary, affordable housing to persons of low and moderate means, the Affordable Housing Providers were engaged in charitable work. The Property was critical to the provision of that housing and, thus, is entitled to an exemption from property tax. The Tax Court erred by concluding otherwise and its opinion must be reversed.

DATED this 4th day of April, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 1,615 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING

I certify that on April 4, 2014, I filed the original and fifteen true copies of this **PLAINTIFFS-APPELLANTS' REPLY BRIEF** with the State Court Administrator, by depositing the same in the United States mail in Portland, Oregon, enclosed in a sealed envelope and addressed as follows:

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CERTIFICATE OF SERVICE

I certify that I served two true copies of this **PLAINTIFFS-APPELLANTS' REPLY BRIEF** on April 4, 2014, by depositing the same in the United States mail in Portland, Oregon, enclosed in a sealed envelope and addressed as follows:

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