

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

REPRESENTATIVES FOR RESPONDENT:
Marilyn S. Meighen, Meighen & Associates, P.C.

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Jamestown Homes of	)	Petition Nos:	71-022-05-2-8-00030
Mishawaka, Inc.	)		71-022-05-2-8-00031
)		
Petitioner	)	Parcels:	27-38180-6514;
	)		27-1001-0001; and
v.	)		Personal Property
)		
St. Joseph County Property Tax	)	County:	St. Joseph
Assessment Board of Appeals	)	Township:	Penn
)		
Respondent.)		
	)	Assessment Year:	2005

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

January 7, 2008

FINAL DETERMINATION

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUES

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

PROCEDURAL HISTORY

2. Mr. James Beatty, Landman & Beatty, on behalf of Jamestown Homes of Mishawaka, Inc. (Jamestown Homes) filed Applications for Property Tax Exemption (Form 136) for the 2005 assessment year on April 27, 2005. The St. Joseph County Property Tax Assessment Board of Appeals (PTABOA) issued its determinations (Form 120) denying property tax exemptions and finding the subject properties to be 100% taxable on December 15, 2005.
3. Pursuant to Ind. Code § 6-1.1-11-7, James Beatty, on behalf of Jamestown Homes, timely filed Form 132 petitions to the Indiana Board of Tax Review for Review of Exemption, on January 9, 2006, petitioning the Board to conduct an administrative review of the above petitions.

HEARING FACTS AND OTHER MATTERS OF RECORD

4. On January 17, 2006, Jamestown Homes filed a “Motion for Summary Judgment,” “Petitioner’s Memorandum in Support of Summary Judgment” and “Designation of Evidence.” On April 13, 2006, Marilyn S. Meighen, on behalf of the St. Joseph County PTABOA, filed its “Brief in Support of the St. Joseph County PTABOA’s Denial of Property Tax Exemption,” and “St. Joseph County PTABOA’s Cross-Motion for Summary Judgment.” On May 1, 2006, the Petitioner submitted its “Petitioner’s Reply Memorandum.” On July 21, 2006, the Petitioner submitted a “Supplemental Designation of Evidence.”

5. Pursuant to Ind. Code § 6-1.1-15-4 and § 6-1.5-4-1, the duly designated Administrative Law Judge (the ALJ), Carol Comer, held a hearing on the Petitioner's motion on July 27, 2006, in Indianapolis, Indiana.

6. The following persons presented testimony at the hearing:

For the Petitioner:

Jessica Findley, Landman & Beatty
James Beatty, Landman & Beatty

For the Respondent:

Marilyn S. Meighen, Meighen & Associates, P.C.

7. The Petitioner presented the following exhibits:

Petitioner Exhibit 1 –	Petition to the Indiana Board of Tax Review for Review of Exemption, Form 132 for Petition No. 71-022-05-2-8-00031, dated January 9, 2006,
Petitioner Exhibit 1-A –	Notice of Action on Exemption Application, Form 120, for Parcel No. 27-1001-001, dated December 15, 2005,
Petitioner Exhibit 1-B –	Application for Property Tax Exemption, Form 136, dated April 27, 2005,
Petitioner Exhibit 1-C –	Articles of Incorporation of Jamestown Homes of Mishawaka, Inc., dated September 2, 1965,
Petitioner Exhibit 1-D –	Bylaws of Jamestown Homes of Mishawaka, Inc.,
Petitioner Exhibit 1-E –	Jamestown Homes' Balance Sheets and Statements of Profit and Loss for 2001 through 2005,
Petitioner Exhibit 1-F –	Jamestown Homes' property record card for Parcel No. 27-1001-0001,
Petitioner Exhibit 1-G –	Regulatory Agreement between Jamestown Homes and the Federal Housing Commission dated November 4, 1965,
Petitioner Exhibit 1-H –	Jamestown Homes' Occupancy Agreement,
Petitioner Exhibit 1-I –	Jamestown Homes' Member Handbook, Rules and Regulations, dated November 1, 2004.
Petitioner Exhibit 2 –	Petition to the Indiana Board of Tax Review for Review of Exemption, Form 132 for Petition No. 71-022-05-2-8-00030, dated January 9, 2006,

Petitioner Exhibit 2-A –	Notice of Action on Exemption Application, Form 120, for Parcel No. 27-38180-6514, dated December 15, 2005,
Petitioner Exhibit 2-B –	Application for Property Tax Exemption, Form 136, dated April 27, 2005,
Petitioner Exhibit 2-C –	Articles of Incorporation of Jamestown Homes of Mishawaka, Inc., dated September 2, 1965,
Petitioner Exhibit 2-D –	Bylaws of Jamestown Homes of Mishawaka, Inc.,
Petitioner Exhibit 2-E –	Jamestown Homes’ Balance Sheets and Statements of Profit and Loss for 2001 through 2005,
Petitioner Exhibit 2-F –	Jamestown Homes’ property record card for Parcel No. 27-1001-001,
Petitioner Exhibit 2-G –	Regulatory Agreement between Jamestown Homes and the Federal Housing Commission dated November 4, 1965,
Petitioner Exhibit 2-H –	Jamestown Homes’ Occupancy Agreement,
Petitioner Exhibit 2-I –	Jamestown Homes’ Member Handbook, Rules and Regulations, dated November 1, 2004,
Petitioner Exhibit 3 –	Jamestown Homes’ rent rolls, dated March 1, 2005,
Petitioner Exhibit 5 –	Rent Comparability Study on Carriage House Mishawaka I, prepared by Governmental Appraisal Services, Inc., dated November 17, 2004,
Petitioner Exhibit 6 –	U.S. Department of Housing and Urban Development Rent Schedule, Low Rent Housing, (Form 92458) for Jamestown Homes of Mishawaka, dated March 1, 2005,
Petitioner Exhibit A –	Copy of the U.S. Department of Housing and Urban Development’s Budget Worksheet.

8. The Respondent presented the following exhibits:

Respondent Exhibit A –	Valuation of Subsidized Housing: Types and Methods of Valuations, by Amy R. Siebel, International Association of Assessing Officials (2003), pages 143 – 147,
Respondent Exhibit B –	Department of Housing and Urban Development’s 2005 Income Limits for Indiana.

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

Board Exhibit A – Form 132 Petitions with attachments.

10. The subject property is a multi-family apartment complex located at 2802 Jamestown Court in the City of Mishawaka, Penn Township, in St. Joseph County, Indiana. The property consists of twenty-four buildings with 160 rental units located on two parcels of land totaling 12.878 acres.
11. The ALJ did not conduct an on-site visit of the property.
12. For 2005, the St. Joseph County PTABOA denied the Petitioner's request for an exemption and determined the land, improvements and personal property of the two parcels to be 100% taxable.
13. For 2005, the Petitioner requested the land, improvements and personal property of the parcels be 100% tax exempt.

JURISDICTIONAL FRAMEWORK

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

BASIS OF EXEMPTION AND BURDEN

15. The General Assembly may exempt property used for municipal, educational, literary, scientific, religious, or charitable purposes from property taxation. Ind. Const., Art. 10 § 1. This provision is not self-enacting. The General Assembly must enact legislation granting an exemption.

16. All property receives protection, security, and services from the government, such as fire and police protection, and public schools. These governmental services carry with them a corresponding obligation of pecuniary support in the form of taxation. When property is exempt from taxation, the effect is to shift the amount of taxes it would have paid to other parcels that are not exempt. *See generally, National Association of Miniature Enthusiasts v. State Board of Tax Commissioners*, 671 N.E.2d 218 (Ind. Tax Ct. 1996).
17. Worthwhile activity or noble purpose alone is not enough. An exemption is justified because it helps accomplish some public purpose. *Miniature Enthusiasts*, 671 N.E.2d 220 (citing *Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*, 550 N.E.2d 850, 854 (Ind. Tax Ct. 1990)).
18. The taxpayer seeking an exemption bears the burden of proving that the property is entitled to the exemption by showing that the property falls specifically within the statutory authority for the exemption. *Indianapolis Osteopathic Hospital, Inc. v. Department of Local Government Finance*, 818 N.E.2d 1009 (Ind. Tax Ct. 2004); *Monarch Steel v. State Board of Tax Commissioners*, 611 N.E.2d 708, 714 (Ind. Tax Ct. 1993); *Indiana Association of Seventh Day Adventists v. State Board of Tax Commissioners*, 512 N.E.2d 936, 938 (Ind. Tax Ct. 1987).

SUMMARY JUDGMENT STANDARD

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

construe all evidence in favor of the non-moving party, and all doubts as to the existence of a material issue of fact must be resolved against the moving party. *See Tibbs v. Grunau Co., Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).

PARTIES' CONTENTIONS

20. The Petitioner contends that it is eligible for a tax exemption pursuant to Ind. Code § 6-1.1-10-16, because its predominant use and charitable purpose is to provide affordable housing and related services to individuals and families with ninety-five percent or less of the area median income. *Findley argument*. The Petitioner further contends that by providing affordable housing to persons with 95% or less of the median area income it relieves the federal government of that burden. *Id.*

21. The Petitioner presented the following evidence and testimony in regard to this issue:
 - a. The Petitioner contends that it is an Indiana non-profit corporation that provides housing on a mutual ownership basis pursuant to Section 221(d)(3) of Title II of the National Housing Act. *Findley argument; Petitioner's Memorandum in Support of Summary Judgment (Memorandum) at 1*. In support of this contention, the Petitioner submitted its Articles of Incorporation and By-Laws. *Petitioner's Exhibits 1-C, 1-D, 2-C and 2-D*. According to the Petitioner's Articles of Incorporation, the Petitioner's purpose is to "(a) provide housing on a mutual ownership basis, in the manner and for the purposes provided in Section 221 (d)(3) of Title II of the National Housing Act, as amended; (b) to construct, operate, maintain and improve, and to buy, own, sell, convey, assign, mortgage or lease any real estate and any personal property necessary or incidental to the provisions of such housing; ... (e) to operate for benevolent, fraternal and social purposes; and (f) to enter into any kind of activity and to perform and carry out contracts of any kind necessary to, or in conjunction with, or incidental to the accomplishment of the non-profit, benevolent, fraternal and social purposes of the corporation." *Petitioner Exhibit 1-C and 2-C*.

- b. The Petitioner argues that it entered into a Regulatory Agreement with the Federal Housing Administration Section of the Housing and Urban Development Department (HUD) in order for it “to receive benefits under Section 221(d)(3) and to pass those benefits to its tenants in the form of below-market rents.” *Memorandum at 7; Petitioner Exhibits 1-G and 2-G.* Pursuant to that agreement, tenancy at the subject property is limited to those persons with incomes at or below 95% of the area median income as defined by HUD (the Below Market Interest Rate income limit or BMIR). *Memorandum at 6.*
- c. The Petitioner further contends that HUD approves a BMIR rent that all tenants must pay. *Memorandum at 6.* The rent is based on the amount needed to operate the project with payments of principal and interest due under a mortgage bearing interest at the rate of 3 percent per annum. *Beatty argument; Petitioner Exhibit 1-G and 2-G.* The rent each tenant pays may not exceed the market rent set for the project. *Memorandum at 6; Findley argument.* The Petitioner argues, however, the phrase “market rent” for Section 221(d)(3) projects is a term of art and may not be the actual “market rent” for comparable unassisted projects. *Id.*
- d. The Petitioner contends that, “[a]s of March 2005, 153 of the 160 units at the subject property were occupied.” *Memorandum at 6.* Only 11 tenants, however, pay market rent. *Id. at 6.* The Petitioner argues these 11 tenants are also receiving a subsidy because the “market rent established by HUD for the Subject Property is less than the true market rent for comparable unassisted projects.” *Id.* According to the Petitioner, a Rent Comparability Study conducted by Governmental Appraisal Services on November 17, 2004, showed comparable unassisted projects in Mishawaka charged \$525 for one-bedroom apartments, \$620 to \$725 for two-bedroom apartments and \$865 for three-bedroom apartments. *Petitioner Exhibit 5.* The Petitioner argues that its March 1, 2005, rent rolls show that the Petitioner received rents and rent subsidies of \$355 for one-bedroom apartments, from \$389 to \$428 for two-bedroom apartments, from \$416 to \$458 for three-bedroom apartments and from \$439 to \$483 for four-

bedroom apartments. *Memorandum at 6; Petitioner Exhibit 3*. Thus, the Petitioner argues, the “market rent” paid by the tenants is not comparable to the “fair market rent” in the Mishawaka area. *Findley argument*.

- e. The Petitioner contends that the Indiana Tax Court established a two-prong test for determining whether a charitable purpose exists. *Memorandum at 4*. According to the Petitioner, “a charitable purpose will generally be found to exist if: 1) there is ‘evidence of relief of human want ... manifested by obviously charitable acts different from the everyday purposes and activities of man in general’; and 2) there is an expectation of a benefit that will inure to the public by the accomplishment of such acts.” *Memorandum at 4; Findley argument* (quoting *Knox County PTABOA v. Grandview Care, Inc.*, 826 N.E.2d 177, 182 (Ind. Tax Ct. 2005)). The Petitioner argues the subject property fulfills both prongs of the charitable purpose test. *Id.* According to the Petitioner, the Tax Court in *College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905 (Ind. Tax Ct. 2006) held that “if [the taxpayer’s] redevelopment efforts were aimed at providing housing for low-income families and individuals, such efforts would provide relief of human want.” *Petitioner’s Reply Memorandum (Reply) at 1 through 2*. Thus, the Petitioner concludes, because it provides low income housing, it relieves the human want of having a safe and affordable place to live for low income persons. *Findley argument*.

- f. The Petitioner contends the Board has also ruled that providing affordable housing for low income persons is a “charitable purpose.” *Memorandum at 5; Findley argument*. The Petitioner cites to Board decisions in support of this contention, including *Greenwood Apartments Incorporated v. Wayne County Property Tax Assessment Board of Appeals*, Petition No. 89-014-02-2-8-00006; *Willowbrook Affordable Housing Corp. v. Marion County PTABOA*, Petition No. 49-800-97-2-8-00083; *Piedmont-Nantucket Cove, LLC and MMA, LLC v. Marion County PTABOA*, Petition No. 49-500-00-2-8-00007; *Hoosier Uplands Economic Development v. Lawrence County PTABOA*, Petition No. 47-012-02-2-8-00002;

Lafayette Neighborhood Housing Services, Inc. v. Tippecanoe County PTABOA, Petition No. 79-001-95-2-8-00007. *Id at 5*. According to the Petitioner, “[i]n the majority of cases decided by the Indiana Board of Tax Review, the issue was not whether providing low-income housing was a charitable purpose, but rather the issues dealt with what percentage of the property should be exempt and whether the property was predominantly used for a charitable purpose.” *Id. at 8*.

- g. In response to the Respondent’s argument that “these apartments do not lessen the government’s burden because it is the federal government who, along with the tenants themselves, shoulder the financial burden of carrying on Jamestown’s business.” *Reply at 3*. The Petitioner contends that the federal government’s participation in providing low income housing relieves state and local governments of the burden to meet the need of providing safe and affordable housing. *Id at 3 and 4*.
- h. The Respondent also argued that Jamestown Homes lessened its cost of operations by receiving a low interest rate mortgage through its participation in Section 221(d)(3) of Title II of the National Housing Act. *Reply at 5*. The Petitioner contends that, while it is paying a low interest rate mortgage, it has also agreed to rent to HUD approved tenants, charge only HUD approved rents, and to submit to HUD audits, inspections, and management reviews and comply with the federal regulations of Section 221(d)(3). *Id.*
- i. Finally, the Petitioner contends that the cases from other jurisdictions cited by the Respondent addressed statutory provisions that are different from Indiana’s charitable exemption and, thus, are not persuasive. *Reply at 6 through 12*. According to the Petitioner, in *Community Action Agency, Inc. v. Board of Equalization of Nez Perce County*, 57 P.3d 793, 796 (Idaho 2002), the court determined that, because the corporation was funded by government subsidies, it was not a charitable corporation. *Reply at 7 and 8*. In *Pittman v. Sarpy County Board of Equalization*, 603 N.W.2d 447, 455 (Neb. 1999), the Nebraska statute

requires the property be owned by a charitable organization. *Id. at 9*. Finally, in *Partnership for Affordable Housing, L.P. v. Board of Review*, 550 N.W.2d 161 (Iowa 1996), the Iowa statute specifically focuses on whether the property is used for a pecuniary profit. *Id. at 10*. The Petitioner argues that these other states' laws differ from Indiana because Indiana law does not focus on the status of the owner, but whether the property claiming exemption is owned, used, and occupied for a charitable purpose. *See College Corner L.P. v. Department of Local Government Finance*, 840 N.E.2d 905, 911 (Ind. Tax Ct. 2006); *Knox County Property Tax Assessment Board of Appeals v. Grandview Care, Inc.*, 826 N.E.2d 177 (Ind. Tax Ct. 2005). *Id. at 9 and 10*.

22. The Respondent contends that the Petitioner is not eligible for a tax exemption because it has not shown that the subject property is owned, occupied, and used for a “charitable purpose.” *Meighen argument*.
23. The Respondent presented the following evidence and testimony in regard to the issue:
 - a. The Respondent contends that granting an exemption to the subject property would be an overly broad, liberal interpretation of Ind. Code § 6-1.1-10-16. *Meighen argument*. According to the Respondent, statutory exemptions are strictly construed against a taxpayer. *Brief in Support of the St. Joseph County PTABOA's Denial of Property Tax Exemption (Brief) at 4*. The Petitioner has the burden to show “that he provides a present benefit to the general public ... sufficient to justify the loss of tax revenue.” *Brief at 5*.
 - b. The Respondent contends that the subject property does not relieve a government burden, as it is the “federal government (taxpayers) who, along with the tenants themselves, shoulder the financial burden of carrying on Jamestown’s business.” *Brief at 1*. According to the Respondent, the Petitioner has merely created a conduit for federal mortgage money and federal rent subsidies. *Brief at 1*. It has not engaged in “charity” in any legal sense. *Id.*

- c. The Respondent argues that the Petitioner's participation in the Section 221(d)(3) program is simply a good business decision. *Brief at 4*. The Petitioner reduced its costs and then passed those savings on to its renters. *Id.* According to the Respondent, being regulated does not make an entity charitable. *Meighen argument*. Many endeavors are heavily regulated. *Id.* Further, despite the restrictions on Section 221(d)(3) properties, the Petitioner did not forfeit its typical landlord rights. *Brief at 3*. Tenants can be evicted for failure to pay rent and additional charges are levied for late payment and returned checks. *Id. at 4*.
- d. The Respondent further argues that the Petitioner's reliance on *College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905, 908 (Ind. Tax 2006) is misplaced. *Brief at 7; Meighen argument*. According to the Respondent, in *College Corner*, a for-profit business and a not-for-profit business built and rehabilitated houses in a blighted historical neighborhood in downtown Indianapolis. *Id. at 8; Meighen argument*. The Tax Court held that the petitioner relieved the burden of the government because there was inherent community benefit in restoring historic areas and the building of sidewalks and alleys. *Id.* The important factor to note in *College Corner*, the Respondent argues, is that the Petitioners there did not seek an indefinite exemption. *Id.* As homes were sold, the tax base increased. *Id.* Here, the Respondent argues, the Petitioner seeks a permanent exemption. *Id.* It does not intend to sell or give away apartments that would result in their return to the tax base. *Id.*
- e. While there is no Indiana case law, the Respondent contends that other jurisdictions have found that federally subsidized housing is not a charitable use of property. *Brief at 9; Meighen argument*. In support of this contention, the Respondent cites to *Pittman v. Sappy County Board of Equalization*, 603 N.W.2d 447 (Neb 1999); *Partnership for Affordable Housing v. Board of Review for the City of Davenport*, 550 N.W.2d 161 (Iowa 1996); *Dow City Senior Citizens Housing, Inc. v. Board of Review of Crawford County*, 230 N.W.2d 497 (Iowa

1975); *Community Action Agency, Inc. v. Board of Equalization of Nez Perce County*, 57 P. 3d 793 (Id. 2002); *Supervisor of Assessments of Baltimore v. Har Sinai West Corporation*, 622 A.2d 786 (Md. App. 1993); *Better Living Services, Inc. v. Balivar County*, 587 So.2d 914 (Miss. 1991); *Oea Senior Citizens, Inc. v. Douglas County*, 185 N.W.2d 464, 470 (Neb 1971); and *Waterbury First Church Housing, Inc. v. Brown*, 367 A.2d 1386 (Conn. 1976). *Brief at 9 – 12.*

- f. Finally, the Respondent contends that the Petitioner seeks to double dip. *Meighen argument*. According to the Respondent, the Petitioner seeks a tax exemption and, yet, is also getting money from the government to do what others do – lease apartments. *Id.*

ANALYSIS

24. Ind. Code § 6-1.1-10-16 (a) states that “all or part of a building is exempt from property taxation if it is owned, occupied, and used by a person for educational, literary, scientific, religious, or charitable purposes.” The Petitioner contends the subject property is multi-family apartment complex whose units are leased to low to moderate income families and individuals at below market rents pursuant to an agreement with HUD. Thus, the Petitioner contends, the subject property is operated for charitable purposes and, therefore, should be exempt from property taxation.
25. The Petitioner operates the property pursuant to the mortgage subsidy program promulgated at § 221(d)(3) of Title II of the Fair Housing Act of 1968. Section 221(d)(3) is an incentive program designed to provide subsidies to encourage investment in affordable housing. *Relational Contracts in the Privatization of Social Welfare*, 24 Yale Law and Policy Review 236, 291-292, Spring 2006. For sponsors of affordable housing under Section 221(d)(3), HUD provides monthly payments sufficient to lower the effective interest rate on project mortgages to three percent (3%). *Petitioner Exhibit 1-G and 2-G; Beatty argument; Id.*

26. The Petitioner argues the Board has already decided that low income housing is a “charitable purpose” and cites to several older determinations in support of its contention. *See e.g. Lafayette Neighborhood Housing Services, Inc. v. Tippecanoe County Property Tax Assessment Board of Appeals*, Petition No. 79-001-95-2-8-00007 (1995 tax year); *Willowbrook Affordable Housing Corporation v. Marion County Property Tax Assessment Board of Appeals*, Petition No. 49-800-97-2-8-00083 (1997 tax year); *Piedmont-Nantucket Cove, LLC v. Marion County Property Tax Assessment Board of Appeals*, Petition No. 49-500-00-2-8-00007 *et al.* (2000 tax year).
27. The Board’s more recent rulings, however, have found low income housing not to be an exempt purpose. *See East Central Reinvestment Corporation v. Delaware County Property Tax Assessment Board of Appeals*, Petition No. 18-003-04-2-8-10007 *et al* (2004 tax year) (“If there is a public benefit based on this low-income housing, Petitioner failed to prove it with substantial, probative evidence. The conclusory testimony about ‘below market rents’ and the other positive aspects about how Petitioner’s operations improve the quality of life in the neighborhood are not probative evidence.”) ¶ 34; *Grandview Care, Inc. v. Perry County Property Tax Board of Appeals*, Petition No. 62-008-03-2-8-00003 (2003 tax year) (“Petitioner failed to establish that providing housing for low income or disabled tenants necessarily constitutes a charitable use.”) ¶¶ 35, 36. Further, while the Tax Court has granted economic obsolescence to low income housing projects in various cases,¹ the parties have pointed to no Indiana cases addressing an exemption application for a low income housing project.

¹ *See, e.g. Pedcor Investments-1990-XIII, L.P. v. State Board of Tax Commissioners*, 715 N.E.2d 432, 437 (Ind. Tax Ct. 1999); *Meadowbrook North Apartments v. Conner*, 854 N.E.2d 950 (Ind. Tax Ct. 2005); and *Hometowne Associates, LP v. Maley*, 839 N.E.2d 269 (Ind. Tax Ct. 2005).

Charitable Use

28. The taxpayer bears the burden of proving that it is entitled to the exemption it seeks. See *New Castle Lodge #147, Loyal Order of Moose, Inc. v. State Board of Tax Commissioners*, 733 N.E. 2d 36, 38 (Ind. Tax Ct. 2000), *aff'd*, 765 N.E.2d 1257 (Ind. 2002). Despite this, “the term ‘charitable purpose’ is to be defined and understood in its broadest constitutional sense.” *Knox County Property Tax Assessment Board of Appeals v. Grandview Care, Inc.*, 826 N.E.2d 177, 182 (Ind. Tax Ct. 2005) (citing *Indianapolis Elks Bldg. v. State Board of Tax Commissioners*, 145 Ind. App. 522, 251 N.E.2d 673, 682 (1969)). A charitable purpose will generally be found to exist if: (1) there is evidence of relief of human want manifested by obviously charitable acts different from the everyday purposes and activities of man in general; and (2) there is an expectation that a benefit will inure to the general public sufficient to justify the loss of tax revenue. *College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905, 908 (Ind. Tax Ct. 2006).
29. “The declaration of charity by an organization does not necessarily mean that the dominant use of the organization’s property is of the form of charity which the law recognizes as entitling an organization to tax exemption.” *Sahara Grotto v. State Board of Tax Commissioners*, 261 N.E.2d 873, 878 (1970). In order to qualify for an exemption, the owner must submit probative evidence that the property is owned for an exempt purpose, used for an exempt purpose, and occupied for an exempt purpose. Once these three elements are met, the property can be exempt from taxation. *Grandview Care, Inc.*, 826 N.E.2d 177, 183 (Ind. Tax Ct. 2005).
30. Here the Petitioner entered into a contractual arrangement with the federal government to provide affordable housing in return for consideration that included a federally insured mortgage and a subsidized mortgage interest rate. The federal government offered the program as an incentive to build affordable housing in which the Petitioner elected to participate. At the end of the mortgage period, the Petitioner is the owner of an apartment building that it can rent without any restriction. In addition, the Petitioner

receives rent subsidies. Thus, the Petitioner receives a set rental rate from a secure source for each of its apartments and, at the end of the mortgage period, the Petitioner has obtained an asset that it may not otherwise have been able to afford to finance or build.

31. The Respondent argues if the provisions of low income housing were “charitable” the Petitioner would need no federal incentives to operate such a facility. In support of this argument, the Respondent cited caselaw from multiple jurisdictions.
32. In *Pittman v. Sappy County Board of Equalization*, 603 N.W.2d 447 (Neb 1999), the Sisters of Mercy sponsored a low-income housing complex operated under HUD’s Section 8 and Section 236 programs. The Nebraska Supreme Court reversed the agency’s grant of exemption holding that “low income housing is not a charitable use of property.” *See also Oea Senior Citizens, Inc. v. Douglas County*, 185 N.W.2d 464, 470 (Neb 1971).
33. Similarly, in *Dow City Senior Citizens Housing, Inc. v. Board of Review of Crawford County*, 230 N.W.2d 497 (Iowa 1975), the Iowa Supreme Court denied exemption to low income housing built with a low interest government loan. The Court there held that the “Plaintiff provides no care; it provides housing.” *Id.* at 499. Further, the Court found that the Plaintiff’s rent was “fixed at a level to make it self-sufficient” and the Plaintiff did not provide housing to those unable to pay its charges individually or with assistance from others. *Id.* The Court found that the government, through the FHA loan program, had already assumed a large share of the burden of meeting the need for low-rent housing and that the plaintiff had “not shown that the exemption statute should be applied in its favor to create an additional burden on other property taxpayers in the community.” *Id.* Similarly, in *Partnership for Affordable Housing v. Board of Review for the City of Davenport*, 550 N.W.2d 161 (Iowa 1996), the Iowa Supreme Court denied exemption to a government subsidized housing complex holding that to the extent that any charity was provided, the charity flowed from federal subsidies.

34. Finally, in *Supervisor of Assessments of Baltimore City v. Har Sinai West Corporation*, 622 A.2d 786 (Md. App. 1993), the property at issue was owned by a non-profit corporation, constructed with HUD financing, and was used exclusively for low income housing. The relevant statute exempted property “necessary for and actually used exclusively for a charitable or educational purpose to promote the general welfare of the people of the State.” 622 A.2d at 789. The Court found that Har Sinai West’s facility was not charitable because “the apartment building was funded entirely by federal subsidies and rent paid by tenants.” *Id.* See also, *Community Action Agency, Inc. v. Board of Equalization of Nez Perce County*, 57 P. 3d 793 (Id. 2002) (below market rent insufficient to be considered charitable where apartments built with state assistance and federal loans, or any landlord renting below market could claim to be a charity); *Better Living Services, Inc. v. Balivar County*, 587 So.2d 914 (Miss. 1991); and *Waterbury First Church Housing, Inc. v. Brown*, 367 A.2d 1386 (Conn. 1976).
35. The Petitioner contends that the Respondent’s cases address statutory provisions that are different from Indiana’s charitable exemption and, thus, are not persuasive. *Reply at 6 through 12*. According to the Petitioner, these other states’ laws differ from Indiana because Indiana law does not focus on the status of the owner, but whether the property claiming exemption is owned, used, and occupied for a charitable purpose.
36. In Indiana, “a charitable purpose will generally be found to exist if: 1) there is ‘evidence of relief of human want ... manifested by obviously charitable acts different from the everyday purposes and activities of man in general’; and 2) there is an expectation of a benefit that will inure to the public by the accomplishment of such acts.” *Knox County PTABOA*, 826 N.E.2d at 182. While the Petitioner is correct that the statutes in the cases cited by the Respondent differ in their wording, some of the statutory provisions at issue are sufficiently similar for the court’s analysis to be considered. Further, at their core, each of the cases were analyzing whether government subsidized housing is a charitable act.

37. For example, in Iowa, the relevant exemption statute reads that “All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural and religious institutions and societies solely for their appropriate object, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit.” *Partnership for Affordable Housing, L.P. v. Board of Review*, 550 N.W.2d 161 (Iowa 1996). The Petitioner argues that the Iowa statute specifically focuses on whether the property is used for a pecuniary profit. *Reply at 10*. One of the factors the Iowa court analyzed, however, was whether the property provided charitable benefits to the community.² 550 N.W.2d at 165. This analysis does not differ substantially from the Indiana requirement that “there is an expectation of a benefit that will inure to the public by the accomplishment of such acts.” In that case, the Court found that any charity from government-subsidized low income housing “flows from federal subsidies” not the petitioner. *Id.* at 168. The Iowa Court also found significant the fact that the petitioner presented no evidence that the petitioner “leased its units to persons who could not pay the subsidized rental fee or that [the petitioner] would waive rent for lessees who became unable to pay.” *Id.* at 165. According to the Court, “A truly charitable institution will make concessions on fees to residents unable to pay them.” *Id.*³
38. In *In the Matter of the Appeal of Housing Southwest, Inc.*, 913 P.2d 68 (Idaho 1996), a non-profit corporation owned a six-unit low-income housing facility. The rent charged to each tenant was based on their income and subsidies from the Farm Home Administration paid the difference between the market rate and the rent paid by the

² “[T]o determine whether Partnership’s operation of Courtland qualifies as ‘charitable’ under Iowa Code section 427.1(9), we consider several factors including: (a) the establishment and operation of Courtland; (b) the policies and practices relating to admission and retention of residents at Courtland; (c) the community support for Courtland; and (d) the benefits provided to the community by Partnership’s operation of Courtland.” 550 N.W.2d at 164.

³ Similarly, in Nebraska, property owned and used exclusively for charitable purposes is exempt if it is not owned or used for financial gain. *Oea Senior Citizens, Inc. v. Douglas County*, 185 N.W.2d 464, 467 (Neb 1971). The Petitioner argues that Nebraska requires ownership by a charitable association. *Reply at 9*. In *Oea Senior Citizens*, however, the Nebraska Supreme Court made clear the dominant use of the property controlled whether a property was exempt. 185 N.W.2d at 468 (“It is neither the incidental use of the property nor the character of the owner which controls. Rather it is the primary and the dominant use of the property which is controlling in determining whether the property is exempt from taxation.”).

tenant. The Idaho Supreme Court held that “Housing Southwest does not perform a function which might otherwise be an obligation of government, because it provides housing supported by federal tax dollars without private donations.” 913 P.2d at 72. The Court concluded that the Petitioner was not entitled to an exemption because its property merely shifts the tax burden from “one group of taxpayers to another, and the government is not relieved of an obligation it would otherwise have.” *Id.*

39. Similarly in *American Heritage Apartments, Inc. v. Bennett*, 2005 Tenn. App. LEXIS 509, the Tennessee Court of Appeals affirmed the denial of an exemption to the provider of low income housing. In that case, American Heritage purchased a 168-unit apartment facility from the Resolution Trust Corporation as part of RTC’s Affordable Housing Disposition Program. Under the program, in exchange for purchase and rehabilitation loans at low interest rates, American Heritage was required to lease 35% of its units to low and very low income persons for 40 years. The Tennessee Court of Appeals held that “While it is undisputed that AHA leases at least 35% of its units at Park Ridge to low and very low income families at below-market rates, its reason for doing so is not the benevolence of the organization but the fact that such is a condition of the federal government’s low-interest loan to AHA.” 2005 Tenn. App. LEXIS 509 at 15, 16. The Court found that American Heritage “purchased the property at a discount, received a rehabilitation loan to refurbish the property and is compensated for all of the apartments it rents, though some are at a reduced rate.” *Id.* at 16. Thus, the Court concluded, American Heritage “is not providing charitable services, its 501(c)(3) status notwithstanding” and, therefore, was not entitled to an exemption from property taxation. *Id.*

40. Here, while the Petitioner may rent its apartment to moderate and low income individuals and families, it does so as a condition of its agreement with HUD. The property does not relieve a government burden, because it is taxpayers, through federal subsidies, and the tenants themselves that shoulder the financial burden of carrying on Jamestown’s business. Further, tenants can be evicted for failure to pay rent and additional charges are levied for late payment and returned checks.

41. If the Petitioner were offering safe, clean, quality apartments to low income individuals for below market rents without contracting to receive a mortgage subsidy or rent subsidies, the Board may have found the property is used for a charitable purpose. That is not the case before us. In fact, the Petitioner's "Occupancy Agreement" states the "lower Monthly Housing Charge is available because the mortgage on this cooperative is subsidized by the Department of Housing and Urban Development (HUD)." *Petitioner Exhibit 1-H & 2-H*. Noticeably absent is any suggestion that the lower monthly housing charge is due to any charitable purpose or intent of the Petitioner. Here, the general public already supports the program with federal and state tax dollars. The subsidized mortgage allows the Petitioner to charge less for its units than it would have to charge in order to cover its costs. This provides the Petitioner with a competitive advantage that may result in higher occupancy than a similar non-subsidized property could achieve. Further, the Petitioner receives rent subsidies from a stable and secure source and, therefore, may experience fewer late payments or non payment situations than similar non-subsidized complexes.
42. The Petitioner purchased or built the property leveraged by federal tax dollars. The Petitioner is being compensated with rental payments and rent subsidies paid for through local tax dollars. The Petitioner is providing a service it contracted with the federal government to provide. This is not "different from the everyday purposes and activities of man in general." *College Corner*, 840 N.E.2d at 908. The Petitioner, thus, is seeking to "double dip." The Petitioner provides a service it has contracted to provide and is being compensated to provide *and* seeks to claim a "charitable" exemption to avoid paying property taxes. The Petitioner has not advanced any argument that sufficient benefit would inure to the general public to justify the loss of the tax revenue that would result from granting a charitable purpose tax exemption in addition to the mortgage assistance and rent subsidies the property presently receives.

Legislative Purpose

43. Further, we note the legislature specifically addressed the issue of low income housing in a separate grant of exemption. *See* Ind. Code § 6-1.1-10-16.7. Ind. Code § 6-1.1-10-16.7 states that “All or part of real property is exempt from property taxation if (1) the improvements on the real property were constructed, rehabilitated, or acquired for the purpose of providing housing to income eligible persons under the federal low income housing tax credit program under 26 U.S.C. 42,⁴ (2) the real property is subject to an extended use agreement under 26 U.S.C. 42 as administered by the Indiana Housing and Community Development Authority; and (3) the owner of the property has entered into an agreement to make payments in lieu of taxes under Ind. Code § 36-1-8-14.2.” Careful reading of these statutes indicates the legislative intent is to use payments in lieu of taxes (PILOTs) to establish a fund to encourage rehabilitation of affordable housing and to establish programs with resources for affordable housing clientele at the state and local level.
44. When interpreting a statute, the Board must consider not only the objects and purpose of the statute, but also the effects and repercussions of its interpretation. *See Bushong v. Williamson*, 790 N.E.2d 467, 471 (Ind. 2003). Here, if the Board were to interpret the charitable-use exemption statute to include low-income housing providers operating under contract with HUD, the PILOT statutes would be nullified. Project owners could merely claim a property tax exemption for charitable use, and side step the “payment in lieu of taxes” requirement that the state legislature designed to benefit low income families. This cannot be the legislative intent of Ind. Code §6-1.1-10-16(a).
45. The Petitioner’s rental restrictions may not be without effect. The market value-in-use of the property, however, should address such obsolescence. *See Pedcor Investments-1990-XIII, L.P. v. State Board of Tax Commissioners*, 715 N.E.2d 432, 437 (Ind. Tax Ct. 1999)

⁴ 26 U.S.C §42(g) provides two tests for qualified low income housing, the 20-50 test and the 60-40 test. Under the 20-50 test, a project meets the requirements of the subparagraph if 20 percent or more of the residential units are both rent restricted and occupied by persons whose income is 50 percent or less of the median gross income. Under the 40-60 test, a project meets the requirements of this subparagraph if 40 percent of the residential units are both rent restricted and occupied by individuals whose income is 60 percent or less of area median income.

(To the extent that a taxpayer shows that such restrictions hinder the property's ability to generate income, an obsolescence adjustment may be applied). Here the Petitioner provided no evidence of the market value-in-use of the property to show that its assessed value is incorrect.

46. Nor do we take the position that the provision of low income housing could never be a "charitable purpose." The Board only finds that, under the facts presented here, the Petitioner has not shown that a benefit would inure to the general public sufficient to justify the loss of the tax revenue that would result from granting a charitable purpose tax exemption in addition to the tax-supported mortgage assistance and rent subsidies the property presently receives.

SUMMARY OF FINAL DETERMINATION

47. The Petitioner's Motion for Summary Judgment is denied. The Respondent's Motion for Summary Judgment is granted. The Board determines the Petitioner's property to be 100% taxable.

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

Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- Appeal Rights -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. P.L. 219-2007 (SEA 287) is available on the Internet at <http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>.