

REPRESENTATIVE FOR PETITIONER:
James W. Beatty, Landman & Beatty
Jessica L. Findley, Landman & Beatty

REPRESENTATIVES FOR RESPONDENT:
Mark A. Thiros, Cohen & Thiros

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Georgetown Homes, Inc.	)	Petition No:	45-023-05-2-8-00001
)		
Petitioner	)	Parcel:	007-26-37-0038-0035
	)		and Personal Property
v.)		
	)	County:	Lake
Lake County Property Tax	)	Township:	North
Assessment Board of Appeals)		
)		
Respondent.	)	Assessment Year:	2005
)		

Appeal from the Final Determination of
Lake County Property Tax Assessment Board of Appeals

January 15, 2008

ORDER ON SUMMARY JUDGMENT

The Indiana Board of Tax Review (the Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUE

1. The issue presented for consideration by the Board is whether the subject property is entitled to a charitable purpose tax exemption for the March 1, 2005, assessment date.

PROCEDURAL HISTORY

2. Mr. James Beatty, Landman & Beatty, on behalf of Georgetown Homes, Inc. (Georgetown Homes) filed an Application for Property Tax Exemption (Form 136) for the 2005 assessment year on April 26, 2005. The Lake County Property Tax Assessment Board of Appeals (PTABOA) issued its determination (Form 120) denying the exemption and finding the subject property to be 100% taxable on June 1, 2007.
3. Pursuant to Ind. Code § 6-1.1-11-7, Georgetown Homes timely filed a Form 132 petition to the Indiana Board of Tax Review for Review of Exemption, on June 4, 2007, petitioning the Board to conduct an administrative review of the above petition.

HEARING FACTS AND OTHER MATTERS OF RECORD

4. On June 20, 2007, counsel for the Petitioner filed a “Motion for Summary Judgment,” “Petitioner’s Memorandum in Support of Summary Judgment,” and a “Designation of Evidence.”
5. On August 9, 2007, the duly designated Administrative Law Judge (the ALJ), Carol Comer, held a telephonic preliminary conference to address procedures and establish a schedule for submission of all material relating to the Petitioner’s motion filed on June 20, 2007.
6. After requesting and being granted an extension of time to respond, Mark A. Thiros, on behalf of the Lake County PTABOA, filed “Respondent’s Memorandum of Law in

Opposition to Petitioner’s Motion for Summary Judgment” on August 29, 2007. On September 13, 2007, the Petitioner submitted it’s “Petitioner’s Reply Memorandum” and a “Supplemental Designation of Evidence” with an attached Affidavit by Alicia Osborne. The parties chose not to present oral argument on the motion.

7. The Petitioner presented the following exhibits:

- Petitioner Exhibit 1 – Application for Property Tax Exemption, Form 136, filed April 26, 2005,
- Petitioner Exhibit 1-A – Articles of Incorporation of Georgetown Homes, Inc., dated March 28, 1968,
- Petitioner Exhibit 1-B – By-laws of Georgetown Homes, Inc.,
- Petitioner Exhibit 1-C – Regulatory Agreement between Georgetown Homes, Inc. and the National Housing Act, dated March, 1969,
- Petitioner Exhibit 1-D – Georgetown Homes’ Annual Financial Statement and Balance Sheets for December 31, 2004,
- Petitioner Exhibit 1-E – Georgetown Homes’ Statements of Profit and Loss for December 31, 2002, 2003 and 2004,
- Petitioner Exhibit 1-F – Property record card for Parcel No. 007-26-37-0038-0035,
- Petitioner Exhibit 1-G – Georgetown Homes’ Occupancy Agreement,
- Petitioner Exhibit 2 – Notice of Action on Exemption Application, Form 120, dated June 1, 2007,
- Petitioner Exhibit 3 – Petition to the Indiana Board of Tax Review for Review of Exemption, Form 132, dated June 4, 2007,
- Petitioner Exhibit 4 – Letter from James Beatty to Paul Karras, Lake County Assessor, dated April 26, 2005,
- Petitioner Exhibit 5 – Letter from James Beatty to Sharon Fleming, Lake County Assessor’s office, dated May 25, 2005; Petitioner’s brief; a copy of *Piedmont-Nantucket Cove, LLC v. Marion County Property Tax Assessment Board of Appeals*, Petition No. 49-500-00-2-8-00007 (odd pages only); *Willowbrook Affordable Housing Corporation v. Marion County Property Tax Assessment Board of Appeals*, Petition No. 49-800-97-2-8-00083 (odd pages only); Georgetown Homes’ U.S. Corporation Income Tax Return, Form 1120, for 2002, 2003 and 2004; Georgetown Homes’ Depreciation and Amortization, Form 4562, for 2002, 2003 and 2004,

- Georgetown Homes' Indiana Corporation Income Tax Return, Form IT-20, for 2002; Georgetown Homes' Indiana Corporation Estimated Income Tax Voucher Extension Payment, Form IT-6 (1030); and Georgetown Homes' Application for Automatic Extension of Time to File Corporation Income Tax Return, Form 7004, dated March 13, 2003,
- Petitioner Exhibit 6 – Letter from James Beatty to Sharon Fleming, Lake County Assessor's office, dated January 3, 2007, and State of Indiana Office of the Secretary of State Certificate of Existence, dated December 29, 2006,
- Petitioner Exhibit 7 – Letter from James Beatty to Paul Karras, Lake County Assessor, dated March 16, 2007; Regulatory Agreement between Georgetown Homes and the National Housing Act, dated March 25, 1969; State of Indiana, Department of State, Certificate of Incorporation, dated March 28, 1968; and Articles of Incorporation, dated March 28, 1968.

7. The Respondent presented the following exhibits:

Respondent Exhibit 1 – Affidavit of Sharon Fleming dated August 29, 2007.

8. The following additional items are officially recognized as part of the record of the proceedings and labeled Board Exhibits:

Board Exhibit A – Form 132 petition with attachments.

9. The subject property is a multi-family apartment complex located at 6939 New Hampshire Avenue, in the City of Hammond, North Township, in Lake County, Indiana. The property consists of sixteen buildings with 108 rental units located on 8.114 acres.

10. The ALJ did not conduct an on-site visit of the property.

11. For 2005, the Lake County PTABOA denied the Petitioner's request for an exemption and determined the land, improvements and personal property to be 100% taxable.

12. For 2005, the Petitioner is requesting the land, improvements and personal property be 100% tax exempt.

JURISDICTIONAL FRAMEWORK

13. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions; and (3) property tax exemptions; that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana Board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Ind. Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

SUMMARY JUDGMENT STANDARD

14. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Board of Appeals*, 782 N.E.2d 483, 487 (Ind. Tax Ct. 2002). The party seeking summary judgment bears the burden of demonstrating through designated evidence that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Coffman v. PSI Energy, Inc.* 815 N.E.2d 522, 526 (Ind. Ct. App. 2004). If the movant satisfies its burden, the non-movant cannot rest upon its pleadings, but instead must designate sufficient evidence to show the existence of a genuine issue for trial. *Id.* The Board must construe all evidence in favor of the non-moving party, and all doubts as to the existence of a material issue of fact must be resolved against the moving party. *See Tibbs v. Grunau Co. Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).

PARTIES' CONTENTIONS

15. The Petitioner contends that it is eligible for a tax exemption pursuant to Ind. Code § 6-1.1-10-16, because its predominant use and charitable purpose is to provide affordable

housing to individuals and families with ninety-five percent or less of the area median income. *Petitioner's Memorandum in Support of Summary Judgment (Memorandum) at 2, 7, 8 and 11.* The Petitioner further contends that by providing affordable housing to persons with 95% or less of the median area income it relieves the federal government of that burden. *Id.*

16. The Petitioner presented the following evidence in regard to this issue:
 - a. The Petitioner contends that it is an Indiana non-profit corporation that provides housing on a mutual ownership basis pursuant to Section 221(d)(3) of Title II of the National Housing Act. *Memorandum at 1.* In support of this contention, the Petitioner submitted its Articles of Incorporation and By-Laws. *Petitioner's Exhibits 1-A and 1-B.* According to the Petitioner's Articles of Incorporation, the Petitioner's purpose is to "(a) provide housing on a mutual ownership basis, in the manner and for the purposes provided in Section 221(d)(3) of Title II of the National Housing Act, as amended; (b) to construct, operate, maintain and improve, and to buy, own, sell, convey, assign, mortgage or lease any real estate and any personal property necessary or incidental to the provisions of such housing; ... (d) to apply for and obtain or cause to be obtained from the Federal Housing Commissioner ... a contract or contracts of mortgage insurance pursuant to the provisions of the above-cited Section of the National Housing Act, as amended; (e) to operate for benevolent, fraternal and social purposes." *Petitioner Exhibit 1-A.*
 - b. The Petitioner argues that it entered into a Regulatory Agreement with the Federal Housing Administration Section of the Housing and Urban Development Department (HUD) in order for it "to receive benefits under Section 221(d)(3) and to pass those benefits to its tenants in the form of below-market rents." *Memorandum at 9; Petitioner Exhibits 1-C.* Pursuant to the Section 221(d)(3) program, tenancy at the subject property is limited to those persons with incomes

at or below 95% of the area median income as defined by HUD. *Memorandum at 11.*¹ According, to the Petitioner, “Georgetown may not admit income-ineligible applicants without first getting written HUD approval.” *Id.*

- c. The Petitioner further contends that it provides housing to low income persons. *Memorandum at 14.* The Petitioner argues that “Families living in Section 221(d)(3) BMIR² projects are considered subsidized because the reduced rents for these properties are made possible by subsidized mortgage interest rate.” *Memorandum at 12.* The rent charged is based on the amount needed to operate the project with payments of principal and interest due under a mortgage bearing interest at the rate of three percent. *Petitioner Exhibits 1-C at ¶4 & 1-G.*
- d. The Petitioner argues that, by Georgetown Homes providing housing to moderate and low-income families, the government’s financial burden has been lessened. *Memorandum at 8.* According to the Petitioner, if the government did not offer the Section 221(d)(3) program, it would have to provide housing to low-income persons in some other way. *See Johnson v. U.S. Department of Housing and Urban Development.* 911 F.2d 1302, 1304 (C.A. MO. 1990). *Id.*
- e. The Petitioner argues the Indiana Tax Court established a two-prong test for determining whether a charitable purpose exists. *Memorandum at 7.* According to the Petitioner, “a charitable purpose will generally be found to exist if: 1) there is ‘evidence of relief of human want ... manifested by obviously charitable acts different from the everyday purposes and activities of man in general’; and 2) there is an expectation of a benefit that will inure to the public by the accomplishment of such acts.” *Memorandum at 7* (quoting *Knox County*

¹ The Petitioner’s Regulatory Agreement, states, “if during the term of any occupancy agreement, lease, or rental agreement, the total current family income exceeds a maximum for occupancy ... it will at its option either (a) cause the over-income family to vacate in favor of a family whose income does not exceed the prevailing established maximum; or (b) collect additional monthly carrying charges from the over-income family commensurate with the increased family income.” *Petitioner Exhibit 1-C, ¶14.*

² BMIR is “Below Market Interest Rate.”

PTABOA v. Grandview Care, Inc., 826 N.E.2d 177, 182 (Ind. Tax Ct. 2005)).

The Petitioner argues the subject property fulfills both prongs of the charitable purpose test. *Id.* According to the Petitioner, the Tax Court, in *College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905 (Ind. Tax Ct. 2006), held “if [the taxpayer’s] redevelopment efforts were aimed at *providing housing for low-income families and individuals*, such efforts would provide relief of human want.” *Memorandum at 7 and 8.* Thus, the Petitioner concludes, because it provides low income housing, it relieves the human want of having a safe and affordable place to live for low income persons. *Id.*

- f. The Petitioner contends the Board has also ruled that providing affordable housing for low income persons is a “charitable purpose.” *Memorandum at 8.* The Petitioner cites to several Board decisions in support of this contention, including *Willowbrook Affordable Housing Corp. v. Marion County PTABOA*, Petition No. 49-800-97-2-8-00083; *Piedmont-Nantucket Cove, LLC and MMA, LLC v. Marion County PTABOA*, Petition No. 49-500-00-2-8-00007; *Hoosier Uplands Economic Development v. Lawrence County PTABOA*, Petition No. 47-012-02-2-8-00002; *Lafayette Neighborhood Housing Services, Inc. v. Tippecanoe County PTABOA*, Petition No. 79-001-95-2-8-00007 and *Greenwood Apartments Incorporated v. Wayne County Property Tax Assessment Board of Appeals*, Petition No. 89-014-02-2-8-00006. *Id.* According to the Petitioner, “[i]n the majority of cases decided by the Indiana Board of Tax Review, the issue was not whether providing low-income housing was a charitable purpose, but rather the issues dealt with what percentage of the property should be exempt and whether the property was predominantly used for a charitable purpose.” *Id. at 8, 13 and 14.*
- g. The Petitioner contends the Respondent’s arguments that the Petitioner has failed to show that the only use of the property is to provide housing for low-income individuals or that the tenants occupying the property are predominantly low-

income persons is mistaken. *Reply at 3*. According to the Petitioner, it has shown with its Articles of Incorporation, Bylaws and Regulatory Agreement with HUD that the “management, operation and control of the affairs of the Corporation shall be subject to the rights, powers and privileges of the Federal Housing Administration.” *Reply at 4 and 6*. In addition, the Regulatory Agreement limits tenancy at the subject property to low and moderate income families. *Id at 6*.

- h. Finally, the Petitioner contends the Affidavit of Sharon Fleming stating that Georgetown Homes “did not provide actual proof of its alleged predominant use of its subject property to the Lake County Property Tax Assessment Board of Appeals” is nothing more than an unsupported statement. *Reply at 9*. According to the Petitioner, “Affidavits that set forth conclusory facts or conclusions of law cannot be used to oppose a motion for summary judgment.” *See Coghill v. Badger*, 430 N.E.2 405, 406 (Ind. Ct. App. 1982). *Id.* Moreover, the Petitioner argues, “the non-movant must do more than simply sit on his pleading; he must come forward with *sufficient* evidence demonstrating the existence of genuine factual issue which should be resolved at trial.” *See Otto v. Park Garden Associates*, 612 N.E.2d 135, 138 (Ind. Ct. App. 1993). *Reply at 9 and 10*. According to the Petitioner, the Respondent failed to set forth specific genuine issues of material fact. *Id. at 10*. Instead, it has merely made broad, generalized, conclusory statements in its opposition to the Petitioner’s Motion for Summary Judgment. *Id.*
17. The Respondent contends the Petitioner is not eligible for a tax exemption because it has not shown that the subject property is used primarily for a “charitable purpose.” *Respondent’s Memorandum of Law in Opposition to Petitioner’s Motion for Summary Judgment (Respondent’s Memorandum)*.
18. The Respondent presented the following evidence in regard to the issue:

- a. The Respondent argues that statutory exemptions are strictly construed against a taxpayer. *Respondent's Memorandum at 2*. According to the Respondent, the Petitioner has the burden to show "that a benefit will inure to the general public sufficient to justify the loss of tax revenue." *Id.* The Respondent contends the Petitioner failed to submit probative evidence that its "predominant and only use of the property is to provide housing for low-income individuals." *Respondent's Memorandum at 3*.
- b. The Respondent also argues that the Petitioner did not submit lease agreements to show that the tenants occupying the subject property are predominantly low income persons. *Respondent's Memorandum at 3*. According to the Respondent, the majority of the Petitioner's evidence relates to its ownership of the subject property. *Id.* Therefore, the Respondent contends that, at minimum, there is a factual dispute as to whether the Petitioner has met its burden to show the subject property is used for a charitable purpose. *Id.*

OBJECTION

19. The Petitioner's counsel objected to the "Respondent's Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment." *Petitioner's Objection to Respondent's Extension of Time to Respond to Petitioner's Motion for Summary Judgment; Beatty argument*. The Petitioner contends that the Respondent's Memorandum was not filed until August 29, 2007, which is more than thirty days after Georgetown Homes' Motion for Summary Judgment was filed on June 20, 2007. *Reply at 2*. Therefore, the Petitioner contends, the Respondent's Memorandum was not filed within the applicable time limit as set forth in Indiana Trial Rule 56. *Reply at 1 and 2*, citing *Morton v. Moss*, 694 N.E.2d 1148, 1151 (Ind. Ct. App. 1998) ("A party may not wait until the summary judgment hearing to oppose the motion.").

20. Pursuant to the Board's rules, "any response to a motion must be filed within ten (10) days after the date of service unless otherwise specified by the board or the administrative law judge." 52 IAC 2-8-5. During the preliminary conference, the Respondent requested and was granted until August 30, 2007, to respond to the Petitioner's motion for summary judgment. The Respondent filed its Respondent's Memorandum prior to this deadline. The Board, therefore, finds the Respondent filed its response timely under the schedule established by the Administrative Law Judge during the prehearing conference in this matter. Thus, the Petitioner's objection is, therefore, over-ruled.

ANALYSIS

21. Ind. Code § 6-1.1-10-16(a) states that "all or part of a building is exempt from property taxation if it is owned, occupied, and used by a person for educational, literary, scientific, religious, or charitable purposes." The Petitioner contends the subject property is multi-family apartment complex whose units are leased to low income families pursuant to an agreement with HUD. Thus, the Petitioner contends, the subject property is operated for a charitable purpose and, therefore, should be exempt from property taxation.
22. The Petitioner contends it is a non-profit organization that operates the property pursuant to the mortgage subsidy program promulgated at § 221(d)(3) of Title II of the National Housing Act. Section 221(d)(3) is an incentive program designed to provide subsidies to encourage investment in affordable housing. For sponsors of affordable housing under Section 221(d)(3), HUD provides monthly payments sufficient to lower the effective interest rate on project mortgages to three percent (3%). *Petitioner Exhibit I-G*.
23. The question, therefore, is whether the Petitioner's provision of "affordable housing" to "low and moderate income individuals and families" is a "charitable purpose" as the legislature intended to use that phrase in Ind. Code § 6-1.1-10-16 (a). The Petitioner argues the Board has already decided that low income housing is a "charitable purpose" and cites to several older determinations in support of its contention. *See e.g. Lafayette*

Neighborhood Housing Services, Inc. v. Tippecanoe County Property Tax Assessment Board of Appeals, Petition No. 79-001-95-2-8-00007 (1995 tax year); *Willowbrook Affordable Housing Corporation v. Marion County Property Tax Assessment Board of Appeals*, Petition No. 49-800-97-2-8-00083 (1997 tax year); *Piedmont-Nantucket Cove, LLC v. Marion County Property Tax Assessment Board of Appeals*, Petition No. 49-500-00-2-8-00007 *et al.* (2000 tax year).

24. The Board’s more recent rulings, however, have found low income housing not to be an exempt purpose. *See East Central Reinvestment Corporation v. Delaware County Property Tax Assessment Board of Appeals*, Petition No. 18-003-04-2-8-10007 *et al.* (2004 tax year) (“If there is a public benefit based on this low-income housing, Petitioner failed to prove it with substantial, probative evidence. The conclusory testimony about ‘below market rents’ and the other positive aspects about how Petitioner’s operations improve the quality of life in the neighborhood are not probative evidence.”) ¶ 34; *Grandview Care, Inc. v. Perry County Property Tax Board of Appeals*, Petition No. 62-008-03-2-8-00003 (2003 tax year) (“Petitioner failed to establish that providing housing for low income or disabled tenants necessarily constitutes a charitable use.”) ¶¶ 35, 36. Further, while the Tax Court has granted economic obsolescence to low income housing projects in various cases,³ the parties have pointed to no Indiana cases addressing an exemption application for a moderate or low income housing project.

Charitable Use

25. Exemption statutes are strictly construed against the taxpayer. The taxpayer bears the burden of proving that it is entitled to the exemption it seeks. *See New Castle Lodge #147, Loyal Order of Moose, Inc. v. State Board of Tax Commissioners*, 733 N.E. 2d 36, 38 (Ind. Tax Ct. 2000), *aff’d*, 765 N.E.2d 1257 (Ind. 2002). Despite this, “the term ‘charitable purpose’ is to be defined and understood in its broadest constitutional sense.”

³ *See, e.g. Pedcor Investments-1990-XIII, L.P. v. State Board of Tax Commissioners*, 715 N.E.2d 432, 437 (Ind. Tax Ct. 1999); *Meadowbrook North Apartments v. Conner*, 854 N.E.2d 950 (Ind. Tax Ct. 2005); and *Hometowne Associates, LP v. Maley*, 839 N.E.2d 269 (Ind. Tax Ct. 2005).

Knox County Property Tax Assessment Board of Appeals v. Grandview Care, Inc., 826 N.E.2d 177, 182 (Ind. Tax Ct. 2005) (citing *Indianapolis Elks Bldg. v. State Board of Tax Commissioners*, 145 Ind. App. 522, 251 N.E.2d 673, 682 (1969)). A charitable purpose will generally be found to exist if: (1) there is evidence of relief of human want manifested by obviously charitable acts different from the everyday purposes and activities of man in general; and (2) there is an expectation that a benefit will inure to the general public sufficient to justify the loss of tax revenue. *College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905, 908 (Ind. Tax Ct. 2006).

26. “The declaration of charity by an organization does not necessarily mean that the dominant use of the organization’s property is of the form of charity which the law recognizes as entitling an organization to tax exemption.” *Sahara Grotto v. State Board of Tax Commissioners*, 261 N.E.2d 873, 878 (1970). In order to qualify for an exemption, the owner must submit probative evidence that the property is owned for an exempt purpose, used for an exempt purpose, and occupied for an exempt purpose. Once these three elements are met, the property can be exempt from taxation. *Grandview Care, Inc.*, 826 N.E.2d 177, 183 (Ind. Tax Ct. 2005).
27. Here, while the Petitioner may rent its apartments to moderate and low income individuals and families, it does so as a condition of its agreement with HUD. The property does not relieve a government burden, because it is taxpayers, through federal subsidies, and the tenants themselves that shoulder the financial burden of carrying on Jamestown’s business. The federal government offered the program as an incentive to build affordable housing in which the Petitioner elected to participate. At the end of the mortgage period, the Petitioner is the owner of an apartment complex that it may not otherwise have been able to afford to finance or build.
28. If the Petitioner were offering safe, clean, quality apartments to low income individuals for below market rents without contracting to receive a mortgage subsidy, the Board may have found the property is used for a charitable purpose. That is not the case before us.

Here, the Petitioner's own evidence shows that the general public already supports the program with federal tax dollars. The subsidized mortgage allows the Petitioner to charge less for its units than it would have had to charge in order to cover its costs. This provides the Petitioner with a competitive advantage that typically results in higher occupancy than a similar non-subsidized property could achieve.

29. The Petitioner purchased or built the property leveraged by federal tax dollars. The Petitioner is being compensated with rental payments. The Petitioner is providing a service it contracted with the federal government to provide. This is not "different from the everyday purposes and activities of man in general." *College Corner*, 840 N.E.2d at 908. The Petitioner, thus, is seeking to "double dip". The Petitioner provides a service it has contracted to provide and is being compensated to provide *and* seeks to claim a "charitable" exemption to avoid paying property taxes. The Petitioner has not advanced any argument that sufficient benefit would inure to the general public to justify the loss of the tax revenue that would result from granting a charitable purpose tax exemption in addition to the mortgage assistance the property presently receives.

30. Finally, the fact that the Petitioner's rents are restricted by its contract with HUD is not substantive proof that the rents it is charging for its units are any different from rents charged by other market participants in the area. Here, the Petitioner's contentions that its rents are "less than the surcharge rate (market) due" is nothing more than a conclusory statement. *Reply at 6*. Statements that are unsupported by probative evidence are conclusory and of no value to the Board in making its determination. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E.2d 1113, 1118 (Ind. Tax Ct. 1998); *and Herb v. State Board of Tax Commissioners*, 656 N.E.2d 890,893 (Ind. Tax Ct. 1995). Thus, whether the Petitioner does, in fact, charge "below market rent" is a question of fact that renders this case inappropriate for summary disposition.

CONCLUSION

31. The Petitioner has not shown that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Coffman v. PSI Energy, Inc.* 815 N.E.2d 522, 526 (Ind. Ct. App. 2004). The Petitioner's "Motion for Summary Judgment" is denied. The parties shall confer and propose hearing dates.

By: _____
Commissioner, Indiana Board of Tax Review

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