

**STATE OF INDIANA
INDIANA BOARD OF TAX REVIEW**

PIEDMONT-NANTUCKET COVE, LLC.)	On Appeal from the Marion County
MMA HOUSING, LLC.)	Property Tax Assessment Board of
Petitioners,)	Appeals (PTABOA)
)	
v.)	Petition for Review of Exemption
)	Form 132
MARION COUNTY PROPERTY TAX)	Petition and Parcel numbers ¹
ASSESSMENT BOARD OF APPEALS)	
Respondent.)	

Findings of Fact and Conclusions of Law

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

Issue

Whether the improvements currently owned by MMA Housing, LLC and owned by Piedmont-Nantucket Cove, LLC on March 1, 2000 (assessment date), qualify for a 100% property tax exemption pursuant to Indiana Code (IC) 6-1.1-10-16 for charitable purpose, rather than the 75% exemption granted by the Marion County Property Tax Board of Appeals (PTABOA).

¹ Petitions filed in duplicate for each parcel as follows: Petition numbers 49-500-00-2-8-00007 and 00010 apply to parcel no. 5031723; Petition numbers 49-500-00-2-8-00008 and 00011 apply to parcel no. 5031724; and Petition numbers 49-500-00-2-8-00009 and 00012 apply to parcel no. 5031725.

Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall be considered a finding of fact.

2. Pursuant to IC 6-1.1-11-3, the Petitioners filed duplicate applications for property tax exemption (Form 136) with the Marion County PTABOA on May 15, 2000. The Petitioners claimed exemption for land and lots (100%) and improvements (100%). The PTABOA mailed its determination (Form 120) to the taxpayer on October 1, 2001.

3. Pursuant to IC 6-1.1-11-7, the Petitioners filed Form 132 petitions seeking a review of the PTABOA action by the State. The Form 132 petitions were filed with the County on October 26, 2001 and received by the State on November 1, 2001.

4. Pursuant to IC 6-1.1-15-4, a hearing was held on April 23, 2002, before Administrative Law Judge (ALJ) Tim Rider. Testimony and exhibits were received into evidence. Larry J. Stroble and Jennifer A. Dunfee, both attorneys at law with Barnes & Thornburg, appeared for the Petitioners. In addition, Walter C. McGill, President of the Piedmont Foundation and David F. Stapleton, President of Montford Management presented testimony on the Petitioners' behalf. Andrew P. Seiwert, Assistant Corporate Counsel of Indianapolis and Marion County represented the PTABOA. Melissa Tetrick, Exemption Deputy, presented testimony for the Respondent.

5. At the hearing, the subject Form 132 petitions with attachments were made part of the record and labeled Board Ex. A. The Notices of Hearing on Petitions were labeled Board Ex. B. In addition, the following items were received into evidence:

Petitioners' Ex. A – Complete record of a previous proceeding between Piedmont-Nantucket Cove, LLC and the Marion County PTABOA involving Petition No. 49-500-98-2-8-00006.

Petitioners' Ex. B – Legal Brief supporting 100% exemption claim.

Petitioners' Ex. C – Reply to PTABOA Post-hearing brief filed May 10, 2002.

Respondent's Ex. 1 – PTABOA Form 120 regarding this appeal.

Respondent's Ex. 2 – IBTR decision Indiana Affordable Housing Inc v. Marion County PTABOA, Petition No. 49-700-00-2-8-00002.

Respondent's Ex. 3 – Post-Hearing brief filed May 3, 2002.

6. The property in question is known as the Nantucket Cove Apartments and is located at 2900 E. Hanna Avenue, Indianapolis, Perry Township, Marion County, Indiana.
7. The ALJ did not view the property.
8. The material facts of this case are not in dispute.
9. All parties agree that the Petitioners qualify for a charitable tax exemption pursuant to IC 6-1.1-10-16.
10. All parties agree that the Petitioners are organized for the purpose of providing safe and affordable low-income housing. The providing of such housing is characterized by the Petitioner as a "charitable purpose." The PTABOA does not disagree with that characterization.
11. All parties agree that by covenant to the Safe Harbor provision of Internal Revenue Service Procedure 96-32, the Petitioners must reserve at least 75% of available units for occupancy by residents who meet the Federal definition of "low-income." Up to 25% may be rented at market rate.

12. The parties agree that the exemption for land is limited to fifteen (15) acres of the total acreage of the apartment complex. The parties also agree that the exemption for personal property is 100%.
13. The parties agreed that, based on the Safe Harbor covenant, at least 75% of the apartments in question must be rented to qualifying low-income individuals or families and that 25% of the apartments can be offered to any tenant at market rate.
14. The PTABOA's position is that only the apartments rented to low-income tenants are exempt, while the Petitioners argue that since this is a qualified charitable enterprise pursuant to IC 6-1.1-10-16, all the improvements should be exempt from property taxation.
15. Over the Respondent's objection, the State admitted into evidence Petitioners' Exhibit A, the complete record of a previous proceeding between Piedmont-Nantucket Cove LLC and the Marion County PTABOA, for the 1999 assessment year. This exhibit was presented to support the claim that substantially nothing has changed in the operation of the apartment complex since the previous proceeding was litigated. In that proceeding, the State granted Piedmont-Nantucket Cove LLC a 100% exemption for the same improvements at bar in this proceeding.² Subsequently, Walter C. McGill and David F. Stapleton each offered testimony to further support the position taken by the Petitioners.
16. The Respondent also made a specific objection to sub exhibit S to Petitioners' Exhibit A which is a memorandum dated in 1997 from Bill Waltz to Bart Sprunger concerning the State Board's "current position" on the facts presented in that memorandum. Since the memorandum is almost five years old and contained the notation that "It is not a ruling to any specific taxpayer, nor may it be cited as

² Parties agreed that this was Tax Year 1999 even though the Petition No. indicates "98".

precedent in either administrative or judicial proceedings” the objection was sustained and this sub exhibit was stricken from the record.

Conclusions of Law

1. The State was the proper body to hear an appeal of the action of the PTABOA pursuant to IC 6-1.1-15-3.

A. Burden

2. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816,820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail.
3. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer’s case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.
4. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence “sufficient to establish a given fact and which if not contradicted will remain sufficient.” *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).

B. Constitutional and Statutory Basis for Exemption

5. The General Assembly may exempt from property taxation any property being used for municipal, educational, literary, scientific, religious, or charitable purposes. Article 10, Section 1, of the Constitution of Indiana.
6. Article 10, Section 1, of the State Constitution is not self-enacting. The General Assembly must enact legislation granting the exemption. In this appeal, exemption was claimed under IC 6-1.1-10-16, which provides that all or part of a building is exempt from property taxes if it is owned, occupied, and used for educational, literary, scientific, religious or charitable purposes.
7. In Indiana, use of property by a nonprofit entity does not establish any inherent right to exemptions. The grant of federal or state income tax exemption does not entitle a taxpayer to property tax exemption because income tax exemption does not depend so much on how property is used but on how money is spent. *Raintree Friends Housing, Inc. v. Indiana Department of Revenue*, 667 N.E. 2d 810 (Ind. Tax 1996) (501(c)(3) status does not entitle a taxpayer to tax exemption). For property tax exemption, the property must be predominantly used or occupied for the exempt purpose. IC 6-1.1-10-36.3.

C. Basis of Exemption and Burden

8. In Indiana, the general rule is that all property in the State is subject to property taxation. IC 6-1.1-2-1.
9. The courts of some states construe constitutional and statutory tax exemptions liberally, some strictly. Indiana courts have been committed to a strict construction from an early date. *Orr v. Baker* (1853) 4 Ind. 86; *Monarch Steel Co., Inc. v. State Board of Tax Commissioners*, 669 N.E. 2d 199 (Ind. Tax 1996).

10. All property receives protection, security and services from the government, e.g., fire and police protection and public schools. This security, protection, and other services always carry with them a corresponding obligation of pecuniary support - - taxation. When property is exempted from taxation, the effect is to shift the amount of taxes it would have paid to other parcels that are not exempt. *National Association of Miniature Enthusiasts (NAME) v. State Board of Tax Commissioners*, 671 N.E. 2d 218 (Ind. Tax 1996). Non-exempt property picks up a portion of taxes that the exempt property would otherwise have paid, and this should never be seen as an inconsequential shift.
11. This is why worthwhile activities or noble purpose is not enough for tax exemption. Exemption is justified and upheld on the basis of the accomplishment of a public purpose. *NAME*, 671 N.E. 2d at 220 (citing *Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*, 550 N.E. 2d 850, 854 (Ind. Tax 1990)).
12. The taxpayer seeking exemption bears the burden of proving that the property is entitled to the exemption by showing that the property falls specifically within the statute under which the exemption is being claimed. *Monarch Steel*, 611 N.E. 2d at 714; *Indiana Association of Seventh Day Adventists v. State Board of Tax Commissioners*, 512 N.E. 2d 936, 938 (Ind. Tax 1987).
13. As a condition precedent to being granted an exemption under the statute (IC 6-1.1-10-16), the taxpayer must demonstrate that it provides “a present benefit to the general public ...sufficient to justify the loss of tax revenue.” *NAME*, 671 N.E. 2d at 221 (quoting *St. Mary’s Medical Center of Evansville, Inc. v. State Board of Tax Commissioners*, 534 N.E. 2d 277, 279 (Ind. Tax 1989), *aff’d* 571 N.E. 2d 1247 (Ind. 1991)).

D. Conclusions Regarding the Exemption Claim

14. Normally, when a charitable exemption is requested the State will perform a complete analysis to determine whether the requirements of IC 6-1.1-10-16 have been met.
15. This analysis would almost always be required to determine whether the property is owned, occupied and used for a charitable purpose.
16. In the instant case, this analysis need not be performed because the PTABOA granted the Petitioners a partial charitable exemption for the improvements. Further, at hearing, the PTABOA stipulated to the fact that the Petitioners qualified for a charitable exemption pursuant to IC 6-1.1-10-16. Therefore, the State will confine its examination to the issue in dispute.
17. The issue in dispute is the amount of exemption the improvements qualify for, that amount being either 75% as approved by the PTABOA or 100% as requested by the Petitioners.
18. The PTABOA has conceded that Piedmont-Nantucket Cove LLC owned the Nantucket Cove Apartments for the charitable purpose of providing safe, affordable housing for low-income individuals or families but would allow an exemption only for the apartments specifically rented to low-income tenants rather than basing the exemption on an overall examination of the nonprofit project.
19. Conversely, the Petitioners concede that they would rent up to 25% of the apartments available at the complex in question at market rate and regardless of income. However, they claim that the market rate rentals are immaterial to the exemption claim because 1) the affirmative defense of collateral estoppel bars the PTABOA from relitigating an issue that has

already been decided by the State, and 2) the renting of some apartments at market rate is a furtherance of the Petitioners' charitable purpose and therefore these apartments are also exempt.

COLLATERAL ESTOPPEL

20. The collateral estoppel defense is predicated on the fact that the State awarded a 100% exemption for this apartment complex for Tax Year 1999 and the operation of the complex remains primarily the same to the present time. The Petitioners apply this defense in arguing that the issue regarding the 25% market rate apartments cannot be subject to another administrative review by the State.
21. Petitioners' counsel, in his brief (Petitioners' Ex. B), cites *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948) as follows: “[C]ollateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.” (Emphasis added) (Citing *Tait v. Western Md. R. Co.*, 289 U.S. 620).
22. In a more recent case the Indiana Court of Appeals points-out that collateral estoppel (issue preclusion) “bars the subsequent litigation of a fact or issue which was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit. In that situation, the former adjudication will be conclusive in the subsequent action even if the two actions are on different claims. However, the former adjudication will only be conclusive as to those issues which are actually litigated and determined therein.” *Bartle v. Health Quest Realty VII*, 768 N.E.2d 912, 917 (Ind. App. 2002) (emphasis added).

23. In *Bartle* the Court went on to add that “Collateral estoppel does not extend to matters which were not expressly adjudicated and can be inferred only by argument. The primary consideration in the use of collateral estoppel is whether the party against whom the former adjudication is asserted had ‘a full and fair opportunity to litigate the issue and whether it would be otherwise unfair under the circumstances’ to permit issue preclusion in the subsequent action.” *Id* at 917.
24. An examination of the Tax Year 1999 case (Petitioners’ Ex. A) reveals that the fundamental issue being litigated before the State at that time was whether or not the apartment complex in question qualified for **any tax exemption**. The evidence presented at hearing (See transcript at Tab 7 of Petitioners’ Ex. A) dealt with whether or not furnishing affordable low-income housing was a charitable purpose. The PTABOA had found that it was not. The fundamental issue in this appeal is the proper application of IC 6-1.1-10-36.3, and the percentage of the property used for charitable purposes. The only time a proportional exemption was mentioned was in closing argument of counsel for the PTABOA (Andrew Seiwert) (See transcript page 61). At no time was a partial exemption litigated nor was the statute dealing with predominant use (IC 6-1.1-10-36.3) discussed either during the hearing or in the State’s final determination.
25. The issue to be litigated in the instant case is clearly whether the apartments held for rent, at market rate, in an otherwise exempt affordable housing complex qualify for exemption from property tax. The PTABOA has agreed that the Petitioners’ predominant use is charitable but argues that such charitable use (providing low-income housing) does not apply to the entire complex.
26. Although the SBTC may have had the opportunity and perhaps, in fact, considered the application of IC 6-1.1-10-36.3, that is not clearly referenced in its findings. Given that the focus of the previous hearing

was fundamentally on different issues, it cannot be concluded that the issues as presented were identical to those now present in this case.

27. After the 1999 decision but prior to the 2000 hearing the IBTR has issued several decisions (discussed below) affirming the application of predominant use and partial exemption as they pertain to the application of the 75%-25% ratio contained in IRS rev. proc. 96-32.
28. Recently, the Indiana Tax Court in *New Castle Lodge #147, Loyal Order of Moose v. State Board of Tax Commissioners*, 733 N.E.2d 36 (Ind. Tax 2000) refined and clarified the law concerning predominate use as discussed below.
29. Based on the above conclusions the State finds that the Petitioners have not met their burden of demonstrating that the affirmative defense of collateral estoppel precludes examination of the issue in this administrative review.
30. In addition, the IBTR understands that decisions issued by administrative agencies should be consistent so as to provide guidance to future petitioners. Accordingly, the IBTR will give some deference to decisions issued by its predecessor agency the SBTC. However when the Indiana Legislature created the IBTR pursuant to Public Law 198-2001 its legislative intent was clearly to create a new system of processing property tax appeals. Accordingly, the IBTR will not be strictly bound by decisions issued by its predecessor when the Board disagrees with the conclusions of law contained therein.

DOES MARKET RATE EQUAL CHARITABLE USE?

31. In support of their case for a charitable exemption for the apartments held for rent at market rate, the Petitioners declare that renting some

apartments at market rate is a furtherance of their charitable purpose. They maintain that attracting tenants who can afford to pay the market rate aids in relieving the poor of distressed conditions by providing safe, clean and affordable housing and allowing for social and economic integration of all residents.

32. In support of their position, the Petitioners rely upon *State Board of Tax Commissioners v. Methodist Home for the Aged*, 241 N.E.2d 84 (Ind. App. 1968).
33. *Methodist Home* involved a retirement home operated by a nonprofit organization, which provided for full care of its aged occupants. The majority of its occupants made an average payment of \$9500 for the right to occupy an apartment. About 25% made no such contribution. *Id* at 86, 87.
34. In *Methodist Home* the Court of Appeals granted a 100% property tax exemption, overruling the State, which had granted a partial exemption due to the fact that some of the occupants made the payments mentioned above. The Court of appeals summarized its conclusions by holding that “* * * it does not operate for the benefit of any select group of individuals or institutions. The fact that it is necessary for the petitioner to charge a substantial admission fee in order to carry on its work does not deprive it of the status of a tax exempt corporation.” *Id* at 89.
35. While *Methodist Home* provides some support for the Petitioners’ argument, it must be noted that this case involves a home for the aged that provided many special amenities and support services that aged citizens need to live and survive from day to day. The only substantial service the Petitioners provide is lodging and regarding the 25% in question they provide lodging at the market rate. Such lodging would be available at any for profit apartment complex for the same market rate but

if the lodging at the nonprofit complex is not taxed, the for profit complex would have to bare the full tax load while receiving the same amount of rent (market rate) for similar units.

36. In support of the partial exemption, the Respondent relies on IC 6-1.1-10-36.3(b)(3) and correctly points-out that this Section of the Indiana Code was not enacted until many years after the Court of Appeals decision in *Methodist Home*. In light of the subsequent statute, *Methodist Home* is appropriately cited to support determination of “charitable use” but has little relevance to the issue of the degree of partial exemption. Further, an implicit endorsement of the PTABOA’s application of that statutory provision is contained in the Tax Court’s holding in *New Castle Lodge #147, Loyal Order of Moose, Inc. v. State Board of Tax Commissioners*, 733 N.E.2d 36 (Ind. Tax 2000).

37. IC 6-1.1-10-36.3 reads:

Sec. 36.3. (a) For purposes of this section, property is predominantly used or occupied for one (1) or more stated purposes if it is used or occupied for one (1) or more of those purposes during more than fifty percent (50%) of the time that it is used or occupied in the year that ends on the assessment date of the property.

(b) If a section of this chapter states one (1) or more purposes for which property must be used or occupied in order to qualify for an exemption, then the exemption applies as follows:

(1) Property that is exclusively used or occupied for one (1) or more of the stated purposes is totally exempt under that section.

(2) Property that is predominantly used or occupied for one (1) or more of the stated purposes by a church, religious society, or not-for-profit school is totally exempt under that section.

(3) Property that is predominantly used or occupied for one (1) or more of the stated purposes by a person other than a church, religious society, or not-for-profit school is exempt under that section from property tax on the part of the assessment of the property that bears the same proportion to the total assessment of the property as the

amount of time that the property was used or occupied for one (1) or more of the stated purposes during the year that ends on the assessment date of the property bears to the amount of time that the property was used or occupied for any purpose during that year.

(4) Property that is predominantly used or occupied for a purpose other than one (1) of the stated purposes is not exempt from any part of the property tax.

(c) Property is not used or occupied for one (1) or more of the stated purposes during the time that a predominant part of the property is used or occupied in connection with a trade or business that is not substantially related to the exercise or performance of one (1) or more of the stated purposes.
(*Emphasis added*)

38. The Tax Court in *Loyal Order of Moose* found that “the Moose used its property predominately, but not solely for charitable purposes” and in its conclusion “* * * REVERSED and REMANDED to the State Board with instructions to conduct further proceedings to determine the exemption allowed * * *.” *Id* at 36.³
39. The PTABOA correctly applied the Tax Court rationale presented in *Loyal Order of Moose* by noting that the predominate use (more than 50%) of the apartments in question was charitable; calculated that 75% of the apartments were held to be rented by low income tenants (the Petitioner generally agrees with that figure); and awarded a 75% exemption from property tax for the improvements in question.
40. The State agrees that the portion of the subject property that can be rented at market rate is not used for charitable purposes and is subject to a proportionate share of the property’s assessment, pursuant to IC 6-1.1-10-36(b)(3).

³ The Indiana Supreme Court affirmed the *Moose Lodge* remand on April 12, 2002.

41. The State has previously supported this proportional exemption for low-income apartment projects that rent partially at market rate (See *Indiana Affordable Housing, Inc. v. Marion County PTABOA*, final determination issued by the IBTR on March 12, 2002; and *Sheltering Palms Foundation, Inc. v. MADISON COUNTY PTABOA*, final determination issued by the IBTR on May 8, 2002.

42. Petitioners' 75% exemption from property taxes for improvements granted by the PTABOA is affirmed. Apartments rented at market rate are not put to a charitable use and such rental is not a charitable purpose. As stipulated by the parties the Petitioners' exemption for land is limited to fifteen (15) acres and personal property is exempted at 100%.

The above stated findings and conclusions are issued in conjunction with and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this ____ day of _____, 2002.

Chairperson, Indiana Board of Tax Review