

**STATE OF INDIANA**  
**Indiana Board of Tax Review**

WILLOWBROOK AFFORDABLE . HOUSING CORPORTION	) On Appeal from the Marion County ) Property Tax Assessment Board ) of Appeals (PTABOA)
Petitioner,	)
	)
v.	) Petition for Review of Exemption, ) Form 132
MARION COUNTY PROPERTY TAX ASSESSMENT BOARD OF APPEALS	) Petition #49-800-97-2-8-00083 ) Parcels #8050692 & 8050688 ) Petitions #49-800-00-2-8-10021 ) #49-800-00-2-8-10022
Respondent.	) #49-800-00-2-8-10023 ) Parcels #H131141 (Personal) ) #8050688 & #8050692

**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 real and personal property owned by Willowbrook Affordable Housing Corporation (Willowbrook) qualifies for property tax exemption pursuant to Ind. Code § 6-1.1-10-16 under the classification of charitable purpose and, if so, how much should the exemption be.

## 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. Regarding Petition #49-800-97-2-8-00083 and pursuant to Ind. Code § 6-1.1-11-3, Willowbrook filed an application for property tax exemption with the Marion County PTABOA. The application was filed on May 14, 1997. The Marion County PTABOA took action on July 25, 1997. Pursuant to Ind. Code § 6-1.1-11-7, Willowbrook filed a Form 132 petition seeking a review of the PTABOA action by the State. The Form 132 petition was filed August 19, 1997. The Form 132 petition has been made a part of this record as Board Exhibit A.
  
3. Regarding Petitions #49-800-00-2-8-10021, #49-800-00-2-8-10022, and #49-800-00-2-8-10023 and pursuant to Ind. Code § 6-1.1-11-3, Willowbrook filed an application for property tax exemption with the Marion County PTABOA. The applications were filed on May 10, 2000. The Marion County PTABOA took action on March 23, 2001. Pursuant to Ind. Code § 6-1.1-11-7, Willowbrook filed Form 132 petitions seeking a review of the PTABOA action by the State. The Form 132 petitions were filed April 18, 2001. The Form 132 petitions regarding each parcel have been labeled Board Exhibit A1, A2, and A3.
  
4. Regarding Petition #49-800-97-2-8-00083, and pursuant to Ind. Code § 6-1.1-15-4 a hearing was scheduled on September 20, 2000. The Notice of Hearing is labeled Board Exhibit B and entered as evidence. On September 7, 2000 the State received a Motion for Stay and Continuance of Hearing from Barton T. Sprunger, Attorney for Willowbrook. The Motion

- for Stay and Continuance is labeled Board Exhibit C and entered as evidence.
5. On September 8, 2000 the State granted the requested stay and continuance pending a decision for CME Postbrook (Petition #49-400-98-2-8-00016). The letter granting the stay and continuance is labeled Board Exhibit D and entered as evidence.
  6. On May 17, 2001 the State received a Motion to consolidate Willowbrook's appeals with respect to parcel numbers 8050688, 8050692, and H131141. The Motion to Consolidate is labeled Board Exhibit E and entered as evidence.
  7. On May 17, 2001 the State received a letter including Petitioner's list of Exhibits and Petitioner's List of Witnesses in compliance with 50 IAC 17-7-1. The letter is labeled Board Exhibit F and entered as evidence.
  8. On September 6, 2001 the State received a letter including a Notice of Amendment of Petitioner's List of Exhibits and Petitioner's List of Witnesses. The letter is labeled Board Exhibit G and entered as evidence.
  9. Petitions #49-800-97-2-8-00083, #49-800-00-2-8-10021, #49-800-00-2-8-10022, and #49-800-00-2-8-10023 were scheduled for hearing on Tuesday, September 18, 2001. The hearing was continued.
  10. Pursuant to Ind. Code § 6-1.1-15-4, and with proper notice, Hearing Officer Betsy Brand held an administrative hearing on September 26, 2001. The Petitioner was represented by: Barton T. Sprunger, and Katrina M. Clingerman, Ice Miller Donadio & Ryan; Philip J. Kennedy, President, American Opportunity Foundation; and Jerry K. Collins and Kelly Higginbotham, Flarity & Collins, Inc., the property management

company. Andrew P. Seiwert, Assistant Corporation Counsel, City of Indianapolis, and Melissa Tetrick, Marion County Assessor Exemption Deputy were present on behalf of the PTABOA.

11. At the hearing, the following documents were entered into the record and labeled as Board exhibits:

Board Exhibit A – The Form 132 (Pet. #49-800-97-2-8-00083) with attachments:

1. Legal descriptions of each parcel.
2. A copy of the Form 136.
3. A Power of Attorney.
4. A duplicate copy of Form 132.
5. A duplicate copy of the Power of Attorney.

Board Exhibit A1 – The Form 132 (Pet. #49-800-00-2-8-10021) with attachments:

1. A list of related parcels currently under appeal.
2. A copy of the Form 120.
3. A copy of the Form 136.
4. Legal descriptions of Parcels #8050692 and #8050688
5. A copy of a Memorandum issued by the State regarding existing policy for low-income housing dated September 2, 1997.
6. A copy of a Final Determination issued by the State on February 2, 2000 for Piedmont Foundation (49-500-98-2-00006).

7. A copy of Articles of Incorporation for Willowbrook Affordable Housing Corp.
8. A copy of Bylaws of Willowbrook Affordable Housing Corp.
9. A copy of audited financial statements and information dated December 31, 1999.
10. A copy of audited financial statements and information dated December 31, 1998.
11. A copy of audited financial statements and information dated December 31, 1997.
12. A copy of Power of Attorney.

Board Exhibit A2 - The Form 132 (Pet. #49-800-00-2-8-10022) with attachments:

1. A list of related parcels currently under appeal.
2. A copy of the Form 120.
3. A copy of the Form 136.
4. A copy of a Memorandum issued by the State regarding existing policy for low-income housing dated September 2, 1997.
5. A copy of a Final Determination issued by the State on February 2, 2000 for Piedmont Foundation (49-500-98-2-00006).
6. A copy of Articles of Incorporation of Willowbrook Affordable Housing Corp.
7. A copy of Bylaws of Willowbrook Affordable Housing Corp.
8. A copy of audited financial statements and information dated December 31, 1999.

9. A copy of audited financial statements and information dated December 31, 1998.
10. A copy of audited financial statements and information dated December 31, 1997.
11. A copy of Power of Attorney.

Board Exhibit A3 - The Form 132 (Pet. #49-800-00-2-8-10023) with attachments:

1. A list of related parcels currently under appeal.
2. A copy of the Form 120.
3. A copy of the Form 136.
4. Legal descriptions of Parcels #8050692 and #8050688
5. A copy of a Memorandum issued by the State regarding existing policy for low-income housing dated September 2, 1997.
6. A copy of a Final Determination issued by the State on February 2, 2000 for Piedmont Foundation (49-500-98-2-00006).
7. A copy of Articles of Incorporation for Willowbrook Affordable Housing Corp.
8. A copy of Bylaws of Willowbrook Affordable Housing Corp.
9. A copy of audited financial statements and information dated December 31, 1999.
10. A copy of audited financial statements and information dated December 31, 1998.
11. A copy of audited financial statements and information dated December 31, 1997.
12. A copy of the Power of Attorney.

Board Exhibit B – The Notice of Hearing (Pet # 49-800-97-2--00083).

Board Exhibit C – A Motion for Stay and Continuance of Hearing.

Board Exhibit D – A copy of a letter from the State to the  
Petitioner's representative granting a continuance and  
stay.

Board Exhibit E – A letter dated May 17, 2001 from the Petitioner's  
representative to the State with enclosure: A  
Motion to Consolidate regarding parcels #8050688,  
#8050692 and #H131141.

Board Exhibit F – A letter dated May 17, 2001 from the Petitioner's  
representative to the State with enclosures:

1. Petitioner's list of exhibits, including copies of all documents referenced therein; and
2. Petitioner's List of Witnesses.

Board Exhibit G – A letter dated September 6, 2001 from the Petitioner's  
representative to the State with enclosures:

1. A Notice of Amendment of Petitioner's List of Exhibits, including copies of all documents referenced therein, and
2. Petitioner's List of Witnesses.

Board Exhibit H – A Notice of Hearing-Re-schedule, dated  
August 9, 2001.

Board Exhibit I – A Notice of Hearing-Re-schedule dated,  
September 14, 2001.

13. At the hearing, Mr. Sprunger, moved to admit to the record the Petitioner's exhibits submitted to the State on September 6, 2001. (Note: Because pages were omitted from Exhibits B, E and R, corrected copies were submitted at the hearing). The exhibits were entered into the record and labeled as follows:

Petitioner's Exhibit A – A copy of the Articles of Incorporation of the American Opportunity Foundation, Inc. (AOF).

Petitioner's Exhibit B – A copy of the Bylaws of AOF.

Petitioner's Exhibit C – A history and business plan of the AOF.

Petitioner's Exhibit D – A copy of a letter from the Internal Revenue Service recognizing the exemption of the AOF and subordinate entities under Section 501 (c)(3) of the Internal Revenue Code and statement of AOF adding Willowbrook Affordable Housing Corp.

Petitioner's Exhibit E – A copy of Articles of Incorporation of Willowbrook Affordable Housing Corp.

Petitioner's Exhibit F – A copy of Bylaws of Willowbrook Affordable Housing Corp.



Petitioner's Exhibit G – A copy of Agreement of Purchase and Sale dated June 12, 1996, by and between Willowbrook Affordable Housing Corp. and Willowbrook Park, L.P.

Petitioner's Exhibit H – A copy of Special Warranty Deed dated September 25, 1996, from Willowbrook Park, L.P. to Willowbrook Affordable Housing Corp.

Petitioner's Exhibit I – A copy of Purchase Money Promissory Note dated September 25, 1996, by Willowbrook Affordable Housing Corp. in favor of Willowbrook Park, L.P. in the amount of \$700,000.

Petitioner's Exhibit J – A copy of Purchase Money Promissory Note dated September 25, 1996, by Willowbrook Affordable Housing Corp. in favor of Willowbrook Park, L.P. in the amount of \$300,000.

Petitioner's Exhibit K – A copy of a Mortgage Note dated August 1, 1996, by Willowbrook Affordable Housing Corp. in favor of the City of Indianapolis, Indiana in the amount of \$16,880,000.

Petitioner's Exhibit L – A copy of Trust Indenture by and among the City of Indianapolis, Indiana, First Commercial Trust Company, National Association and People's Bank & Trust Company.

Petitioner's Exhibit M – A copy of Opinion letter dated September 25, 1996, issued by Ice Miller Donadio & Ryan to Standard & Poor's Rating Services and Powell Goldstein Frazer and Murphy.

Petitioner's Exhibit N – Opinion letter dated September 25, 1996, issued by Ice Miller Donadio & Ryan to City of Indianapolis, First Commercial Trust Company, National Association, Peoples Band & Trust Company, and Miller & Schroeder Financial, Inc.

Petitioner's Exhibit O – A copy of Supplemental Opinion letter dated October 2, 1996, issued by Ice Miller Donadio & Ryan to City of Indianapolis, Standard & Poor's Rating Services, Willowbrook Affordable Housing Corp., Powell Goldstein Fraser & Murphy, First Commercial Trust Company, National Association, Peoples Bank & Trust Company, and Miller & Schroeder Financial, Inc.

Petitioner's Exhibit P – A copy of Land Use Restriction Agreement by and among the City of Indianapolis, Indiana, Willowbrook Affordable Housing Corp., First Commercial trust Company, National Association and People's Bank & Trust Company.

Petitioner's Exhibit Q – A copy of Certificates of Continuing Program compliance for 2000 under Land Use Restriction Agreement.

Petitioner's Exhibit R – A copy of Pilot Agreement by and between the Consolidated City of Indianapolis, Indiana, by and through its Department of Metropolitan Development and Willowbrook Affordable Housing Corp.

Petitioner's Exhibit S – A copy of Financial Statements for Willowbrook Affordable Housing Corp. as of December 31, 2000.

Petitioner's Exhibit T – A copy of a map of Willowbrook Park Apartments.

Petitioner's Exhibit U – A copy of Rent Roll Report for Willowbrook Affordable Housing Corp. dated March 25, 2000.

Petitioner's Exhibit V – A copy of Income guidelines for Willowbrook Affordable Housing Corp. for 2000.

Petitioner's Exhibit W – A copy of Application for Property Tax Exemption, Form 136, filed by Willowbrook Affordable Housing Corp. for the March 1, 1997, assessment date and file stamped May 14, 1997.

Petitioner's Exhibit X – A copy of Action by Marion County Board of Review, Form 120, dated July 25, 1997, issued by the Marion County Board of Review to Willowbrook Affordable Housing Corp. for parcel numbers 8050692 and 8050688.

Petitioner's Exhibit Y – Petition to the State for review of exemption Form 132, filed by Willowbrook Affordable Housing Corp. on August 19, 1997.

Petitioner's Exhibit Z – A copy of Application for Property Tax Exemption, Form 136, filed by Willowbrook Affordable Housing Corp. for the March 1, 2000, assessment date and file stamped May 10, 2000.

Petitioner's Exhibit AA – A copy of Notice of Action on Exemption Application, Form 120, dated March 23, 2001, issued by the Marion County Property Tax Assessment Board of Appeals to Willowbrook Affordable Housing Corp. for parcel number 8050688.

Petitioner's Exhibit BB – A copy of Notice of Action on Exemption Application, Form 120, dated March 23, 2001, issued by the Marion County Property Tax Assessment Board of Appeals to Willowbrook Affordable Housing Corp. for parcel number 8050692.

Petitioner's Exhibit CC – A copy of Notice of Action on Exemption Application, Form 120, dated March 23, 2001, issued by the Marion County Property Tax Assessment Board of Appeals to Willowbrook Affordable Housing Corp. for parcel number H131141.

Petitioner's Exhibit DD – Petition to the State for Review of Exemption Form 132, filed by Willowbrook Affordable Housing Corp. on April 18, 2001, for parcel number 8050688.

Petitioner's Exhibit EE – Petition to the State for Review of Exemption Form 132, filed by Willowbrook Affordable Housing Corp. on April 18, 2001, for parcel number 8050692.

Petitioner's Exhibit FF – Petition to the State for Review of Exemption, Form 132, filed by Willowbrook Affordable Housing Corp. on April 18, 2001, for parcel number H131141.

Petitioner's Exhibit GG - A copy of Rev. Proc. 96-32.

Petitioner's Exhibit HH - A copy of a Memorandum of September 2, 1997, from Bill Waltz to Barton T. Sprunger detailing a Statement of Existing Policy regarding the exemption of low-income housing projects.

(Objected to by the PTABOA. Objection was later sustained and this document was stricken from the record.)

Petitioner's Exhibit II – A copy of the Final Determination, including Findings of Fact and Conclusions of Law, issued by the State on February 2, 2000 for Piedmont-Nantucket Cove, LLC.

Petitioner's Exhibit JJ – A Copy of a Final Determination, including Findings of Fact and Conclusions of Law, issued by the State on July 16, 2001, for Corporation for Community Housing.

Petitioner's Exhibit KK – A Memorandum of Law.

Petitioner's Exhibit LL – A copy of Power of Attorney.

14. At the hearing, for the first time, the Petitioner presented Petitioner's Exhibit MM – A copy of Form 103, Business Tangible Personal Property Assessment Return dated June 11, 1997.

15. At the hearing the Respondent submitted the following exhibits:

Respondent's Exhibit A – A copy of IC §6-1.1-10-16.

Respondent's Exhibit B - A copy of IC §6-1.1-10-16.7.

16. Mr. Seiwert objected to the admission of Petitioner's Exhibit HH. He contends the Memorandum specifically states it may not be cited as precedent in either administrative or judicial proceedings. The objection was noted for the record and is now sustained as this letter has no probative value and the author clearly states in the last paragraph "This statement represents the current view of the State Board on the issue presented. It is not a ruling to any specific taxpayer, *nor may it be cited as precedent in either administrative or judicial proceedings.*" (Emphasis added).

17. On October 5, 2001 the State received Petitioner's Post-Hearing Memorandum. The Memorandum is labeled Petitioner's Exhibit NN and entered as evidence.
18. On October 12, 2001 the State received Respondent's Post-Hearing Memorandum. The Memorandum is labeled Respondent's Exhibit C and entered as evidence.
19. Willowbrook is seeking exemption from property taxation for the assessment year 1997 with taxes due and payable in 1998. Willowbrook is also seeking exemption for the assessment year 2000 with taxes due and payable in 2001. Willowbrook is claiming 100% of the improvements and personal property, and 100% of 15 acres of the land as exempt.
20. Regarding the 1997 assessment year the PTABOA granted twenty eight percent (28%) exemption for the portion of the property used by the elderly and disabled. The County Auditor's Statement on the Form 132 indicates no personal property assessed for March 1, 1997.
21. Regarding the 2000 assessment year the PTABOA determined the land, improvements and personal property one hundred percent (100%) taxable.
22. The real and personal property subject to this appeal is located at 4803 Roundlake Road, Indianapolis, Indiana. Willowbrook consists of three hundred eighty five (385) units in twenty-nine (29) buildings. The property includes a lake and a clubhouse that is used as a management office. There is a swimming pool, playground and basketball area for use of the residents. (Collins testimony.)

23. Willowbrook Affordable Housing Corporation (Willowbrook) was incorporated on September 17, 1996 as a nonprofit corporation organized under the laws of the State of Indiana. Willowbrook is a subordinate of the American Opportunity Foundation, Inc., (AOF) a Georgia nonprofit corporation. AOF is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code and has received a group exemption as a central organization whose subordinates are recognized as exempt from federal income tax under Section 501(c)(3). A Board of Trustees that is appointed by AOF governs Willowbrook. Willowbrook was organized to acquire and operate an apartment complex for low-income, elderly and/or mentally or physically disabled persons or families. (Petitioner's Exhibit A3-10 and Kennedy testimony.)
  
24. In September 1996, the City of Indianapolis, Indiana, issued its Economic Development Revenue Bonds in the aggregate principal amount of \$16,880,000 to finance the acquisition of a multifamily apartment complex. In September the City of Indianapolis entered into a Trust Indenture with First Commercial Trust Company, National Association, and Peoples Bank & Trust Company. Pursuant to the Indenture the City of Indianapolis entered into a Loan Agreement with Willowbrook for a secured nonrecourse loan of \$16,880,000 to provide permanent financing for the acquisition of a multifamily apartment complex. (Kennedy testimony and Petitioner's Exhibit A3-10.)
  
25. In September 1996 Willowbrook used the proceeds from the Loan Agreement to finance the acquisition and rehabilitation of the 385-unit Willowbrook Park Apartments, a multifamily housing complex. A special warranty deed, which conveys title of the Willowbrook Park Apartments to the Willowbrook Affordable Housing Corp., was executed on September 25, 1996. (Petitioner's Exhibit A3-10 and H)



26. In order to maintain the tax-exempt status of certain Bonds, the Regulatory Agreement in connection with the Bonds (Land Use Restriction Agreement) requires at least forty percent (40%) of the units in the apartment complex to be leased or rented or available for lease or rental to Low-Income Tenants on a continuous basis. Low-Income tenants are those individuals whose income is sixty percent (60%) or less of the area median gross income within the meaning of Section 8(f)(3) of the United States Housing Act of 1937, as amended. (Petitioner's Exhibit A3-10 and P)
  
27. To induce the City of Indianapolis to finance the acquisition and rehabilitation of the property, Willowbrook entered into a pilot agreement with the City of Indianapolis. Pursuant to the agreement Willowbrook agrees to make payments in lieu of the lost real estate taxes presuming Willowbrook is exempt from the requirement to pay real estates taxes. (Kennedy testimony.)
  
28. The purchase of Willowbrook was financed principally through tax-exempt bond financing. In addition there are two (2) promissory notes, which Willowbrook provided to the previous owner. One note is in the amount of \$700,000 and the second note is in the amount of \$300,000. (Kennedy testimony and Petitioner's Exhibits I and J.)
  
29. Willowbrook operates under the guidelines of revenue procedure 96-32, which sets forth a safe harbor under which organizations that provide low-income housing will be considered charitable as described in § 501(c)(3) of the Internal Revenue code. An organization will be considered charitable as described in § 501(c)(3) if it satisfies the following requirements:

- (1) The organization establishes for each project that (a) at least 75 percent of the units are occupied by residents that qualify as low-income; and (b) either at least 20 percent of the units are occupied by residents that also meet the very low-income limit for the area or 40 percent of the units are occupied by residents that also do not exceed 120 percent of the area's very low income limit. Up to 25 percent of the units may be provided at market rates to persons who have incomes in excess of the low-income limit.
- (2) The project is actually occupied by poor and distressed residents.
- (3) The housing is affordable to the charitable beneficiaries.
- (4) If a project consists of multiple buildings and each building does not separately meet the requirements of sections 3.01(1), (2), and (3), then the buildings must share the same grounds.

(Kennedy testimony and Petitioner's Exhibit GG.)

30. Willowbrook has operated in compliance with the safe harbors in revenue procedure 96-32. Willowbrook is allowed to have twenty-five percent (25%) of the units over the safe harbor limit and they have only eight percent (8%) over the safe harbor limit. Ninety two percent (92%) of the current residents are below the safe harbor guidelines. (Higgenbotham and Collins testimony.)
31. Flarity & Collins, Inc. is the management company for the Willowbrook property. The manager is responsible for compliance with the land use restriction agreement as well as compliance with maintaining

Willowbrook's tax-exempt status. The management company collects rents, markets the property, authorizes all purchases through the annual operating budget, monitor's compliance of the income limits of residents and maintains both the interior and exterior of the units along with the grounds and common areas. (Collins testimony.) The management company is compensated in a fixed fee arrangement based on the number of units. They are paid a flat monthly fee regardless of vacancies. (Kennedy testimony.)

32. Willowbrook pays an asset management fee of \$24,766 annually to certain related non-profit entities for management of Willowbrook's assets. Asset management fees of \$24,766 and \$8,598, respectively, were incurred during the year ended December 31, 1997 and the period for inception (September 17, 1996) through December 31, 1996. Additionally, Willowbrook paid fees of \$41,175 during 1997 to the related entities as an overhead reimbursement fee. (Board Exhibit A3-11.)
33. At December 31, 1998, Willowbrook had advanced \$16,500 to an affiliated non-profit corporation (AOF). The advance, which is non-interest bearing, is due on demand. Asset management fees of \$24,217 and \$24,766 respectively, were incurred during the years ended December 31, 1998 and 1997. (Board Exhibit A3-10.)
34. During the year ended December 31, 1999, AOF repaid \$11,500 of the \$16,500 advanced in 1998, leaving a balance of \$5,000 at December 31, 1999. Asset management fees of \$24,906 and \$24,217 respectively, were incurred but not paid during the years ended December 31, 1999 and 1998. (Board Exhibit A3-9)

### **Conclusions of Law**

1. The State is the proper body to hear an appeal of the action of the Board of Review pursuant to Ind. Code § 6-1.1-15-3.

### **Burden in General**

2. The courts have long recognized that in the administrative review process, the State is clothed with quasi-judicial power and the actions of the State are judicial in nature. *Biggs v. Board of Commissioners of Lake County*, 7 Ind. App. 142, 34 N.E. 500 (1893). Thus, the State has the ability to decide the administrative appeal based upon the evidence presented.
3. In reviewing the actions of the County Board (or 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).
4. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128. See also Ind. Code § 4-21.5-2-4(a)(10) (Though the State is exempted from the Indiana Administrative Orders & Procedures Act, it is cited for the proposition that Indiana follows the customary common law rule regarding burden).

5. Where a taxpayer fails to submit evidence that is probative evidence of the error alleged, the State can properly refuse to consider the evidence. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1119 (Ind. Tax 1998)(citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).
6. If the taxpayer were not required to meet his burden of proof at the State administrative level, then the State would be forced to make a case for the taxpayer. Requiring the State to make such a case contradicts established case law. *Phelps Dodge v. State Board of Tax Commissioners*, 705 N.E. 2d 1099 (Ind. Tax 1999); *Whitley, supra*; and *Clark, supra*.
7. 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).
8. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer’s evidence and justify its decision with substantial evidence.
9. If the taxpayer fails to meet his burden of proof at the administrative level, the State does not have to support its decision with substantial evidence if that decision is challenged in court. *Whitley*, 704 N.E. 2d at 1116- 21.

## Constitutional and Statutory Basis for Exemption

10. 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.
11. Article 10, Section 1 of the Constitution is not self-enacting. The Indiana General Assembly must enact legislation granting the exemption. In this appeal, Willowbrook claims exemption under Ind. Code § 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
12. In Indiana, the general rule is that all property in the State is subject to property taxation. Ind. Code § 6-1.1-2-1.
13. 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).
14. Strict construction construes exemption from the concept of the taxpayer citizen. 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.

15. 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)).
16. 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).
17. As a condition precedent to being granted an exemption under the charitable or educational purpose clause of the statute, 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)).

## Charitable Purpose

18. Indiana courts broadly construe the term “charitable” as the relief of human want and suffering in a manner different from the everyday purposes and activities of man in general. *NAME*, 671 N.E. 2d at 221 (quoting *Indianapolis Elks Bldg. Corp. v. State Board of Tax Commissioners*, 145 Ind. App. 522, 540, 251 N.E. 2d 673, 683 (Ind. App. 1969)).
  
19. “Charity” is not defined by statute, and the Tax Court looked to *Black’s Law Dictionary* to find the plain, ordinary, and usual meaning of “charity”; namely:

a gift for, or institution engaged in, public benevolent purposes. [It is a]n attempt in good faith, spiritually, physically, intellectually, socially, and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources and without hope or expectation, if not with positive abnegation, of gain or profit by donor or by instrumentality of charity.

*Raintree Friends*, 667 N.E. 2d at 813 - 14 (quoting *Black’s Law Dictionary*, 213 (5<sup>th</sup> ed. 1979)).
  
20. Plainly, “charity” is not confined to relief for the destitute. It may be limited to one sex, church, city, or confraternity. *City of Indianapolis v. The Grand Master, etc. of the Grand Lodge of Indiana*, 25 Ind. 518, 522-23 (1865).
  
21. It is equally clear that “charity” must confer benefit upon the public at large or relieve the government of some of an obligation that it would otherwise be required to fill. *NAME*, 671 N.E. 2d at 221; *Foursquare Tabernacle*, 550 N.E. 2d at 854; *St. Mary’s Medical Center*, 534 N.E. 2d at 279. Relieving



the government from an obligation that it would otherwise be required to fill can be seen as a benefit to the public at large.

**Does Willowbrook qualify for property tax exemption?**

**[Conclusions regarding Willowbrook’s qualifications for a property tax exemption and, if qualified, how much the exemption should be.]**

22. Willowbrook claims a charitable exemption pursuant to Ind. Code § 6-1.1-10-16. To qualify for the requested exemption the Petitioner must show that the property in question is “owned, occupied, and used by a person for \* \* \* charitable purposes.” See Section 16. (a) (c) and (e).
23. Willowbrook has presented evidence that it is a nonprofit organization recognized as exempt from federal income tax under Section 501(c) (3) of the Internal Revenue Code.
24. This determination is influenced by the fact that the PTABOA did not dispute that Willowbrook is a charitable organization sufficient to satisfy the “charitable ownership” test.
25. The next showing to be made is that the property is occupied for charitable purposes. Willowbrook claims to occupy this property to provide low-income housing for people in need of help. The PTABOA does not dispute Willowbrook’s claim.
26. The State has previously recognized that the providing of low-income housing may, under particular circumstances, qualify as a charitable purpose as it relieves the poor and distressed by providing them one of life’s basic necessities and it relieves the government of some of its obligation to provide such housing to the needy. See *Piedmont-Nantucket*

*Cove, LLC v. Marion County PTABOA*, Petition number 49-500-98-2-8-00006, Final Determination issued 2/2/2000 and *Corporation for Community Housing v. Allen County PTABOA*, Petition number 02-072-99-2-8-00201, Final Determination issued 7/16/2001.

27. The need or demand for low-income housing in a particular market, and a demonstrated difference between that particular market's rent rate and the actual rent caps applicable to the subject property's tenants, may be relevant factors, but are not in dispute in this matter.
28. The test that is in dispute between the parties is whether Willowbrook's **predominant** use of the property in question should be classified as charitable.
29. Pursuant to Ind. Code § 6-1.1-10-36.3(a) "**\* \* \*** 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".
30. In determining whether property qualifies for tax exemption, predominant and primary use of property is controlling. See *NAME*, 671 N.E.2d at 221.
31. While the PTABOA does not dispute the Petitioner's position that providing low-income housing is a charitable purpose, it takes the position that providing low-income housing is not the **predominant** use of the property in dispute.

32. The Petitioner admits that all the apartments at Willowbrook are not rented to tenants who qualify as “low-income” as some apartments are rented at “market rate”.
33. The overall use of the property must be carefully examined to determine whether the predominant use of the apartments is for market value rentals or for rentals reserved for low-income tenants.
34. The PTABOA bases its assertion that the predominant use of the apartment complex is not charitable by alluding to a land-use restriction described in finding of fact ¶ 26. That land use restriction dealt with the bonds used to purchase the property in question. The restriction specified that in order to maintain tax-exempt status for certain bonds, at least forty percent (40%) of the units in the complex must be leased to tenants whose income is **sixty percent (60%) or less of the area median gross income.** (Emphasis added).
35. The PTABOA argument would be persuasive if no other restrictions were placed on the Petitioner, if the Petitioner indeed did rent more than fifty percent (50%) of its units at market rate, and if tenants whose income was greater than sixty percent (60%) of the area median gross income were considered to be ineligible for low-income classification. However, the Petitioner presented evidence that contradicts each of these points.
36. In addition to the land use restriction discussed above, Willowbrook is also restricted by the terms of revenue procedure 96-32 which is discussed in detail in finding of fact ¶ 29. This revenue procedure provides what is commonly alluded to as a “safe harbor” under which organizations providing low-income housing will remain qualified as a § 501(c)(3) corporation. This safe harbor provision has a number of restrictions, the ones on point being the requirement to rent at least seventy-five percent

(75%) of the available units to low-income tenants and the authority to rent no more than twenty-five percent (25%) of the available units to tenants above the low-income threshold at market rates. Low-income is defined in this revenue procedure as no more than one hundred twenty percent (120%) of the areas very low-income limit.

37. The Petitioner's post-hearing brief, as well as testimony by its officers and various exhibits presented as evidence, indicate that somewhere between 88% and 92% of **occupied** units are rented to low-income qualifiers. This leaves between 8% and 12% being rented at market rate.
38. Finally, no evidence was presented to show that any tenant whose income was greater than sixty percent (60%) of the area median gross income was ineligible for low-income housing and must be charged market rate. The standard in the revenue procedure appears to be eighty percent (80%) of the area median gross income.
39. Based on the above conclusions, it is clear that the predominant use of Willowbrook's property has been and is the providing of housing for qualified low-income tenants. This being so, Willowbrook qualifies for a charitable property tax exemption pursuant to Ind. Code § 6-1.1-10-16.

**What should be the amount of Willowbrook's exemption?**

40. The current position of the State regarding this issue was reflected in its determination of a factually similar situation in *Indiana Affordable Housing, Inc. v. Marion County Board of Tax Review (PTABOA)*, Petition number 49-700-00-2-8-00002, published March 12, 2002.

41. In *Affordable Housing* the Petitioner had claimed a 100% exemption for low-income housing and the PTABOA had offered 75% based on the fact that the Petitioner rented 25% of its apartments at market rate. The State, citing an Indiana Tax Court decision captioned *New Castle Lodge #147, Loyal Order of Moose, Inc. v. State Board of Tax Commissioners*, 733 N.E.2d 36 (Ind. Tax 2000), applied the predominant use test recognized by Tax Court when it found “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 exemption allowed \* \* \*.” *Id* at 36.<sup>1</sup>
42. In applying the statutory predominant use test recognized in *Moose Lodge*, the amount of the exemption should be determined by looking to the percentage of charitable use (i.e. the percentage of units used by or reserved for qualified low-income tenants.) Based on the testimony of Petitioner’s officers, Petitioner’s evidence on occupancy, and Petitioner’s post-hearing brief, between 88% and 92% of the units are occupied by low income tenants.
43. However, the PTABOA correctly points-out that a large number of vacancies exist at Willowbrook. The vacancy rate fluctuated in the year 2000. At the beginning of that year approximately 259 of 385 units were rented to low-income tenants (67.3%). By years end, only 181 of 385 units were rented to low-income tenants (47%). Since the total percentage of units occupied by low-income tenants is about 88%, Willowbrook had a very large number of vacant units in 2000 and that number of vacancies increased greatly during the course of that year.

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<sup>1</sup> *Moose Lodge* is currently under appeal to the Indiana Supreme Court on the issue of whether the Taxpayer’s use was one that was predominately charitable. In the instant matter, it has been determined that the Petitioner’s use is predominately charitable.

44. Based on the large number of vacancies and the Petitioner's announced intention to abide by the "safe harbor" requirement that 75% of the rented units be held by qualified low-income tenants, it follows that the Petitioner will attempt to rent units at market rate up to the allowable 25% of rented units.
45. Accordingly, the State grants an exemption for Tax Year 2000 of seventy five percent (75%) of improvements and personal property and seventy five percent (75%) of land not to exceed fifteen (15) acres.
46. In regard to Tax Year 1997, the Petitioner did not present vacancy and rental rate figures to the State. Therefore, the State will assume that a large number of vacancies existed in that year as well and, applying the same logic as used above, grants a seventy five (75%) exemption for improvements and a seventy five (75%) exemption for land not to exceed fifteen (15) acres.

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.

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Chairman, Indiana Board of Tax Review