

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2005-050401

02/12/2007

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

TUCSON BOTANICAL GARDENS INC

STEVEN L BOSSE

v.

PIMA COUNTY, et al.

TERRI A ROBERTS

MINUTE ENTRY

The Court has considered Plaintiff's Motion for Summary Judgment and the briefs, as well as the supplemental briefs submitted by the parties on the effect of the Court of Appeals decision in *Volunteer Center of Southern Arizona v. Staples*, 214 Ariz. 36 (App. 2006), on this case. Plaintiff Tucson Botanical Gardens is a 501(c)(3) nonprofit organization whose property is covered by the statutory exemption for botanical gardens found at A.R.S. § 42-11116. While the bulk of its property is devoted to horticulture, Plaintiff operates a gift shop and a hall which is sometimes rented out and/or used for the sale of artworks. It is not disputed that the proceeds from the gift shop and hall are used for the charitable purposes for which Plaintiff was created. Defendant Pima County, in assessing the property, denied exemption for the gift shop and hall, on the ground that such use fell outside the statutory language.

The Court finds that *Volunteer Center* controls this case. While that case arose under a different statute, the Court finds no material difference in the language of the two statutes. (The Court observes that Defendant, also the defendant in *Volunteer Center*, has petitioned the Supreme Court for review. However, unless and until the Supreme Court acts, that decision is good law.) In *Volunteer Center*, the plaintiff nonprofit organization leased a portion of its property to another nonprofit organization. The Court of Appeals rejected the argument that a lease at market rate was *per se* a use for profit, disqualifying that portion of the property from exemption: "the legislature unambiguously instructs us to determine whether property is 'used or held for profit' by referring to the official federal tax status of the organization owning and using

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the property -- not the nature of the specific financial transactions conducted on the property.” *Id.* at 38 ¶ 7. Significantly, the court both here and at footnote 3 relied on *Southern Methodist Hospital & Sanitorium of Tucson v. Wilson*, 31 Ariz. 424 (1938), as well as RESTATEMENT (THIRD) OF TRUSTS § 38, comment a(1), for the proposition that it is the organization’s use of the receipts, not the manner in which the receipts are obtained, that determines whether the use of the property is charitable. *Volunteer Center* holds the “physical use” test to have been superseded by enactment of the exemption statutes, *id.* at 39 ¶ 10, in which the legislature has created a bright-line rule anchoring the exemption in the “ultimate function” of the organization. *Id.* at 40 ¶ 12. While the County is surely correct that the owner must make a charitable use of the property, *Volunteer Center* holds that the charitable use can constitute making money which is channeled to the recognized charitable activity. The County may not look beyond the A.R.S. § 42-11154 letter of determination issued by the organization, at least as long as there has not been a sufficient transfer of the rights of ownership as to render the certification false.

There is no transfer of the rights of ownership of the real property involved in the operation of the gift shop. While there is technically a transfer of some rights involved in renting the hall, these are not so significant as to constitute a transfer of effective ownership to the renters. Renting out to generate charitable revenue unused space that would otherwise bear no fruit promotes the eleemosynary purpose which the legislature recognized as legitimate, and sacrifices no contrary public purpose.

Therefore, IT IS ORDERED Plaintiff’s Motion for Summary Judgment is granted.