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**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

RICHMOND ELKS LODGE #649)	
Petitioner,)	
)	
v.)	Petition Nos. 89-030-00-2-8-00002 through
)	89-030-00-2-8-00005
WAYNE COUNTY PROPERTY)	
TAX ASSESSMENT BOARD OF)	Parcel Nos. 0299945400, 0299945401,
APPEALS (PTABOA))	0299945402 & 2292756500
Respondent)	Assessment Year: 2000

Remand from the Indiana Tax Court
Cause No. 49T10-0112-TA-105

February 3, 2003

FINAL DETERMINATION

The Indiana Board of Tax Review assumed jurisdiction of this matter as the successor entity to the State Board of Tax Commissioners, and the Appeals Division of the State Board of Tax Commissioners. For convenience of reference, each entity is without distinction hereafter referred to as the "Board".

History of the Case

1. The Petitioner (Richmond Elks) timely filed Form 136 “Application for Property Tax Exemption” (The “Application”) with the Wayne County Auditor with respect to the March 1, 2000 assessment date.
2. On September 6, 2000, the Wayne County Property Tax Assessment Board of Appeals (PTABOA) denied the Application.
3. On October 4, 2000, the Richmond Elks filed Form 132 “Petition to the State Board of Tax Commissioners for Review of Exemption” (The “Petition”) with the Wayne County Auditor.
4. The Board conducted a hearing on the Petition on April 9, 2001.
5. On November 16, 2001, the Board notified the Petitioner that it would not issue a determination in this matter until the Indiana Supreme Court had rendered a decision in *State Board of Tax Commissioners v. New Castle Lodge #147, Loyal Order of Moose, Inc.*
6. On December 28, 2001, Richmond Elks appealed the Board’s failure to decide this case to the Indiana Tax Court. On June 26, 2002, the Indiana Tax Court remanded this case to the Board for further consideration in light of the Indiana Supreme Court’s decision in *New Castle Lodge #147* at 765 N.E.2d 1257 (Ind. 2002).
7. On October 22, 2002, the Petitioner requested that, in lieu of a hearing on remand, the parties be directed to file briefs with the Board on the basis of the existing record. The Board agreed with this request and ordered briefs to be filed.

8. This matter is now fully briefed and the Board, after examination of the existing administrative record; the Indiana Supreme Court decision in *New Castle Lodge #147*; and the parties' legal analysis, issues this final determination.

Issue

What portion of the real and personal property owned by Richmond Elks Lodge #649 qualifies for a charitable exemption from property taxes pursuant to Ind. Code § 6-1.1-10-16, 6-1.1-10-23 and 6-1.1-10-36.3?

FINDINGS OF FACT From Existing Administrative Record

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law herein shall be considered a finding of fact.
2. The real and personal property at issue consists of a lodge with several rooms, a swimming pool, golf course and garage, and is owned by the Richmond Lodge # 649, Benevolent & Protective Order of Elks, (Lodge) located at 2100 U.S. Highway 27 South, in Richmond, Indiana, 47374. The property is located in Wayne Township in Wayne County, Indiana.
3. The Lodge was certified as an Indiana "Not For Pecuniary Profit" association in 1907, and filed a 1999 Form 990 "Return of Organization Exempt from Income Tax." Testimony was undisputed that the Lodge has been granted 501(c)(3) status by the Internal Revenue Service.
4. The Articles of Incorporation of the organization state its purpose as follows:

The object of this association is and shall be to inculcate the principles of charity, justice, brotherly love and fidelity: To promote the welfare and enhance the happiness of its members: to quicken the spirit of American patriotism and to cultivate good fellowship.

5. The Form 136, "Application for Property Tax Exemption" was filed with the Wayne County Auditor by, or on behalf of, the Lodge, on May 11, 2000, seeking exemption from property taxation for charitable and fraternal purposes pursuant to Ind. Code § 6-1.1-10-16.
6. On September 6, 2000, the Wayne County Property Tax Assessment Board of Appeals (PTABOA) issued a Form 120, Notice of Action on Exemption Application," denying the Petitioner's Application for Property Tax exemption and finding the land, improvements, and personal property at issue to be 100% taxable.
7. On October 4, 2000, the Lodge filed four Form 132 Petitions, claiming exemption for charitable and fraternal purposes pursuant to Ind. Code § 6-1.1-10-16, Ind. Code § 6-1.1-10-23, and Ind. Code § 6-1.1-10-36.3.
8. Thereafter, the Board issued a "Notice of Defect in Completion of Assessment Appeal Form" to the Lodge, granting an additional period of approximately thirty days to the Lodge to file the Form 132 Application with the County Assessor. The Notice of Defect was apparently issued due to the absence of a file stamp from the County Assessor's Office. Thereafter, the Forms 132 were filed with the Wayne County Assessor, and no issue as to the date of filing was raised by the County at the hearing.
9. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was scheduled on March 26, 2001. The Wayne County Assessor requested a continuance of the same, and this matter was reset for hearing on April 9, 2001.

10. The hearing was held on April 9, 2001, before Hearing Officer Sandra M. Oakes. Mr. Charles K. Todd, attorney at law, represented the Wayne County PTABOA. Also present and participating were Mr. Andrew Cecere, President of the Wayne County PTABOA, and Mr. Joseph L. Kaiser, a member of the Wayne County PTABOA. Ms. Wanda Ronan, Wayne County Assessor, Ms. Lynnette Shepard, Chief Deputy, and Mr. Michael P. Statzer, Wayne Township Assessor, were also present for the hearing. The Lodge was represented by Mr. Larry Stroble and Ms. Jennifer Dunfee (now Seymour), attorneys at law. Mr. Carl Schuler, Chairman, Elks Bingo, and Mr. Ronald Stier, Chairman Trustee, were present on behalf of the Lodge. Testimony and exhibits were received into evidence.
11. The Form 132 Petitions filed herein with attachments were admitted collectively as the Board's Exhibit A without objection.
12. At the hearing, counsel for the Lodge submitted and filed a Memorandum in Support of the Lodge's position. The Respondents did not submit or file a memorandum.
13. At the hearing, counsel for the Lodge offered written "testimony" of Mr. Carl Schuler, Chairman, Elks Bingo, not as a summary of his testimony, but as a substitution for some direct testimony. The Respondents objected and the objection was sustained. A copy of the offered exhibit was marked as Petitioner's Exhibit 1 and maintained with the record.
14. The Lodge then presented the testimony of Mr. Carl Schuler, Chairman, Elks Bingo, and Mr. Andrew Cecere, President, Wayne County PTABOA. During Mr. Schuler's testimony, the Lodge offered several exhibits, detailed below, to which the Respondents objected, stating that these items were not provided to the PTABOA with the original application and furthermore, that the offered exhibits were not relevant. The Lodge responded that many of these items were in fact requested by the Board to be made available at the hearing in the actual Notice of

Hearing issued by the Board. The following exhibits were admitted into evidence over the Respondents' objection:

Petitioner's Exhibit A: Certificate of Incorporation

Petitioner's Exhibit B: Articles of Incorporation

Petitioner's Exhibit C: By-Laws

Petitioner's Exhibit D: 2000-2001 Grand Lodge Program

Petitioner's Exhibit E: What It Means to Be an Elk Guidebook for New Members

Petitioner's Exhibit F: Form 990, 1999 "Return of Organization Exempt from Income Tax"

Petitioner's Exhibit G: Financial Statements Year Ending 3/31/2000

Petitioner's Exhibit H: Indiana Department of Revenue Charity Gaming Report dated 10/01/2000

Petitioner's Exhibit I: Sample Agendas from Board, Lodge, and Ladies Elks meetings held at the Lodge

15. The following exhibits were admitted into evidence without objection:

Petitioner's Exhibit J: Form 136, Application for Property Tax Exemption

Petitioner's Exhibit K: Form 120 Notice of Action on Exemption Application issued by the Wayne County PTABOA Dated September 6, 2000

Petitioner's Exhibit L: Four (4) Form 132, Petitions for Review of Exemption filed on October 4, 2000

Petitioner's Exhibit M: Notices of Hearing on Petitions

Petitioner's Exhibit N: Two Power of Attorneys filed herein

16. The Respondents offered no testimony and the following exhibits were offered and admitted without objection:

Respondents' Exhibit 1: Document signed by Mr. Schuler provided to County officials regarding charitable contributions

Respondents' Exhibit 2: Letter Wayne County PTABOA to the Lodge dated April 2, 2000 requesting information

17. Mr. Robert Schuler, Chairman of the Elks Bingo, Lodge # 649, testified to the following:
- a. The Indiana Department of Revenue has approved an application for a charitable gaming license for the Lodge.
 - b. With regard to charitable gaming, the Lodge had gross receipts of \$463,357.00; total expenses of \$423,400.00, net proceeds of \$39,957.00; charitable contributions of \$11,763.00, with the amount retained by the Lodge of \$28,194.00 during the taxable year of April 1, 1999 through March 31, 2000.
 - c. The total revenue of the Lodge for the taxable year April 1, 1999 through March 31, 2000 was \$762,759.00. The total expenses for the same period were \$927,377.00, for a loss of \$161,618.00.
 - d. The Lodge donated a total of \$25,980.00 to charity during this same period, which included the monies from charitable gaming of \$11,763.00 mentioned above. Mr. Schuler was unsure as to the source and distribution of the balance of the \$25,980.00, as he is in charge of the bingo operations only.
 - e. The Lodge made charitable contributions from its charitable gaming proceeds to the following organizations: American Legion Fireworks, Youth Football, Green Acres Center, American Cancer Society, Richmond State Hospital, Richmond Art Museum, Junior Achievement of East Indiana, Parade of Nichols, Elks National Foundation, Elks Cancer Fund, Richmond High School Alumni Fund, Indiana Gold Foundation, Boy Scouts of America, DARE, Elks Boy's Camp, and Girls Basketball.
 - f. The Lodge raises funds through charitable gaming activities, especially Bingo.
 - g. The Lodge also raised funds to donate to charity by sponsoring golf

Scrambles.

- h. Bingo is held every Tuesday night from 6:00 p.m. to 10:00 p.m.
- i. The funds from Bingo are deposited into a separate Bingo account and it is from this account that the charitable contributions are taken.
- j. With regard to the organization's meetings during the time in question, approximately 25 members attended the bi-monthly meetings that lasted about 1 ½ hours each.
- k. Approximately 5 members of the Board of Trustees and 4 Chair Officers regularly attended the monthly Board meetings which lasted about 1 – 1 ½ hours.
- l. About 30 members of the Ladies Elks attended Ladies Elks Board meetings which lasted about 1 – 1 ½ hours.
- m. The Golf Committee met on a bi-monthly basis and about 15 members attended those meetings.
- n. Both business and charitable activities are discussed at the meetings of the lodge members, the Board meetings, the Ladies Elks meetings, and the meetings of the Golf committee.
- o. Mr. Schuler himself attended and managed Bingo night once a week for 50 weeks and eleven (11) other members assisted on Bingo nights.
- p. The Richmond Elks Lodge Soccer Shoot and Hoop Shoot lasted two days each and necessitated approximately 24 volunteers during the events.
- q. The total number of hours donated by members for planning meetings and to facilitate the Soccer Shoot and Hoop Shoot totaled 2,712 volunteer hours.
- r. Members contributed 20 volunteer hours to facilitate the Scott Boys Club Scramble, 20 volunteer hours to facilitate the Girls Club Scramble, 4 hours to facilitate the Boys Scouts Scramble, 804 hours to facilitate the State Elks' Championship Scholarship Event, and 20 hours to facilitate the Mitrione Cancer Scramble, for a total of 868 volunteer hours.
- s. A member of the Lodge, Mr. Kovach, developed a presentation and program on patriotism and the American flag, including kits to present to local schools, which development totals a minimum of 10 hours.

- t. The combined number of hours contributed by members of the Richmond Elks Lodge to plan or facilitate charitable activities totals at least 3,590 hours.
- u. Approximately 375 members belong to the Lodge, of which roughly 200 – 225 are Golf members.
- v. The Lodge owns the lodge building, a golf course and swimming pool. The Lodge building contains a dining room, ballroom, kitchen, administrative office, pro shop, club storage, locker rooms, and maintenance shed.
- w. A summary of the charitable activities at the Lodge is as follows:
 - 1. Board Meetings, once every month, totaling 12 days per year
 - 2. Lodge Meetings, twice every month, totaling 24 days per year
 - 3. Ladies of the Elks, once every month, totaling 12 days per year
 - 4. Golf Committee, twice every month, totaling 24 days per year
 - 5. Bingo, once every week for 50 weeks, totaling 50 days per year
 - 6. Use of Lodge ballroom by Sertoma once per week, totaling 52 days per year
 - 7. Soccer Shoot for kids, 2 days per year
 - 8. Elks Hoop Shoot for kids, 2 days per year
- x. The Lodge swimming pool was open for use from Memorial Day to Labor Day in 1999, totaling 98 days. During that time, it was used for charitable purposes by the children from the Noah's Ark Day care on 13 days, by children from the First Assembly Kiddie Kollege on 6 days, and by children from Green Acres Rehabilitation Center on 28 days. The pool is used exclusively by each respective group, free of charge, Mr. Schuler thinks, and the Lodge provides the lifeguard. This use totals about 1 ½ months.
- y. The Lodge sponsored five charitable events on the golf course, those being the Scott Boys Club Scramble, Girls Club Scramble, Boy Scouts Scramble, the State Elks' Championship scholarship event, and Mitrione Cancer Scramble.
- z. The Scott Boys Club Scramble had 100 participants at a reduced charge, the State Elks' Championship event had a total of 398 players at a reduced charge for green fees from \$37.00 to \$19.00, and the Mitrione Cancer Scramble had 68 players.

- aa. The Lodge also solicited donations on the 19th hole over the course of one month for a total of 30 days.
 - bb. The Lodge itself was used a total of 178 times in 1999 to plan or sponsor charitable events in 1999, the pool was used 47 times and the golf course was used 36 times, for a total of 261 times to support charitable activities. The evidence was unclear whether these “times” were simultaneous, taking place on the same days.
 - cc. The level of charitable activity as outlined by Mr. Schuler’s testimony for 1999 is consistent with charitable activity in earlier years.
 - dd. The denial of the Lodge’s property tax exemption at issue was the first time the Lodge had been denied an exemption from property tax and the Lodge has received an exemption from the county since 1964.
 - ee. Prior to March 1, 1987, the Lodge has received an exemption for 50 acres of land and did so for a period of years prior to that time.
 - ff. The Lodge dining room is rented for weddings.
 - gg. Food and beverages (concessions) are sold during Bingo by the Ladies of the Elks and the monies received from the same is included in the Bingo revenue figures.
18. Mr. Andrew Cecere, President of the Wayne County PTABOA, called as a witness by the Lodge, testified to the following:
- a. The County PTABOA has not established or adopted any guidelines or formulas about the amount of charitable contributions an organization must make to qualify for an exemption for charitable purposes.
 - b. The PTABOA considers the amount of contributions to charity and the use of the property at issue.
 - c. The PTABOA considered both time and monetary contributions but said consideration was not the sole determining factor. The PTABOA also looked at the primary purpose and/or predominant use of the property.

19. The Board's Hearing Officer did not view the property.

CONCLUSIONS OF LAW

1. The Board is authorized to issue this final determination pursuant to Ind. Code § 6-1.1-15-3.

Board Review and Petitioner's Burden

2. The Board does not undertake to make the case for the petitioner. The Board decision is based upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E. 2d 1113 (Ind. Tax 1998).
3. The petitioner must submit 'probative evidence' that adequately demonstrates the alleged error. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E. 2d 1113 (Ind. Tax 1998), and *Herb v. State Bd. of Tax Comm'rs*, 656 N.E. 2d 1230 (Ind. Tax 1998). ['Probative evidence' is evidence that serves to prove or disprove a fact.]
4. The petitioner has a burden to present more than just 'de minimis' evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Bd. of Tax Comm'rs*, 715 N.E. 2d 1018 (Ind. Tax 1999). ['De minimis' means only a minimal amount.]
5. The petitioner must sufficiently explain the connection between the evidence and petitioner's assertions in order for it to be considered material to the facts. 'Conclusory statements' are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Bd. of Tax Comm'rs*, 714 N.E. 2d 329

(Ind. Tax 1999). [‘Conclusory statements’ are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]

6. The Board will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a ‘prima facie case.’ See *Clark v. State Bd. of Tax Comm’rs*, 694 N.E. 2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Bd. of Tax Comm’rs*, 689 N.E. 2d 765 (Ind. Tax 1997). [A ‘prima facie case’ is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner’s position is correct. The petitioner has proven his position by a ‘preponderance of the evidence’ when the petitioner’s evidence is sufficiently persuasive to convince the Board that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner’s position.]

Constitutional and Statutory Basis for Exemption

7. The General Assembly may exempt from property taxation any property being used for municipal, educational, literary, scientific, religious, or charitable purposes. Article 10, § 1 of the Constitution of Indiana.
8. Article 10, §1 of the State Constitution is not self-enacting. The General Assembly must enact legislation granting the exemption.
9. 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. Ind. Code § 6-1.1-10-36.3.

Basis of Exemption and Burden

10. In Indiana, the general rule is that all property in the State is subject to property taxation. Ind. Code § 6-1.1-2-1.
11. 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).
12. 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.
13. 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)).
14. 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).

15. As a condition precedent to being granted an exemption under the statute (Ind. Code § 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 (Ind. Tax 1991)).

Conclusions Regarding Exemption Claim

16. The PTABOA’s determination was that although the Lodge does engage in charitable endeavors, the property is used mainly as a social club or country club, and that the predominate use of the property, the lodge building itself with its ballroom, dining room and kitchen, and the golf course and swimming pool, was social and recreational use by the members.
17. The Lodge takes the position that the predominant use of the property is charitable. The Lodge also argues that the Lodge relieves the county or government of part of its burden by allowing the Sertoma Club to use their facility 12 times per year free of charge and by allowing the Children’s Rehabilitation center and two day care centers to use their pool facilities for certain days during the pool season.
18. The Lodge’s argument that the County is relieved of some of its burden is not persuasive as there is no evidence that the County or government in general has any obligation to provide a facility for Sertoma to meet, or to provide comparable recreational equipment or a swimming pool for the children who use the Lodge pool.

19. The combined number of hours contributed by members of the Richmond Elks Lodge to plan or facilitate charitable activities totals at least 3,590 hours. The number of days and hours each of the Lodge facilities were open during the taxable year is unknown and a diary of activities was not presented at the hearing. (See, for example the diary recording use of property by various charitable groups in the community admitted at trial in, *Plainfield Elks Lodge vs. State Board of Tax Commissioners*, 733 N.E.2d 32, at 34, n.3, (Ind. Tax 2000.)
20. The Richmond Lodge has approximately 375 members, and assuming that all members of the Lodge participate in charitable activities in some manner, since encouraging participation in charitable endeavors is a stated purpose of the organization, then the number of hours donated per person toward charitable events equals 9.57 hours per year or .79 hours per month.
21. When considering the total number of hours available to put toward charitable endeavors, that is, the total number of hours all of the facilities are available to be used for charitable purposes, multiplied by the number of members, 3590 charitable hours no doubt represents only a fraction of that time. (See, e.g. *New Castle Lodge Loyal Order of Moose, Inc., v. State Board of Tax Commissioners*, 733 N.E.2d 36, at 39, (Ind. Tax 2000) some 20,000 hours of members' time donated).
22. The lodge building may have been used 178 "times" during the year, however this is not illuminating as the evidence did not indicate how many "times" the lodge building was used simultaneously or in a manner in which the "times" were overlapping. Further, without knowing the total number of "times" the lodge building was available for use, it is impossible to determine the percentage of use of the property for charitable purposes. There is no evidence as to how many hours each area or room of the Lodge was used relative to the total use of the facility. There was no evidence as to the total number of hours the facility was open, available for use, or actually used.

23. The golf course was used 36 times for charitable endeavors, and assuming the golf course was realistically open and in use more than 72 days (2 ½ months) during the year, this represents less than half of the total days the golf course was available to be used for charitable endeavors. The evidence did not indicate how many total days the golf course was available for use or actually used by members for social purposes. Mr. Schuler was questioned on cross-examination as to the total number of rounds of golf played on the course, to which Mr. Schuler replied, “A lot.”
24. The pool was used 47 times for charitable endeavors which represents less than half of the available 98 days.
25. The Elks encourage “pleasant” gatherings such as “dinners, dances and other goods and services to their members,” to encourage friendship so as to enhance their benevolent programs. Petitioner’s Exhibit E, *What It Means to Be An Elk, A Guidebook for New Members*, p. 16. There is no evidence in the record which supports the postulation that dinners and dances held at the Lodge encourage benevolent activity.
26. Mr. Schuler was asked if the property was used more than 50 per cent of the time for charitable purposes and he was unable to answer that question.
27. In summary, although the Lodge has certainly engaged in charitable activities, considering the resources available at the Lodge, with the dining room, the kitchen, the ballroom, the pool, and the golf course, the overall operations, and the membership activities, the charitable activities of the Lodge, though noble, represent but a small portion of the use of facilities. The evidence adduced at the hearing did not establish that the property at issue was used predominantly for charitable purposes.

Exemption for Fraternal Purposes

28. The Form 136, “Application for Property Tax Exemption” sought exemption from property taxation for charitable and fraternal purposes pursuant to Ind. Code § 6-1.1-10-16.
29. The Lodge filed four Form 132 Petitions, claiming exemption for charitable and fraternal purposes pursuant to Ind. Code § 6-1.1-10-16, 6-1.1-10-23, and 6-1.1-10-36.3.
30. The evidence was inconclusive as to whether the Lodge was currently classified as a fraternal beneficiary association under Ind. Code § 6-1.1-10-23¹.
31. However, even if the Lodge could be established as a fraternal beneficiary association under Ind. Code § 6-1.1-10-23, it would remain necessary to establish that the property at issue was used predominantly for charitable purposes. See *Indianapolis Elks Building Corp v. State Board of Tax Commissioners*, 251 N.E.2d 673, at 681, (Ind. App. 1969).
34. The record is unclear as to the Petitioner’s position regarding whether its organization structure is a “fraternal beneficiary association” under Ind. Code § 6-1.1-10-23 or how that status would qualify for an exemption from property tax without a further showing that the predominant use of the property is for an exempt purpose under Ind. Code § 6-1.1-10-16.

¹ Ind. Code § 6-1.1-10-23 reads as follows:

- Sec. 23. (a) Subject to the limitations contained in subsection (b) of this section, tangible property is exempt from property taxation if it is owned by a fraternal beneficiary association which is incorporated, organized, or licensed under the laws of this state.
- (b) This exemption does not apply to real property unless it is actually occupied and exclusively used by the association in carrying out the purpose for which it was incorporated, organized, or licensed.

CONCLUSIONS OF LAW
Regarding
Indiana Tax Court Remand

1. On remand the parties agreed to stand on the previously developed agency record and to brief the issue of whether the Lodge qualifies for exemption from Indiana real and personal property taxes as of March 1, 2000 assessment date in light of Indiana Supreme Court decision in *State Board of Tax Commissioners v. New Castle Lodge #147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257 (Ind. 2002).

Petitioner's Argument

2. The Petitioner maintains that the Supreme Court's decision in *New Castle Lodge #147* prohibits the Board from denying an exemption through application of an erroneous standard and cites STB Instructional Bulletin 92-43 dated July 12, 1992 (IB 92-43) as being the source of such an erroneous standard.
3. The Petitioner argues that the official position taken by the Board in IB 92-43 is that the primary consideration as to whether an organization qualifies as charitable for exemption purposes deals with contributing a sufficient percentage of gross income to other charitable organizations.
4. The Petitioner ends by pointing-out that the amount of income contributed to charity standard was rejected by the Supreme Court in *New Castle Lodge #147*.
5. Based on the above conclusions the Petitioner demands an exemption for tax year 2000. It is assumed that a 100% exemption is being demanded.

Respondent PTABOA's Argument

6. In its brief the Respondent argues that the facts of the instant case are distinguishable from those before the Supreme Court in *New Castle Lodge #147*.

7. The Respondent points out that the only similarities are that in each case the taxpayer failed to meet its burden of establishing that the predominant use of the property was for a charitable purpose, and the taxpayer failed to produce facility usage evidence of charitable use versus total time usage for the properties in question.
8. The Respondent then argues that in the instant case the Petitioner did not focus on the wrong target based on the Board's presenting an erroneous standard. Accordingly, the Petitioner did not face an "agency created disadvantage". *Id* at 1265.
9. Finally, in referring to the administrative record, the Respondent maintains that much of the Petitioner's argument at hearing focused on the predominant use of the facility in question.

Indiana Board of Tax Review Analysis

10. The Petitioner claims it is entitled to an exemption because the facts in this case are "no different" than the facts considered by the Indiana Supreme Court in *New Castle Lodge #147*, and therefore should receive the same remedy as was afforded the New Castle Moose Lodge.
11. In the pertinent part of the decision in *New Castle Lodge #147* the Supreme Court found fault with the State Board's argument that "[T]he Moose Lodge failed (the predominant use) test because it failed to prove that its facility was used charitably for more than 50% of the time during the relevant tax year" because the Board's past actions had caused the Lodge to focus on the wrong target, that being charitable contribution levels. *Id* at 1263.

12. Accordingly the Court then focused on what should be done in a case such as this and arrived at the conclusion that normally the case would be vacated and remanded to the agency for a further determination. *Id* at 1264.
13. However, the Court rejected the “remand for a further determination” course of action in *New Castle Lodge #147* due to the period of time that had passed (ten years) and the availability of a hearing officer’s report, which contained a facility usage breakdown that was rejected by the Board. *Id* at 1265.
14. The Court arrived at what it called a “pragmatic remedy” and remanded the case to the Board for a final determination with evidence limited to the hearing officer’s recommendation. *Id* at 1264,1265.
15. The instant case is distinguishable in many ways from *New Castle Lodge #147*.
 - a. The New Castle Lodge was misled by the Board’s prior actions into believing that the standard of evidence regarding exemption applications dealt with charitable contributions. The Petitioner points to IB 92-43 as being the source of the same type of erroneous standard. A careful reading of IB 92-43 reveals that it contains several references to the requirement for making a “predominant use for exempt purpose” showing (see pg 7-8; attachment A, pg 3; and attachment B, pg 3-5). In fact, in attachment B an example shows exactly how to calculate percentages of charitable use for buildings by applying a room-by-room analysis. (A more in depth analysis of IB 92-43 is given below.)
 - b. Further, in *New Castle Lodge #147* the taxpayer, being misled, only presented evidence of charitable contributions. It was the Board’s hearing officer that did the room-by-room analysis. In the instant case, the Petitioner presented a great deal of evidence at hearing in an attempt to establish a predominant charitable use. However, the evidence was not convincing or sufficient. It is difficult to understand a claim of being

misled as to the standard of proof when the effort was made at the hearing to show the type of proof required by the standard.

- c. Finally, the Supreme Court in *New Castle Lodge #147* hesitated to remand the case for another hearing due to the ten-year period of time that had passed. In this case the original hearing was held in 2001. The Petitioner was entitled to another hearing at which time a better room-by-room analysis could have been presented. The Petitioner rejected that opportunity.

16. The Petitioner is correct that evidence was presented at the hearing dealing with charitable contributions and that the PTABOA indicated it examined charitable contributions as well as the use of the property when considering exemption applications. While charitable contributions are not of paramount importance in exemption claims, such contributions do tend to show the charitable nature of the organization and, therefore, are not irrelevant.

17. The Supreme Court found the State Board's original conclusions of law misstated and misapplied the law by indicating that percentage of revenues donated to charity is of "primary consideration" in making the exemption determination. *New Castle Lodge #147* at 1263.

18. The Court recognized that the 'predominant use' of the facility is the appropriate test, as set out in statute. IC 6-1.1-10-36.3.

19. The Court acknowledged that the predominant use test was the correct test, but essentially estopped the Board from taking advantage of such a "disingenuous" position. The Court basically said 'right argument, but wrong time –you are too late.'

20. The Court found that the State Board could not be allowed to lead the Moose Lodge to focus on their income distribution, by reference in their initial determination, then maintain that they failed to meet the true test, the predominant use of the property, when the case was argued in Tax Court.
21. The Court explained that it would normally be required to vacate an administrative agency's decision and remand the case for further proceedings (a new hearing.)
22. However, it realized the practical difficulty the Lodge would face in trying to prove charitable usage of the facility, ten years after the fact. Therefore, the Court sought out an equitable remedy to overcome such an "agency created disadvantage."
23. In *New Castle Lodge #147* the Court noted that the record contained evidence of facility usage in the form of the hearing officers room-by-room analysis embodied within his recommendation to the State Board. Consequently, the Court remanded the case to the Board for a new final determination, instructing that the case be decided based on the evidence "limited to the hearing officer's recommendation."
24. The subject case of Petitioner, the Richmond Elks, presents a very different set of facts. Richmond Elks was not prejudiced or misled; nor was the law misstated or misapplied. The Richmond Elks was well aware of the proper test at the time of their State Board hearing.
25. The Petitioner's brief implies that Petitioner was focused on and operating under the same erroneous standard, and misconceptions, at the time of their hearing, as existed and misled the Moose Lodge, and served as the basis of a decision in their favor.

26. Petitioner suggests that they should receive an exemption for the same reasons the New Castle Moose Lodge ultimately received an exemption, because the State Board likewise caused the Richmond Elks to be focused on the wrong standard; that they believed the “primary consideration”, in the eyes of the State Board, was the percentage of revenue the subject entity donated to charity. This suggestion is not supported by the facts.
27. The Petitioner points to Bulletin 92-43 in support of this proposition. However, the Bulletin 92-43 makes it very clear that determining whether a fraternal organization should receive an exemption is a two-step process. The Petitioner conveniently omits important portions of the Bulletin. The Petitioner recites most of the first sentence of the provision below, but omits the immediately following bolded portion:

It must first be determined whether the organization can be characterized as “charitable” by examining the extent to which it makes contributions to charitable groups, conducts charitable activities, or allows its property to be used by Charitable associations. **If the organization meets the first criterion, it must then be determined whether its property is used predominantly for charitable purposes.** (*emphasis added*)

28. Without benefit of the context, the Petitioner recites, with emphasis, the segment of Bulletin where it is talking about the donation percentage being of “primary consideration when making the determination.” The misleading aspect is that the “determination” being referred to is only the determination of the first step –that is whether the organization can be characterized as ‘charitable.’
29. The Bulletin pays perhaps unnecessary attention to a line of cases that tie the amount of charitable contributions to the evaluation of whether an entity is ‘charitable.’ The Supreme Court stated that, “charitable giving might serve as evidence to support charitable use”, but went on to clearly recognize that the statutory predominant use test is controlling. *Id.* at 1263. Regardless the significance, or lack of significance, of the line of cases, the point is that the

Petitioner could not have been misled by the State Board's Bulletin. The Petitioner had no reason at the time of the hearing to think that the overall primary consideration was the percentage of donations (as was the premise of the Supreme Court's decision in *New Castle Lodge #147*), or that predominant use was not of relevance.

30. Even more erosive of the Petitioner's contention that it was misguided into focusing on the wrong standard and suffered prejudice, like the New Castle Moose Lodge, is the fact that the Petitioner's argument at the State Board hearing made several references to the Tax Court decision in the case of *Plainfield Elks Lodge No. 2186* (Ind. Tax 2000), 733 NE2d 32. *Plainfield Elks* expressly recognized the proper statutory test of IC 6-1.1-10-36.3. The *Plainfield Elks* decision left no question as to what the appropriate test is when it stated that "exempt status turns on whether its property is used for [charitable] purposes the majority of the time." *Id.* at 36. The transcript of the hearing reveals that the Petitioner presented its case with full knowledge of the predominant use test, and presented their evidence with the objective of demonstrating that they met the applicable evidentiary burdens of showing the facilities were predominantly used for charitable purposes.
31. The facts of this case are fundamentally different than those operating in *New Castle Lodge #147*. The Petitioner is not similarly situated as the Moose Lodge in *New Castle Moose Lodge #147* and ought not benefit from the application of a case that was decided on very different facts and procedural circumstances.
32. Consequently, the Board finds that the Supreme Court decision in *New Castle Lodge #147* does not support the Petitioner's claim that Petitioner be afforded the same remedy received by the Moose Lodge in that case.
33. The Petitioner chose to rely on the previous administrative record. That record demonstrates that the Richmond Elks' property was used for charitable purposes

some of the time, and that Petitioner made charitable contributions from the usage of property, but does not prove that the charitable usage is the predominant usage of the property, as required pursuant to Ind. Code § 6-1.1-10-36.3.

34. Accordingly, the Petitioner's real and personal property is 100% taxable for Tax Year 2000.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

Chairman, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS ON REMANDED CASE -

You may petition for judicial review of this final determination of corrected assessment pursuant to the provisions of Indiana Code § 6-1.1-15-9. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.