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Attorneys for Evergreen Aviation and Space Museum and  
The Captain Michael King Smith Educational Institute

**UNITED STATES BANKRUPTCY COURT**

**FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

In re:  The Falls at McMinnville LLC,  Debtor.	Bankr. No. 18-25492  Chapter 11  Honorable Chief Judge R. Kimball Mosier
In re:  The Falls Event Center LLC,  Debtor.	Bankr. No. 18-25116  Chapter 11  Honorable Chief Judge R. Kimball Mosier

**DECLARATION OF ANDREW E. AUBERTINE**

I, Andrew E. Aubertine, declare as follows to the best of my information and belief:

1. I submit this declaration in this case, which pursuant to 28 U.S.C. § 1746, I declare is true and correct.

2. I serve as General Counsel for Evergreen Aviation & Space Museum and The Captain Michael King Smith Educational Institute (the "*Museum*"). I have been General

Counsel for the Museum since July of 2015. Prior to my service as General Counsel, I provided legal advice and services on a number of matters for the Museum dating back to April of 2013.

3. I address in this declaration the Museum's obligation and practice to file applications for non-profit property tax exemptions each year in order that the owners of the buildings and property which the Museum occupy are not taxed.

4. Under Oregon Law, if a non-profit, charitable, or religious organization tenant occupies property pursuant to a lease of at least one year in length and uses the property to advance the non-profit, charitable, and/or religious activities of the organization, the property is exempt from property taxes. ORS 307.112; ORS 307.130(2).

5. The Museum is a nonprofit corporation organized for literary, benevolent, charitable, educational and scientific purposes. The Museum has the right to claim a property tax exemption for the property it occupies or uses in conjunction with its non-profit purposes. ORS 307.130(2)(a).

6. The Museum currently occupies and uses three of the five buildings on the Museum Campus and the land adjacent to those buildings to advance its non-profit mission. The buildings are the Space Building owned by The Falls at McMinnville, LLC ("*TFM*") and the Aviation Building and Theater Building owned by Affordable Mid-Coast Housing. The Museum has long term leases on each of the three buildings.

7. The Museum occupies almost all of the Space Building, all of the Theater Building and Aviation Building, and the surrounding property at each of those buildings. TFM occupies a small portion of the Space Building that is used to hold special events in that space. The Museum subleases a portion of the Space Building to the McMinnville School District to allow the district to hold classes and other educational programs during the year.

8. The Museum uses each of these buildings and the surrounding property to advance its non-profit mission which includes inspiring and educating students and adults in the fields of science, technology, engineering, and math, promoting and preserving aviation and space history, and honoring the patriotic service of this country's veterans.

9. Under this arrangement, TFM, as owner of the Space Building and as a result of the current lease on the Space Building wherein the Museum is the occupant ("***Space Building Lease***"), realizes a significant tax savings estimated to be hundreds of thousands of dollars each year. For example, according to the Yamhill County Tax Assessor's property tax assessment for the year 2015-2016, the tax savings realized by the property owner was approximately \$465,000.<sup>1</sup> See, **Exhibit A** attached hereto and incorporated herein by this reference.

10. Also under Oregon law, all tax savings realized by the property owner must flow through and inure solely to the benefit of the non-profit tenant. ORS 307.112(3). In other words, a land owner cannot simultaneously charge a non-profit occupant a market rate for the property and enjoy the property tax savings through exemption. In this case, any tax savings realized by TFM due to an exemption, must pass through to the Museum. *Id.*

11. Under Oregon law, the occupant – in this case the Museum – is responsible for submitting an application for property tax exemption for the upcoming year. ORS 307.112(2). The filing deadline for submitting the property tax exemption application is April 1. ORS 307.112(4). Late filings are allowed, but the filing fee is the greater of \$200 or one-tenth of one percent of the real market value as of the most recent assessment date of the property to which the claim pertains. ORS 307.162 (2)(a)(A).

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<sup>1</sup> The Tax Assessor granted an exemption of 97.5% during that tax year. Based on my calculations, had the exemption not been granted, the assessed tax on the property would have been approximately \$465,000.



12. My understanding of the law is that the property tax exemption on the Space Building will continue to apply if: (1) the Museum files an application for exemption by April 1; (2) the Space Building Lease remains intact; and (3) the Museum continues to use the premises in accordance with its mission.

13. Pursuant to Section 6.4.3 of the Space Building Lease, TFM is required to pay any property taxes assessed on the building or property due to the for-profit events that TFM or TFEC holds on the property or due to TFM's fault or actions that result in an assessment. (See Space Building Lease §6.4.3, attached to the Haker Declaration as Exhibit 14).

14. The April 1 deadline for filing an exemption is important to avoid property tax assessment on the Space Building and/or to avoid a significant late filing fee of one-tenth of one percent of the real market value of the Space Building and adjacent property that the Museum uses. ORS 307.162 (2)(a)(A).

15. Based on my experience, I see up to three issues that the County Tax Assessor may consider in reviewing a property tax exemption application relating to the Space Building and adjacent property. Each of these issues has been brought to the forefront by this bankruptcy.

16. The first issue relates to whether the tax exemption realized on the Space Building inures to the benefit of the Museum. The rent-free term in the current Space Building Lease is evidence that, as of now, the exemption flows through to the benefit of the Museum.

17. The State of Oregon has changed its tax exemption application form to specifically require the following language in the lease itself:

"The lease document must state that any tax savings resulting from the exemption shall inure solely to the benefit of the lessee, or the lessee and lessor must complete the Tax Savings Agreement on page 2."

18. I attach a true copy of the new application as Exhibit B to this Declaration, which includes the Tax Savings Agreement on page 2 of that exhibit.

19. The language in Exhibit B tracks the statutory language on this point. ORS 307.112 (3) states:

“If the assessor is not satisfied that the tax saving resulting from the exemption granted under this section will inure solely to the benefit of the institution, organization or public body, before the exemption may be granted the lessor must provide documentary proof, as specified by the Department of Revenue, that the tax saving resulting from the exemption will inure solely to the benefit of the institution, organization or public body.”

20. The Space Building lease contains language similar to what is in the statute, but the exact language seemingly required by the State of Oregon is not contained in the Space Building Lease. I read Exhibit B to mean that if that exact language is not contained in the lease, then TFM and the Museum must sign the Tax Savings Agreement, confirming that the tax exemption benefit flows through to the Museum. Therefore, and shortly after the upcoming March 18 hearing on motions filed by the Museum and the Trustee, I plan to send the above-mentioned property tax application to the Trustee’s counsel to determine whether the Trustee will sign the form so that the Museum can file the completed application on or before April 1.

21. If the Trustee decides to not complete its portion of the form, that might be viewed by the County Tax Assessor as an incomplete application or at least give rise to the question of the Trustee’s position on this point.

22. The second issue is whether the County’s view on whether the exemption is available will be influenced by the fact that the Trustee has not yet determined whether to assume the Space Building Lease. The County may determine that the statutory requirements that must be satisfied to obtain the tax exemption are not met, given the possibility of a lease

rejection followed by a sale of the building, and the removal of the Museum from the building as tenant after the sale.

23. The third issue is whether there has been a change of use of the Space Building or whether there will be an anticipated change of use in 2019. The sale of the building to a different entity that would not use the building for non-profit activities, depending on the timing of the sale, may result in a denial of the exemption for the particular tax year at issue.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: March 12, 2019



Andrew E. Aubertine, General Counsel  
Evergreen Aviation & Space Museum and the  
Captain Michael King Smith Educational Institute

### CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2019, I filed a true and correct copy of the foregoing **Declaration of Andrew E. Aubertine** with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF Users.

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- United States Trustee USTPRegion19.SK.ECF@usdoj.gov
- Brent D. Wride bwride@rqn.com, docket@rqn.com; pbrown@rqn.com

DATED: March 12, 2019

/s/ Kevin P. McKenzie  
Kevin P. McKenzie, Practice Assistant



## A - Real Property Tax Statement Page 1 of 1

07/01/2015 TO 06/30/2016 REAL PROPERTY TAX STATEMENT

PROPERTY DESCRIPTION YAMHILL COUNTY, OREGON ACCOUNT NO: 169070  
 510 NE CAPT MICHAEL KING 535 NE FIFTH STREET  
 MCMINNVILLE MCMINNVILLE, OR 97128  
 (503) 434-7521  
 (HRS: 9:00AM-5:00PM M-F)

**LAST YEAR'S TAX** \$11,257.51  
**See back for explanation of taxes marked with (+)**

PIN #: R4423 00600  
 CODE: SPLIT PCA: 2541

CHEMEKETA COMM COLL 438.46  
 MCMINNVILLE SD 40 2,906.42  
 WILLAMETTE REGIONAL ESD 207.84

EDUCATION TOTAL: 3,552.72

PMB 502  
 MCMINNVILLE OR 97128

MCMINNVILLE UR PL1 35.06  
 CHEMEKETA LIBRARY 57.30  
 MCMINNVILLE 3,423.35  
 YAM CO SOIL & WATER 24.81  
 YAMHILL CO EXT SERV 31.50  
 YAMHILL COUNTY 1,805.43  
 MCMINNVILLE RFPD 17.71

**VALUES: LAST YEAR THIS YEAR**

REAL MARKET-RMV

LAND: 26,553,331 26,730,444  
 STRUCTURES: 37,800,000 38,556,000  
 TOTAL RMV: 64,353,331 65,286,444  
 ASSESSED: 27,351,675 28,172,004  
 EXEMPTION: 26,668,906 27,468,972

GENERAL GOVT TOTAL: 5,395.16

CHEMEKETA COMM COLL ADD'L 206.06  
 MCMINNVILLE ADD'L 796.59  
 MCMINNVILLE SD 40 546.87  
 MCMINNVILLE SD 40 ADD'L 1,364.86

**NET TAXABLE:** 682,769 703,032

BONDS - OTHER TOTAL: 2,914.38

TOTAL 2015-16 TAXES: 11,862.26

POTENTIAL ADDITIONAL TAX LIABILITY  
 60.00 ACRES IN SEC 23 T4S R4W  
 ASSOCIATED PERSONAL PROPERTY ACCOUNT P  
 15050

---> PAY TAXES ONLINE AT  
 WWW.CO.YAMHILL.OR.US/ASSESSOR

**If a mortgage company pays your taxes,  
 This statement is for your records only.**

-> NO STATEMENT SENT FOR FEBRUARY  
 AND/OR MAY INSTALLMENT

Full Payment with 3% Discount \$11,506.40  
 2/3 Payment with 2% Discount \$7,750.01  
 1/3 Payment No Discount \$3,954.09

**TOTAL TAX: (After Discount)** \$11,506.40

---> Tear Here

**PLEASE RETURN THIS PORTION WITH YOUR PAYMENT**

Tear Here <---

2015-16 PROPERTY TAXES R4423 00600 ACCOUNT NO: 169070

**Full Payment Enclosed .....Due:** 11/16/2015 \$11,506.40  
**or 2/3 Payment Enclosed .....Due:** 11/16/2015 \$7,750.01  
**or 1/3 Payment Enclosed .....Due:** 11/16/2015 \$3,954.09

**DISCOUNT IS LOST & INTEREST APPLIES AFTER DUE DATE**

☐ Mailing address  
 change on back

Enter Payment Amount

\$

MAKE PAYMENT TO:

YAMHILL COUNTY TAX COLLECTOR  
 535 N.E. 5TH  
 MCMINNVILLE, OR 97128

PMB 502  
 MCMINNVILLE OR 97128

36 00169070 0001150640 0000775001 0000395409 5



## Application for Real and Personal Property Tax Exemption

For lease, sublease, or lease-purchased property owned by a taxable owner and leased to an exempt public body, institution, or organization, other than the state of Oregon or the U.S. Government, ORS 307.112.

- The lessee, sublessee, or lease-purchaser of the property must file this form with the **county assessor** on or before April 1 for the ensuing tax year. See page 3 of this form for late filing information.
- The applicant is obligated to prove the property meets the requirements for exemption. Include all documents or information that show the exemption is appropriate.
- See ORS 307.112 on page 3 of this form.
- This form is available online on the Department of Revenue's website at: [www.oregon.gov/dor/forms](http://www.oregon.gov/dor/forms).

Name of organization			<b>For assessor's use only</b>	
Mailing address		Phone (      )	Date received	Account number
City	State	ZIP code	<input type="checkbox"/> Approved <input type="checkbox"/> Denied By _____	Late filing fee \$
Email			Exemption applies to tax year 20 ____ - ____	Lease expiration date

I am claiming a property tax exemption under the following Oregon Revised Statute (mark **one** box):

- |   |   |
|---|---|
| <input type="checkbox"/> 307.090 Public body (other than state of Oregon or the U.S. government)                        | <input type="checkbox"/> 307.140 Religious organizations*                         |
| <input type="checkbox"/> 307.130 Literary, benevolent, charitable, scientific institutions, volunteer fire departments* | <input type="checkbox"/> 307.145 Child care facilities, schools, student housing* |
| <input type="checkbox"/> 307.136 Fraternal organizations*   | <input type="checkbox"/> 307.147 Senior services centers*                         |
|   | <input type="checkbox"/> 307.580 Industry apprenticeship or training trust*       |
|   | <input type="checkbox"/> Other (provide ORS number) _____                         |

**\*You must attach current copies of your organization's Articles of Incorporation, By-Laws, and proof of your status as a non-profit corporation.**

### Property description

Account number (as shown on owner's property tax statement)	Name of property owner
Physical address (street address, city)	

**You must attach a list of all real and personal property you are claiming for exemption. Include detailed and complete descriptions of all property claimed and costs.**

### Property use

To qualify for this exemption, the lessee, sublessee, or entity in possession of the property must be using the property for their exempt purposes. Property not used for qualified purposes before July 1 is taxable.

Describe the purpose of this organization:

Describe how you will use the property, such as, church services, offices, classrooms, student housing, etc.:

Does the property include a parking area? <input type="checkbox"/> Yes <input type="checkbox"/> No	What is the fee for using the parking area? \$
Is any portion of the property you lease used by others? <input type="checkbox"/> Yes <input type="checkbox"/> No	If yes, what is the square footage of the area used by others: _____ square feet
If yes, explain and identify the area that is used by others:	

### Lease or sublease

Your lease or sublease must be for a period of at least one year. A month-to-month tenancy or general rental agreement won't qualify for this exemption. The lease document must state that any tax savings resulting from the exemption shall inure solely to the benefit of the lessee, or the lessee and lessor must complete the Tax Savings Agreement on page 2. A new application must be filed by the due date if a new lease, sublease, or lease-purchase agreement or extension or modification to the existing lease, sublease, or lease-purchase agreement is made.

Is property under: ☐ Lease ☐ Sublease ☐ Lease-purchase      Type of lease: ☐ Modified gross ☐ Net ☐ Triple-net  
Beginning date: \_\_\_\_\_ Expiration date: \_\_\_\_\_ Square footage of area leased, subleased, or lease-purchased: \_\_\_\_\_

**You must attach a current signed copy of your lease, sublease, or lease-purchase agreement.**

### Late fee

If this form is filed after April 1, a late filing fee must accompany the form. See page 3 of this form for late filing information.

A late fee is attached: ☐ Yes ☐ No

Exemption requested for tax years:

### Declaration

I declare under the penalties for false swearing [ORS 305.990(4)] that I have examined this document (and attachments) and to the best of my knowledge they are true, correct, and complete.

**Must be signed by the president, proper officer, head official, or authorized delegate of the organization.**

Name (print or type)	Title	Phone (      )	Signature X	Date / /
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This form may be used as documentary proof under ORS 307.112(3) that the tax savings resulting from an exemption under ORS 307.112 will inure solely to the benefit of the institution, organization or public body that has been granted the exemption.

Name of lessee

Name of lessor

Property address

The lessor acknowledges that the lessee is applying for exemption on the property described above under provisions of ORS 307.112. If the property tax exemption is granted, the lessee and lessor of property described above agree that any savings resulting from the tax exemption shall solely benefit the lessee.

The tax savings will be passed on to the lessee by (describe the manner in which the lessee will receive the benefit of the tax savings):

Signature of lessee

Signature of lessor

Date

/ /

Date

/ /

ORS 307.112. (1) Real or personal property of a taxable owner held under lease, sublease or lease purchase agreement by an institution, organization or public body, other than the State of Oregon, or a public university listed in ORS 352.002, granted exemption or the right to claim exemption for any of its property under ORS 307.090, 307.130, 307.136, 307.140, 307.145, 307.147 or 307.181 (3), is exempt from taxation if:

(a) The property is used by the lessee or, if the lessee is not in possession of the property, by the entity in possession of the property, in the manner, if any, required by law for the exemption of property owned, leased, subleased or being purchased by it; and

(b) It is expressly agreed under the terms of the lease, sublease or lease-purchase agreement that any tax savings resulting from the exemption granted under this section shall inure solely to the benefit of the institution, organization or public body.

(2) To obtain the exemption under this section, the lessee or, if the lessee is not in possession of the property, the entity in possession of the property, must file a claim for exemption with the county assessor, verified by the oath or affirmation of the president or other proper officer of the institution or organization, or head official of the public body or legally authorized delegate, showing:

(a) A complete description of the property for which exemption is claimed.

(b) If applicable, all facts relating to the use of the property by the lessee or, if the lessee is not in possession of the property, by the entity in possession of the property.

(c) A true copy of the lease, sublease or lease-purchase agreement covering the property for which exemption is claimed.

(d) Any other information required by the claim form.

(3) If the assessor is not satisfied that the tax savings resulting from the exemption granted under this section will inure solely to the benefit of the institution, organization or public body, before the exemption may be granted the lessor must provide documentary proof, as specified by rule of the Department of Revenue, that resulting from the exemption will inure solely to the benefit of the institution, organization or public body.

(4)(a) The claim must be filed on or before April 1 preceding the tax year for which the exemption is claimed, except:

(A) If the lease, sublease or lease-purchase agreement is entered into after March 1 but not later than June 30, the claim must be filed within 30 days after the date the lease, sublease or lease-purchase agreement is entered into if exemption is claimed for that year; or

(B) If a late filing fee is paid in the manner provided in ORS 307.162 (2), the claim may be filed within the time specified in ORS 307.162 (2).

(b) The exemption first applies for the tax year beginning July 1 of the year for which the claim is filed.

(5)(a) An exemption granted under this section continues as long as the use of the property remains unchanged and during the period of the lease, sublease or lease purchase agreement.

(b) If the use changes, a new claim must be filed as provided in this section.

(c) If the use changes due to sublease of the property or any portion of the property from the tax exempt entity described in subsection (1) of this section to another tax exempt entity, the entity in possession of the property must file a new claim for exemption as provided in this section.

(d) If the lease, sublease or lease-purchase agreement expires before July 1 of any year, the exemption terminates as of January 1 of the same calendar year.

#### **OAR 150-307-0060**

##### **Property Held Under Lease**

(1) A new claim must be filed with the county assessor, as required under ORS 307.112(4), when a new lease, new lease-purchase agreement, extension of current lease, extension of current lease-purchase agreement or any modification to the existing lease or lease-purchase agreement is made.

(2) The new claim must meet all the requirements of ORS 307.112.

(3) Late filing as provided in ORS 307.162(2) is permitted.

(4) The State of Oregon and the United States government are not permitted to file a claim for exemption under ORS 307.112.

(5) When used in reference to real property or tangible personal property, a lease is a contract of at least one year by which the owner of a property grants the rights of possession, **use, and** enjoyment of the property to another for a specified period of time in exchange for payment.

(6) Month-to-month tenancy or a general rental agreement is not considered the same as a lease for purposes of an exemption under this statute and will not qualify in an exemption claim.

(7) The assessor must be satisfied that the tax savings resulting from the exemption will inure solely to the benefit of the lessee.

(8) Sufficient documentary proof must be submitted at the time of application. Documentary proof to show the property tax savings is passed on to the lessee includes:

(a) A form prescribed by the department stating that the lessee and lessor agree that the tax savings resulting from the exemption will inure solely to the benefit of the lessee;

(A) The form must be signed by the lessor and lessee; and

(B) The form must specify how the tax savings inures to the lessee.

(b) Other documentation the county assessor deems necessary to prove that the lessee is receiving the full benefit of the tax savings; or

(c) An agreement under the terms of the lease that any tax savings resulting from the exemption will inure solely to the benefit of the lessee.

(9) Insufficient proof or failure to show the tax savings inures to the lessee as described above is grounds for denial of the exemption.

##### **Late filing information:**

ORS 307.162 provides for late filing as follows:

1. If you are filing before December 31 for the current tax year, the late filing fee is \$200.00 or one-tenth of one percent of the real market value of the property, whichever is greater.
2. If you are filing before April 1 of the current tax year, for the current tax year only, and you are a first-time filer, have good and sufficient cause for filing late, or are a government entity described in ORS 307.090, the late filing fee is \$200.00.
3. If you are filing for the current tax year and up to five prior tax years and you are a first-time filer, have good and sufficient cause for filing late, or are a government entity described in ORS 307.090, **and** are either filing within 60 days of the mailing date of a notice of additional tax or are filing at any time if no notice was mailed, then the late filing fee is the greater of \$200.00 or one-tenth of one percent of the real market value as of the most recent assessment date, multiplied by the number of prior years claimed.