

REPRESENTATIVES FOR PETITIONER:

Robert H. Hendren, Attorney and Counselor at Law
Steven Hedges, Attorney and Certified Public Accountant

REPRESENTATIVES FOR RESPONDENT:

Marilyn Meighen, Meighen and Associates, P.C.

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

FRATERNAL ORDER OF	)	Petition No.:	55-005-04-2-8-00001
EAGLES #3988, INC.)		
	)	Parcel Nos.:	0210125485001000
Petitioner,	)		0210125485001001 ¹
)		
v.	)	County:	Morgan
	)	Township:	Brown
MORGAN COUNTY)		
PROPERTY TAX ASSESSMENT)		
BOARD OF APPEALS,	)	Assessment Year:	2004
)		
Respondent.)		

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

December 15, 2006

FINAL DETERMINATION

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

¹ The ALJ read only one parcel number into the record. However, the Form 132 petition and all prior procedural forms list both parcel numbers. Both parcels are properly before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUES

1. The parties raise numerous issues, which the Board restates as:
 - (1) *Whether the Fraternal Order of Eagles #3988 (Lodge) is entitled to an exemption for charitable use under Ind. Code §§ 6-1.1-10-16 and 6-1.1-10-36.3;*
 - (2) *Whether the Lodge is entitled to an exemption under Ind. Code § 6-1.1-10-23 or Ind. Code §27-11-7-4 as a fraternal beneficiary association;*
 - (3) *Whether the actions of the Morgan County Property Tax Assessment Board of Appeals (PTABOA), which the Lodge characterizes as arbitrary and capricious, entitle the Lodge to relief in a proceeding before the Board;*
 - (4) *Whether the PTABOA's denial of the Lodge's exemption application while granting the applications of other fraternal organizations denied the Lodge equal protection and due process of law;*
 - (5) *Whether the Lodge is entitled to an award of attorney fees and costs.*

PROCEDURAL HISTORY

2. The Petitioner, Fraternal Order of Eagles #3988, Inc. (Lodge), filed a Form 136 Application for Property Tax Exemption on May 13, 2004. The Morgan County Property Tax Assessment Board of Appeals (PTABOA) denied the Lodge's Form 136 application on July 21, 2004. On July 22, 2004, the PTABOA issued its Form 120 Notice of Action on Exemption Application (Form 120 Notice) notifying the Lodge that it had denied the Lodge's application. On August 17, 2004, the Lodge filed a Form 132 Petition for Review of Exemption (Form 132 petition), petitioning the Board to conduct an administrative review of the denial of its application. On May 3, 2006, the Lodge filed Petitioner's Motion for Summary Judgment. The administrative law judge designated by the Board to conduct the hearing in the instant appeal issued his Order Denying Petitioner's Motion for Summary Judgment on July 5, 2006.

HEARING FACTS AND OTHER MATTERS OF RECORD

3. Pursuant to Ind. Code § 6-1.1-15-4 and § 6-1.5-4-1, David Pardo, an administrative law judge duly authorized by the Board under Ind. Code § 6-1.5-3-3 and § 6-1.5-5-2, conducted an administrative hearing on the Lodge’s Form 132 Petition. The hearing occurred on August 4, 2006, in Martinsville, Indiana.

4. The following persons were present at the hearing:

For the Lodge:

Robert H. Hendren, Attorney
Steven Hedges, Attorney
Mike Rogers,
Robert K. Kennedy, Secretary, Fraternal Order of Eagles #3988
Roy Finchum, Trustee, Fraternal Order of Eagles #3988
Lloyd Taylor, Trustee, Fraternal Order of Eagles #3988

For the PTABOA:

Marilyn Meighen, Attorney for PTABOA
Brenda Brittain, County Assessor/PTABOA Secretary

5. The following persons were sworn as witnesses and presented testimony:

For the Lodge:

Mike Rogers
Robert K. Kennedy
Roy Finchum
Lloyd Taylor

For the PTABOA:

Brenda Brittain

6. The following exhibits were admitted by stipulation:

Petitioner (Lodge)²

No. Description

2.1 Usage Study for Eagles Lodge #3988

² The Lodge relied exclusively on exhibits that it submitted in support of its Motion for Summary Judgment, and it did not submit additional copies at the administrative hearing. The Lodge used the same numbering system to denote the exhibits, although not all of the exhibits submitted with the Lodge’s summary judgment motion were admitted into evidence at the hearing.

- 2.2 Articles of Incorporation, Constitution and Statutes of the Grand Aerie, Fraternal Order of Eagles, 2003 Edition
- 2.3 Bylaws adopted February 2002
- 3 Portions of Articles of Constitution of the Grand Aerie, Fraternal Order of Eagles, and certificate of incorporation for Mooresville Lodge, documents from records of Morgan County PTABOA, produced in discovery, as documents submitted to PTABOA in exemption application including
 - 3.1 Certificate of Incorporation of Mooresville Eagles #3988 in Indiana as of March 29, 1999
 - 3.2 Articles of Incorporations of Fraternal Order of Eagles
 - 3.3 Constitution of the Fraternal Order of Eagles
- 4 PTABOA list of exemption applications from 7/23/04
- 5 PTABOA notes from same meeting, reflecting actions taken on applications
- 6 2004 Application for Property Tax Exemption, filed 5/13/04 (not including attachments) and Action (denial), from documents produced in discovery from PTABOA
- 7 Determination of Action, dated 7/22/04, denying exemption application
- 12 Certificate of Existence for FRATERNAL ORDER OF EAGLES #3988 INC.
- 13 Notice of Hearing on Exemptions publication certification, produced in response to Petitioner's discovery request to Morgan County PTABOA
- 14 Deposition of Brenda Brittain
- 15 Demonstrative Exhibits submitted in Lodge's opening statement

Respondent (PTABOA)

- | <u>No.</u> | <u>Description</u> |
|------------|---|
| 1 | Certified Record of Administrative Proceedings, Fraternal Order of Eagles #3988 v. Morgan County PTABOA, IBTR Petition # 55-005-02-2-8-00001 |
| 2 | DLGF Memo/April 17, 2002 |
| 3 | A - Entertainment Committee Newsletter / March - April
B - Newsletter / Jan - Feb 2004
C - Entertainment Committee Newsletter / November - December
D - Newsletter / May - June 2004 |
| 5 | <i>Fraternal Order of Eagles, Rose City Aerie #933 v. Henry County PTABOA</i> (IBTR petition no. 33-016-02-2-8-00035, decided June 19, 2003) |
| 6 | <i>Benevolent & Protective Order of Elks, #1349 v. Morgan County PTABOA</i> (IBTR petition no. 55-021-02-2-8-00001, decided January 8, 2004) |
| 7 | <i>Fraternal Order of Eagles, #2455 v. Noble County PTABOA</i> (IBTR petition no. 57-002-02-2-8-00002, decided November 17, 2003) |
| 8 | <i>Elks Onyx Lodge #479 IBPOE v. Wayne County PTABOA</i> (IBTR petition no. 89-030-01-2-8-00003, decided March 27, 2002) |
| 9 | <i>Richmond Elks Lodge #649 v. Wayne County PTABOA</i> (IBTR petitions no. 89-030-00-2-8-00002 through 89-030-00-2-8-00005, decided February 3, 2003) |

7. The following exhibits were separately offered and admitted:

Petitioner (Lodge)

No. Description

- 1.1 Monthly profit and loss statements Jan. 05 to Nov. 05
- 1.2 Charitable Contribution by Eagles from April, 04 thru March, 06
- 1.3 Newspaper articles and flyer/announcements of Eagles local charitable activity
- 1.4 990 tax returns for three year period

8. The PTABOA offered the following exhibit to which the Lodge objected:

Respondent (PTABOA)

No. Description

- 4 IDOI letter / June 14, 2005

The ALJ took the Lodge's objection under advisement. The Board addresses that objection, *infra*.

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

- Board Exhibit A – The Form 132 petition, filed August 17, 2004
- Board Exhibit B – Notice of Hearing on Petition, dated May 24, 2006
- Board Exhibit C – Hearing sign-in sheet

In addition, the Board incorporates all filings by the parties and all orders issued by the Board or its duly authorized administrative law judge into the record. The Board specifically notes the following orders concerning the conduct of the hearing: Order Granting Morgan County Property Tax Assessment Board of Appeal's Motion to Compel; Order Granting Request to Withdraw Motion to Enforce Board Order Compelling Production and Motion for Sanctions; Confidentially Stipulation Order; Pre-hearing Conference Agreement; Agreed Amendment to Pre-hearing Conference Agreement; Pre-hearing Order; Order Denying Motion for Summary Judgment; and Order Regarding Conduct of Exemption Hearing.

10. The subject property consists of two parcels located at 451 North Old State Road 67, Mooresville. The subject property contains a lodge building, a storage building and a parking lot.

11. For 2004, the PTABOA determined the subject property to be:

Land: 100% taxable

Improvements: 100% taxable

12. The Lodge requests a 100% exemption for the subject land, improvements, and personal property.

JURISDICTIONAL FRAMEWORK

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

OBJECTIONS

14. Both parties raised various objections during the hearing. The ALJ ruled on all but one objection at the hearing, which the Board now addresses.
15. The Lodge objected to the submission of Respondent's Exhibit 4, which purports to be a letter dated June 14, 2005, from Dan Tollefson, Financial Services Counsel for the Indiana Department of Insurance ("IDOI"), to counsel for the PTABOA, Ms. Meighen. *Resp't Ex. 4*. The letter provides: "The Department has received your public records request dated May 20, 2005 The Department has no records that are responsive to your request. The Fraternal Order of Eagles has been inactive in the state of Indiana since November 12, 1999." *Resp't Ex. 4*.
16. The Lodge objects to the admissibility of the letter on two grounds. First, the Lodge contends that the PTABOA did not lay a foundation authenticating the letter. *Hendren argument*. The Lodge points out that public records generally are not self-authenticating unless they are certified, and the letter does not contain a certification. *Id.* Second, the

Lodge contends that the letter refers only to the “Fraternal Order of the Eagles,” rather than to the Lodge. *Id.* Thus, the Lodge argues that the letter is not relevant. *Id.* In response, the PTABOA argues that the rules of evidence do not apply in proceedings before the Board and that the letter, on its face, purports to be from a government agency. *Meighen argument.* The PTABOA further argues that the Fraternal Order of Eagles is the umbrella organization under which the Lodge operates, and if the Fraternal Order of Eagles is not active with the Indiana Department of Insurance, the Lodge cannot be active either. *Id.*

17. Pursuant to the Board’s procedural rules, the administrative law judge “shall regulate the course of the proceedings in conformity with any pre-hearing order and in an informal manner without recourse to the rules of evidence.” Ind. Admin. Code tit. 52, r. 2-1-2(a). Nonetheless, the Board shall determine the relevance and weight to be assigned to evidence, and if evidence that is irrelevant, immaterial or otherwise excludable is admitted over a party’s objection, the Board will not assign any weight to such evidence. 52 IAC 2-1-2(b).
18. Thus, although the Board’s administrative hearings are not governed strictly by the Indiana Rules of Evidence, basic prerequisites to the admissibility of evidence exist. While the Board’s rules specifically mention lack of relevancy as a ground for exclusion, those rules are broad enough to encompass the exclusion of evidence for want of other basic prerequisites to admissibility, such as establishing the authenticity of documents. That is not to say that parties necessarily must follow the requirements of Rules 901-903 of the Indiana Rules of evidence to establish the authenticity of documents, although authentication under those rules certainly would suffice. A party offering a document into evidence, however, must provide at least some indication that the document is what it purports to be, particularly if the opposing party interposes an objection to its admissibility.
19. Here, the PTABOA did not attempt to establish the authenticity of Respondent’s Exhibit 4 beyond the fact that the exhibit is written on the letterhead of the Indiana Department of

Insurance. The PTABOA easily could have obtained evidence of the document's authenticity, such as a certification from the Department of Insurance, if it chose to do so.

20. Moreover, the letter, by itself, is too vague and indefinite to have any clear relevance to a fact of consequence in the instant case. The letter purports to respond to a public record request from Ms. Meighen, but the PTABOA did not submit any evidence regarding the content of Ms. Meighen's request. Moreover, the letter refers generally to the "Fraternal Order of Eagles" rather than to the Lodge specifically. Finally, the letter indicates that the Fraternal Order of Eagles has not been "active" in the State of Indiana since November 12, 1999, without any indication of what being "active" with the State of Indiana entails.
21. Based on the foregoing, the Board sustains the Lodge's objection to Respondent's Exhibit 4 on grounds that the PTABOA did not authenticate the exhibit and that the exhibit lacks any clear relevancy to this appeal. Even if the Board were to admit the letter into evidence, the problems identified above would deprive it of any persuasive value.

FACTS

22. The Board finds the following facts, which are relevant to its determination:
 - a) The Lodge is a not for profit corporation, incorporated under Indiana law on March 29, 1999. *Pet'r Ex. 3.1.*
 - b) The Lodge is a local aerie instituted by the authority and under the constitution of the Grand Aerie Fraternal Order of Eagles (Grand Aerie). *Pet'r Ex. 2.3 at 1.* The Grand Aerie is an international, non-profit organization. The Grand Aerie ordained a constitution in order to do the following:

To unite fraternally for mutual benefit, protection, improvement, social enjoyment and association, all persons of good moral character who believe in a Supreme Being to inculcate the principles of liberty, truth, justice and equality, to perpetuate itself as a fraternal organization and to provide for its government as its Constitution, Laws, Rituals, By-Laws or other rules and regulations may from time to time provide, and

to promote the general welfare To promote and raise funds for duly authorized Fraternal Order of the Eagles charities and contribute to worthwhile charitable causes.

Pet'r Ex. 2.2 at 1; Pet'r Ex. 3.3 at 1.

- c) The Lodge operates on a lodge system. *Kennedy, Finchum, and Taylor testimony.* The lodge is an affiliate of a ritualistic national fraternal organization with a democratic form of government. *Id.*
- d) Pursuant to its bylaws, dues paying members of the Lodge who have been initiated prior to turning fifty-five (55) years of age are entitled to a funeral benefit upon death as well as to a floral arrangement or other form of tribute. *Pet'r Ex. 2.3 at 3; see also Taylor testimony.* Benefits range from \$150 to \$250 depending on the number of years of membership. *Pet'r Ex. 2.3 at 3.* The benefit for the floral arrangement is not to exceed \$50. *Id.* The Lodge did not present any documents to establish that it had paid a funeral benefit during the period at issue in this appeal, or indeed at any time. *See Rogers testimony; Taylor testimony.* Nonetheless, Mr. Taylor testified that the Lodge actually does pay those benefits and has done so for years. *Taylor testimony.* The Board finds that the Lodge pays funeral benefits to eligible members in accordance with its bylaws.
- e) The subject building contains the following rooms: a “Social Room” with a raised platform and dance floor; an “Entertainment Room” with a dance floor; a “Lodge Room” with a bar, tables, chairs, televisions, and gambling ticket dispensers on the wall; a “Pool & Dart Room” with two (2) pool tables and four (4) dart machines; a kitchen; offices; restrooms; and various storage rooms. *Finchum testimony; Resp't Ex 1 at 218; Pet'r Ex. 2.1 at 37.*³ The lodge building contains a total of 10,500 square feet, which is divided between the above-identified rooms as follows: Social Room – 2910 sq. ft.; Entertainment Room – 1782 sq. ft.; Lodge Room – 1880 sq. ft.; Pool & Dart Room – 560 sq. ft.; Kitchen – 304 sq. ft.; Offices – 496 sq. ft.; Storage – 616 sq. ft; Restrooms – 661 sq. ft.; and Corridors – 1291 sq. ft. *Pet'r Ex. 1 at 37.*

³ The parties submitted two different schematic drawings of the lodge building. *See Pet'r Ex. 2.1 at 37; Resp't Ex. 1 at 218.* The “Entertainment Room” identified in the usage study prepared for the Lodge by Mr. Rogers is identified as the “Banquet Room” in the schematic drawing presented by the Respondent. *Id.* Similarly, the “Pool & Dart Room” and the “Lodge Room” from the usage study are identified as the “Pool Room” and “Bar Room” in the Respondent’s schematic drawing. *Id.* For ease of reference, the Board will use the names set forth in Mr. Rogers’ usage study unless otherwise indicated.

- f) Members play pool and darts and watch television in the Pool & Dart and Lodge Rooms. *Finchum testimony; see also Resp't Ex. 3D* (Identifying “dart league” and “pool tournament” as weekly events). Members also purchase alcoholic beverages and gambling tickets from dispensers. *Id.* For the year preceding the Lodge’s application for exemption, the Pool & Dart Room and Lodge Room were used exclusively by members of the Lodge. *See Pet'r Ex. 2.1 at 19-30.*
- g) The Lodge also hosts karaoke for members and guests. *Finchum testimony.* During the year preceding the Lodge’s application for exemption, the Lodge hosted karaoke two (2) nights per week in the Entertainment Room. *Pet'r Ex. 2.1 at 13-18.* The Entertainment Room was devoted exclusively to karaoke during that period. *Id.*
- h) Once a month, the Lodge allows members to bring outside guests to the subject property. *Kennedy testimony.* On those nights, the Lodge frequently offers live entertainment, such as bands. *See Kennedy testimony.* The Lodge advertises those nights as “open to the public.” *See id.; Resp't Ex. 3B.* Those events occur in the Social Room. *See Pet'r ex. 2.1 at 7-12.* The Lodge also hosts bingo games in the social room. *See Resp't Ex. 3D* (listing bingo every Thursday in May-June 2004); *Pet'r Ex. 2.1 at 7-12.* The Lodge has a license to conduct bingo, which also covers “pull tab” tickets sold by the Lodge. *Finchum testimony.*
- i) The Lodge permits numerous organizations to use the Social Room free of charge for community activities and fundraisers. *See Rogers testimony; Pet'r Ex. 2.1 at 5, 7-12; see also Kennedy testimony; Finchum testimony.* Those organizations include the Komen Breast Cancer Foundation, the Lions Club, the Morgan County Emergency Medical Service. *Kennedy testimony; see also Pet'r Ex. 2.1 at 7-13.*
- j) The Lodge also donates money to numerous charitable organizations. *Rogers testimony; Pet'r Ex. 1.2, passim; Pet'r Ex. 2.1 at 5.* In 2004, the Lodge had \$351,310 in total revenue. *Pet'r Ex. 1.4 at 11, 14.* “After covering overhead,” the Lodge had \$36,646 in revenue and donated \$30,314 to charitable causes in 2004. *Rogers testimony; see also Pet'r Ex. 1.4 at 12, 14.* In 2003, the Lodge had \$327,195 in total revenue. *Pet'r Ex. 1.4 at 1, 5.* That year, the Lodge had only \$15,618 in revenue after covering overhead, but it donated \$24,535 to charitable causes. *Rogers testimony; see also, Pet'r Ex. 1.4 at 2, 5.*

- k) The Lodge occasionally leases the subject property for events unrelated to charitable causes. The Lodge's tax return reflects net rental income of \$5,200 in both 2003 and 2004. *Pet'r Ex. 1.4 at 1, 11*. Mr. Rogers was equivocal in explaining that entry. On direct examination, Mr. Rogers testified that he saw "no evidence of a charge for rent," and explained that any money derived from organizations using the lodge building was "mainly just to cover actual expenses," such as renting extra tables or chairs. *Rogers testimony*. Mr. Rogers further testified that he saw no evidence of "rental income" as such, but rather indicated that the income was "more in the nature of a license" giving a person or entity a temporary right to use the facility. *Id.* On cross-examination, however, Mr. Rogers testified that a wedding reception for a member represents an example of a temporary license given by the Lodge. *Id.* In light of the ambiguous nature of Mr. Rogers' testimony and the fact that the entry for \$5,200 on the Lodge's Form 990 return purports to be for "net rental income" after deducting rental expenses, the Board finds that the Lodge occasionally either licensed or rented-out the lodge building for use in non-charitable events. *See Pet'r Ex. 1.4 at 1, 11*.
- l) On its Form 136 Application for Property Tax Exemption (Form 136 application) for the 2004 tax year, the Lodge identified Ind. Code § 6-1.1-10-16 and Ind. Code § 6-1.1-10-23 as setting forth the bases for its claimed exemption. *Board Ex. A*. The PTABOA wrote "denied" on the face of the Lodge's Form 136 application. *Pet'r Ex. A*. On the Form 120 Notice mailed to the Lodge, the PTABOA found that the Lodge's land and improvements were one-hundred percent (100%) taxable, and discussed its reasons for denying the Lodge's claim for exemption based on its purported charitable use of the subject property. *Id.* The PTABOA, however, did not explicitly discuss the Lodge's claim for exemption as a fraternal beneficiary association pursuant to Ind. Code Ind. Code § 6-1.1-10-23. *Id.* Nonetheless, the PTABOA clearly denied the Lodge's petition in its entirety. *See Bd. Ex. A; Brittain testimony*.

ANALYSIS

Parties' Contentions

23. The Lodge makes the following contentions in support of its claim for exemption:
- a) The Lodge qualifies for an exemption for real and personal property as a charitable entity under Ind. Code § 6-1.1-10-16 and § 6-1.1-10-36.3 and as a fraternal beneficiary association under Ind. Code § 27-11-7-4 and Ind. Code § 6-1.1-10-23.
 - b) Taken as a whole, the Lodge performs a charitable and community service by preserving a community resource. *Post Trial Brief of Petitioner, Order of Eagles #3988(Lodge's Post Trial Brief) at 4*. Although the PTABOA denied the Lodge's Form 136 application because it did not provide proof of charitable giving, charitable giving is not the test for whether a property is exempt from taxation Ind. Code § 6-1.1-10-16; instead, the predominant use of the property is the determinative factor. *Lodge's Post Trial Brief, at 4*. The Lodge contends that it occupied and used the subject property exclusively for charitable purposes. *Id. at 5*.
 - c) In support of its claim that it used the subject property exclusively for charitable purposes, the Lodge points to the various charitable entities that it allowed to use the subject property free of charge for community activities and fundraisers as well as to the extent of its charitable donations. *Id. at 5-6; See also, Rogers testimony; Pet'r Ex. 1.4*. While members play pool and darts, attend dances, engage in karaoke and watch bands, those activities are all designed to bring members into the facility where they spend money. The Lodge deposits its money into its general fund, from which it both pays maintenance and operating expenses, which preserve the lodge building as a community resource, and makes its charitable donations. Moreover, the Lodge utilizes the subject property one-hundred percent (100%) for member use. Such member usage amounts to a charitable use. *Lodge's Post Trial Brief at 6*.
 - d) The Lodge is entitled to an exemption as a fraternal beneficiary association under Ind. Code § 27-11-7-4 and Ind. Code § 6-1.1-10-23. Fraternal organizations have been exempt from property taxation for many years under what the Lodge refers to as the "common law test." *Lodge's Post Trial Brief at 8*. According to the Lodge, the

Indiana Attorney General has defined a “fraternal benefit association” under the “common law test” as one being organized under Indiana law, without capital stock, without profit, under a lodge system with ritualistic form of work, a representative form of government and which provides benefits to its members. *Id.* at 9. According to the Lodge, in order to qualify for an exemption pursuant to Ind. Code § 6-1.1-10-23, an entity must show (1) that it is a fraternal beneficiary association under the “common law test,” and (2) that the entity owns and exclusively uses the property in carrying out the purposes for which the entity was organized. *Lodge’s Post Trial Brief at 10.*

- e) The Lodge meets the definition of a “fraternal beneficiary association” based upon the testimony of Messrs. Kennedy and Finchum as well as the articles of incorporation, bylaws and constitution of the Grand Aerie and the bylaws of the Lodge. *See Lodge’s Post Trial Brief at 11-13.* As to the requirement that it exclusively use the subject property in carrying out the purposes for which it is organized, the Lodge points to *State Bd. of Tax Comm’rs v. Indianapolis Lodge #17, Loyal Order of Moose, Inc.*, 245 Ind. 614, 200 N.E.2d 221 (Ind. 1964). According to that decision, the term “exclusively used” means simply “no third party profits are allowed to go to third persons from the use of the entity’s property. *Lodge’s Post Trial Brief at 11.* The Lodge uses all of the proceeds that it receives to reduce its expenses, to support its duties as a mutual benefit association and to complete its charitable works and it does not provide any of those proceeds to third parties. *Id.*
- f) An entity must prove following elements to establish a claim for exemption under Ind. Code 27-11-7-4: (1) it has capital stock; (2) it is conducted solely for the benefit of its members and their beneficiaries; (3) it is not-for-profit; (4) it operates on a lodge system with a ritualistic form or work; (5) it has a representative form of government; and (6) it provides benefits in accordance with Ind. Code Ind. Code 27-11. *Lodge’s Post Trial Brief at 11.*
- g) The Lodge meets each of those elements based upon the testimony of Messrs. Kennedy and Finchum as well as the articles of incorporation, bylaws and constitution of the Grand Aerie and the bylaws of the Lodge. *See Lodge’s Post Trial Brief at 11-13.*

- h) The PTABOA acted arbitrarily and capriciously in denying the Lodge's application for exemption. *Lodge's Post Trial Brief at 13-16*. The PTABOA ignored the clear language of the relevant statutes and established case law in denying the Lodge's exemption application on grounds that the Lodge did not present a usage study and a "charitable gifting table." *Id. at 14*. Moreover, the PTABOA did not even address the Lodge's claim for an exemption as fraternal beneficiary association under Ind. Code § 6-1.1-10-23. *Lodge's Post Trial Brief at 15-16*. The PTABOA's failure to address its claim for an exemption as a fraternal beneficiary association even more galling considering that the PTABOA granted the exemption application of nine (9) other fraternal organizations. *Id. at 18(citing Pet'r Exs. 4-5)*. In the Lodge's view, this disparate treatment deprived it of its rights to equal protection and due process of law. *Id. at 14-15*.
- i) The PTABOA's actions are "strangely at odds with the requirements of notice and the duties of the . . . PTABOA . . ." *Lodge's Post Hearing Brief at 15*. The Lodge's Form 136 application is marked as denied, signed by Brenda Brittain as secretary of the PTABOA and dated July 21, 2004. *Id. (citing Pet'r Ex. 6 at 2)*. The Form 120 Notice is dated July 22, 2004. *Id. (citing Pet'r Ex. 7 at 2)*. The notice of publication provided by the PTABOA during discovery, however, indicates that the hearing on the Lodge's application was to be held on July 23, 2004, and Ms. Brittain's notes indicate that the PTABAOA held a meeting on that date. *Post Trial Brief at 15*.
- j) Ms. Brittain's testimony at the administrative hearing held before the Board was tainted by an improper whispered colloquy between Ms. Brittain and counsel for the PTABOA while Ms. Britain was testifying under oath. *Lodge's Post Trial Brief at 2*.
- k) As a whole, the PTABOA's actions reflect a "dereliction of duty" entitling the Lodge to an award of costs and attorney fees. *Lodge's Post Trial Brief at 2*.

24. The PTABOA makes the following contentions in support of its denial of the Lodge's application for exemption:

- a) The Lodge is not entitled to an exemption under Ind. Code § 6-1.1-10-16 because it does not own, occupy and predominately use the subject property for charitable purposes. *Respondent's Post Hearing Brief (PTABOA's Post Hearing Brief) at 8*.

- b) Although the subject property is occupied for charitable purposes on at least some occasions, members of the Lodge as well as the general public use the property for recreational and leisure activities. *Id. at 9*. According to the PTABOA, Indiana courts historically have held that the use of facilities for social and leisure activities does not qualify as a charitable use for purposes of entitlement to a property tax exemption. *Id. at 11-12* (citing *Sahara Grotto and Styx, Inc. v. State Bd. of Tax Comm'rs*, 147 Ind. App. 471, 261 N.E.2d 873, 877 (1970) and *Indianapolis Elks Building Corp. v. State Bd. of Tax Comm'rs*, 145 Ind. App. 522, 251 N.E.2d 673, 681 (1969)).
- c) The Lodge failed to meet its burden of proof because it did not walk the Board through a comparison of the total hours that the lodge building was used for charitable purposes versus the total number of hours that it was used for all purposes. *PTABOA's Post Hearing Brief at 11*. The Lodge's evidence regarding usage is entirely conclusory, consisting of assertions that the lodge building is devoted to 100% member usage or 100% charitable purposes. *Id.* The usage study prepared by Mr. Rogers simply lists activities that take place in certain rooms and indicates that other areas are open for members only. In fact, Mr. Rogers' usage study lists activities such as pool tournaments as the only activity in the bar area despite the fact that the bar area is open during normal hours. *Id.* (citing *Pet'r Ex. 2.1; Finchum testimony*).
- d) Moreover, while the Lodge devoted a significant amount of time at the hearing describing the extent of its charitable donations, it is the use of a property - not the owner's charitable giving - that determines whether the property is entitled to a charitable use exemption. *PTABOA's Post Hearing Brief at 9-10* (citing *State Bd. of Tax Comm'rs v. New Castle Lodge #147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257 (Ind. 2002)).
- e) The Lodge is not automatically entitled to property tax exemption under Indiana's insurance laws simply because it provides nominal funeral benefits plus a floral arrangement of \$50 or less to certain members. *PTABOA's Post Hearing Brief at 5*. Fraternal benefit societies are subject to Indiana's insurance laws and are regulated by the Indiana Department of Insurance under Ind. Code § 27-11 because they can

- provide benefits similar to insurance companies. *Id. at 7*. The statute, however, makes the insurance laws applicable only to fraternal benefit societies that provide certain statutorily defined benefits, none of which are provided by the Lodge. *Id.* (citing Ind. Code § 27-11-1-1 and Ind. Code § 27-11-6-1). While the statute specifically lists “death benefits,” the Lodge provides only *funeral* benefits. *Id.* (citing *Fraternal Order of Eagles # 3988 v. Morgan County Property Tax Assessment Bd. of App.* (Pet. no. 55-005-02-2-8-0001, decided January 8, 2004); *Fraternal Order of Eagles, Rose City Aerie, #933 v. Henry County Property Tax Assessment Bd. of App.* (Pet. no. 33-016-02-2-8-00035, decided June 19, 2003).
- f) Even if the funeral benefits provided by the Lodge equate to death benefits, the Lodge is excluded from Ind. Code § 27-11 because the benefits it provides are less than \$400. *See PTABOA’s Post Hearing Brief at 8 n. 3* (citing Ind. Code Ind. Code § 27-11-9-4(a)(4)). Regardless of the benefits it provides, the Lodge is not covered under Ind. Code § 27-11 because it is not “conducted solely for the benefit of its members and their beneficiaries.” *Id.* (citing Ind. Code § 27-11-1-1). This is demonstrated by the weekly bingo games and monthly social activities that are open to the general public. *Id.*
- g) If the exemption set forth in Ind. Code § 27-11-7-4 applied to organizations like the Lodge, any organization dedicated to social and recreational activities could exempt itself simply by providing a nominal funeral benefit and flower baskets to members while other organizations must face the heavy burden of showing that their property is owned, occupied and used for an exempt purpose. *Respondent’s Post Hearing Brief at 8*.
- h) Being part of a lodge system does not automatically entitle the Lodge to an exemption pursuant to Ind. Code § 6-1.1-10-23; instead, the Lodge must show that it has a charitable purpose and provides benefits under the insurance laws of Indiana. *PTABOA’s Post Hearing Brief at 13*.
- i) Ind. Code § 6-1.1-10-23 must be read in light of Article 10 Section 1 of the Indiana Constitution, which requires the General Assembly to provide a uniform and equal rate of property taxation and authorizes the General Assembly to exempt from taxation property being used for municipal, educational, literary, scientific, religious

- or charitable purposes. *PTABOA's Post Hearing Brief at 13*. Thus, the Lodge must demonstrate that the subject property is used for charitable purposes in order to qualify for an exemption under Ind. Code § 6-1.1-10-23. *PTABOA's Post Hearing Brief at 14*.
- j) Finally, the Lodge is not entitled to an exemption on grounds that the PTABOA disregarded the appropriate exemption criteria in issuing its decision. *PTABOA's Post Hearing Brief at 14*. Hearings before the Board are *de novo*, and a petitioner bears the burden of showing that it meets the constitutional and statutory requirements for exemption. *Id.* The Lodge failed to meet its burden of proof. *Id.*

Constitutional and Statutory Basis for Exemption

25. In Indiana, the general rule is that all property in the State is subject to property taxation. *See* Ind. Code § 6-1.1-2-1. Nonetheless, the Indiana Constitution provides that the General Assembly may exempt from property taxation any property being used for municipal, educational, literary, scientific, religious, or charitable purposes. IND CONST. Art. 10, § 1. This provision is not self-enacting; the General Assembly must enact legislation to create exemptions within the constitutional authority provided to it. The Indiana General Assembly has exercised that authority by enacting various statutes providing for property tax exemptions, including exemptions for property owned, occupied and used for charitable purposes and certain property owned, occupied and used by fraternal beneficiary associations. Ind. Code § 6-1.1-10-16(a) and (c); § 6-1.1-10-23.
26. 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 – taxation. *Id.* When property is exempted from taxation, the effect is to shift the amount of taxes that parcel would have paid to other parcels that are not exempt. *National Ass'n of Miniature Enthusiasts v. State Bd. of Tax Comm'rs*, 671 N.E.2d 218, 220-21 (Ind. Tax Ct. 1996). The transfer of this obligation to non-exempt properties is not an inconsequential shift. For this reason, an exemption from taxation is strictly construed against the taxpayer. *Id.* (citing *St.*

Mary's Medical Center of Evansville, Inc. v. State Bd. of Tax Comm'rs, 534 N.E.2d 277, 280 (Ind. Tax Ct. 1989). Thus, the taxpayer must demonstrate that it provides a “present benefit to the general public . . . sufficient to justify the loss of tax revenue.” *Id.* (quoting *St. Mary's Medical Center*, 534 N.E.2d at 279).

27. When interpreting the exemption provided by I.C. § 6-1.1-10-16(a), however, “the term ‘charitable purpose’ is to be defined and understood in its broadest, constitutional sense.” *Knox County Property Tax Assessment Bd. of Appeals v. Grandview Care, Inc.*, 826 N.E.2d 177 (Ind. Tax Ct. 2005)(citing *Indianapolis Elks Bldg. v. State Bd. of Tax Comm'rs*, 145 Ind. App. 522, 251 N.E.2d 673, 682 (1969)). As a result, “[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.” *Id.* (quoting *Indianapolis Elks*, 251 N.E.2d at 683).

Issue I

Whether the Fraternal Order of Eagles #3988 (Lodge) is entitled to an exemption for charitable use under Ind. Code §§ 6-1.1-10-16 and 6-1.1-10-36.3

28. The Board turns first to the Lodge’s claim that it is entitled to exemption under Ind. Code §§ 6-1.1-10-16 and 6-1.1-10-36.3 on grounds that it owns, occupies and uses the subject property for charitable purposes. Pursuant to Ind. Code § 6-1.1-10-16, “[a]ll 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.” Ind. Code § 6-1.1-10-16(a). Similarly, a tract of land is exempt if “a building that is exempt under subsection (a) or (b) is situated on it. . . .” and personal property is exempt if it is owned and used in such a manner that it would be exempt if it were a building. I.C. § 6-1.1-10-16(c) and (e).
29. The Indiana General Assembly has adopted a “predominant use” test for determining whether an exemption under Ind. Code § 6-1.1-10-16(a) applies. *State Bd. of Tax*

Comm'rs v. New Castle Lodge # 147 Loyal Order of Moose, 765 N.E.2d 1257, 1259 (Ind. 2002). Thus, Ind. Code § 6-1.1-10-36.3 provides:

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

(b) The determination under subsection (c) of:

(1) the use or occupation of the property; and

(2) the application of an exemption;

applies separately to each part of the property identified under IC 6-1.1-11-3(c)(5).

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

* * * * *

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

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

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

Ind. Code § 6-1.1-10-36.3 (emphasis added).

30. There is no dispute that portions of the subject property were owned occupied and used for charitable purposes for significant amounts of time in 2003 and 2004. As explained *supra*, the Lodge allowed several charitable and community organizations to use the subject property free of charge. The PTABOA acknowledges such charitable usage, but

points to the fact that the Lodge also devoted a portion of the subject property to use by members for purposes of socializing, playing darts and pool, and wagering, and that the Lodge invited members of the public to attend bingo events and dances. According to the PTABOA, those are non-charitable uses, and the Lodge did not provide sufficient evidence from which to determine the relative percentage of time that the subject property was devoted to charitable uses out of the total amount of time that the property was in use as required by the predominant use test set forth in Ind. Code § 6-1.1-10-36.3. The Lodge counters that the activities identified by the PTABOA are necessary for the Lodge to raise money for its charitable donations and to pay expenses so that its facility can remain open as a community resource. According to the Lodge, those uses support its overall mission, which is charitable and fraternal.

31. The Indiana Court of Appeals has held that a fraternal organization's use of its facilities for purposes of the relaxation and recreation of its members is not a charitable use. *See Indianapolis Elks Bldg. Corp. v. State Bd. of Tax Comm'rs*, 145 Ind. App. 522, 251 N.E.2d 673, 682 (1969). In *Indianapolis Elks Bldg.*, the Indiana Court of Appeals rejected the claim of a fraternal holding corporation that the predominately social activities for which its property was used were charitable because they promoted the purposes for which the fraternal organization using the property was formed, namely charity, brotherly love, justice, fidelity and Americanism. *Indianapolis Elks Bldg.*, 251 N.E.2d at 682. The court explained its rationale, in part, as follows:

The appellant's facilities and activities undoubtedly suppress human want and suffering in addition to promoting brotherly love, justice, fidelity, etc. But these noble objectives can also be seen in the family home and at various other public and private establishments, all of which are not exempt from property tax. Both the record and the court's findings of fact plainly exhibit the fact that the property in question is used for *drinking, eating, dancing*, card games, swimming and general relaxation. These same activities exist at any good country club.

Id. (emphasis added); *see also Sahara Grotto et. al. v. State Bd. of Tax Comm'rs*, 147 Ind. App. 471, 261 N.E.2d 873, 878 (1970).

32. Indianapolis Elks Bldg., however, does not necessarily answer the Lodge’s contention that the social and recreational activities conducted at the subject property help to defray operation and maintenance costs required to preserve the facility as a “community resource” and to fund the Lodge’s charitable donations.
33. The Indiana Supreme Court provided at least some guidance on that question when it issued its decision in *State Bd. of Tax Comm’rs v. New Castle Lodge #147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257 (Ind. 2002)(*Moose II*). In that case, the Court granted the State Board of Tax Commissioners’ petition for review in order to examine the standards applicable to a non-profit organization’s claim that its property was used predominately for charitable purposes. *Moose II*, 765 N.E.2d at 1259. At issue was the taxpayer’s 1992 application for exemption. The State Board of Tax Commissioners (State Board) had granted the taxpayer a sixty-seven percent (67%) exemption based upon its 1988 application, but rejected the taxpayer’s 1992 application entirely, even though the hearing officer had found little change in the actual room-by-room use of the facility and had recommended granting a sixty-three percent (63%) exemption. *Id.* at 1260-62. In both instances, the State Board found that the taxpayer’s charitable giving was of primary importance in determining whether the taxpayer was entitled to an exemption. *Id.* In 1988, the taxpayer had donated over seven percent (7%) of its gross revenue to charity, whereas in 1992 it had donated only four percent (4%) of its gross revenue to charity. *Id.*
34. In analyzing the case, the Indiana Supreme Court first explained that the General Assembly adopted a “predominant use” test for determining whether a property qualifies for a charitable use exemption when it enacted Ind. Code § 6-1.1-10-36.3 in 1983. *Moose II*, 765 N.E.2d at 1259. The Court then held that the State Board had misapplied the law by relying upon the percentage of gross revenues that the taxpayer donated to charity to determine that the taxpayer was not eligible for an exemption. In support of its holding the Court explained, “*although charitable giving might serve as evidence to support claimed charitable use of the facility*, the statutory test since 1983 has been the

predominant use of the facility, not distribution of income for charitable purposes. *Id.* at 1263 (emphasis added).

35. The Court agreed with the State Board’s argument on appeal that the taxpayer had failed to meet its burden of proof under the predominant use test because it relied largely on anecdotal evidence regarding a few charitable projects and on a tax return listing some of its charitable donations. *Id.* at 1264. Nonetheless, the Court found that the taxpayer had done so in response to the State Board’s declaration that charitable giving was of primary significance in determining whether a taxpayer is entitled to an exemption. *Id.* Given the unique circumstances of the case, including that facts that ten (10) years had elapsed and that the hearing officer had prepared a table detailing the room-by-room usage of the facility, the Court remanded the case to the Board to enter a determination based upon the recommendation of its hearing officer. *Id.* at 1265.
36. Thus, the Indiana Supreme Court has squarely held that the actual use of a facility, rather than the taxpayer’s charitable giving, is the controlling question in determining the taxpayer’s entitlement to an exemption. In fact, the Court’s holding makes clear that a taxpayer’s lack of charitable giving cannot be grounds for denying an exemption. It is also clear that, in some circumstances, charitable giving may serve to support a claimed charitable use of the facility, although the Court did not elaborate on that point. When actually faced with evidence of charitable donations made by the taxpayer in *Moose II*, however, the Court held that such donations related to the charitable use of the facility “only indirectly, if at all.” *Moose II*, 765 N.E.2d at 1262.
37. With the above guidance in mind, the Board turns to the Lodge’s contention that its practice of depositing revenues generated by social and recreational activities into its general fund from which it paid operating costs and made charitable donations evinces a charitable purpose behind those activities.
38. As an initial matter, the Board notes that the social and recreational activities at issue comprise a significant portion of the overall use of the subject property. According to

Mr. Rogers' usage report, the Lodge Room, Pool and Dart Room, and kitchen all were used exclusively by members during the year preceding the Lodge's application for exemption. *See Pet'r Ex. 1.2 at 19-30.* There is nothing in the record to indicate that members used those rooms for anything other than social or recreational activities. *See Finchum testimony.* Similarly, the Entertainment Room appears to have been devoted exclusively to karaoke, which occurred two nights per week during the year in question. *See Pet'r Ex. 2.1 at 13-18.* According to Mr. Rogers' sketch of the lodge building, those three rooms encompass 4,526 square feet, or approximately forty-three percent (43%) of the total area of the building. Moreover, the Social Room, which is the only other room for which the Lodge presented any evidence concerning usage, was used for clearly social and/or recreational purposes for significant blocks of time. For example, the Lodge hired a band to play for members and guests in the Social Room every Saturday night from 8:00 p.m. to 12:00 p.m. *Pet'r Ex. 2.1 at 7-12; see also, Finchum testimony; Kennedy testimony.* By using the revenue generated from such recreational and social uses of the facility to defray maintenance and operating costs, the Lodge was preserving a social and recreational resource for its members as much or more than it was preserving a resource for the community. In fact, Mr. Finchum testified that the Lodge set the price of its drinks low, which indicates an intent to serve the social and recreational needs of its members at least as much as a desire to generate funds to preserve a community resource and fund charitable donations. *See Finchum testimony.*

39. As to its charitable giving, the Lodge donated \$24,535 and \$30,314 to charitable cause in 2003 and 2004, respectively. *Rogers testimony; Pet'r Ex. 1.4 at 2.* While the Lodge's donations were laudable and actually exceeded the Lodge's net revenue for 2003, those donations did not comprise an overwhelmingly large percentage of the Lodge's gross revenue.⁴ *Id.* at 7. The Board emphasizes that it is not rejecting the Lodge's claim simply because the Lodge did not donate a sufficient percentage of its gross revenues to charity. The Board recognizes that the predominant use of the subject property – not the Lodge's charitable giving – controls whether the Lodge is entitled to an exemption. In fact, the Board finds that the subject property was devoted to charitable uses in many

⁴ The Lodge had gross revenue of 327,195 in 2003 and \$351,310 in 2004. *Pet'r Ex. 1.4 at 1, 5, 11, 14.*

instances, such when the Lodge provided various charities access to the subject property free of charge for community events and fundraisers. Had the Lodge seriously attempted to quantify the amount of time that the subject property was used for those and other charitable purposes as a percentage of facility's total usage, it might have been entitled to at least a partial exemption. Instead, the Board examines the Lodge's charitable giving solely in the context of whether that giving is sufficient to evince a charitable purpose behind the otherwise social and recreational activities occurring at the Lodge, such as drinking, dancing, dart and pool playing, and karaoke.

40. It is important to note that the Lodge does not offer evidence of its charitable giving to demonstrate a charitable purpose behind discrete activities, as would have been the case if the Lodge had presented evidence that it donated all of the net revenue from a certain event, such as a dance, to a specific charity. Under those circumstances, the donation might be sufficient to reveal a charitable purpose behind what otherwise would appear to be a purely social activity. Instead, the Lodge paints with a broad brush and asserts that all of its otherwise social and recreational activities actually were charitable because they were designed to generate revenue that the Lodge ultimately used to fund its charitable giving. In proffering such an argument, however, the Lodge makes charitable giving the primary focus of its exemption claim. That is precisely the approach rejected by the Indiana Supreme Court in *Moose II*.

41. Having found that the subject property was owned, occupied and used both for charitable and non-charitable purposes, the Board must now determine whether the Lodge is entitled to a partial exemption. As explained above, charitable use exemptions are governed by the predominant use test set forth in Ind. Code § 6-1.1-10-36.3. Thus, the Board must determine whether the subject property was owned, occupied and used for charitable purposes at least fifty percent (50%) of the time that it was in use. I.C. § 6-1.1-10-36.3(a). To the extent that the Lodge has shown a predominant charitable use, the Lodge is entitled to an exemption for a portion of the property's assessment equal to percentage of time that the property was devoted to an exempt use. *See* I.C. § 6-1.1-10-36.3(c)(3).

42. To that end, the Lodge submitted a usage study prepared by Mike Rogers. *Pet'r Ex. 2.1*. In that usage study, Mr. Rogers examined the use of each room contained in the lodge building for the year immediately preceding the assessment date under appeal. *See id.* Mr. Rogers, however, concluded that the Lodge was owned occupied and used one-hundred percent (100%) of the time for charitable purposes. This is true even though non-charitable uses occurred in virtually every room of the facility during the period examined by Mr. Rogers' usage study.
43. Because it steadfastly maintains that the subject property was devoted to charitable use one hundred percent (100%) of the time, the Lodge does not attempt to break down the subject property's usage between charitable and non-charitable activities. Although the usage report submitted by Mr. Rogers arguably contains information from which such an analysis might be derived,⁵ the Lodge, not the Board, shoulders the burden of proving its exemption claim. *See, Indianapolis Racquet Club, Inc. v. Washington Twp Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) (“[I]t is the taxpayer’s duty to walk the Indiana Board . . . through every element of the analysis”).
44. The Board therefore finds that the Lodge failed to establish its entitlement to an exemption pursuant to Ind. Code § 6-1.1-10-16 and Ind. Code §6-1.1-10-36.3.

Issue II

Whether the Lodge is entitled to an exemption under Ind. Code § 6-1.1-10-23 or Ind. Code §27-11-7-4 as a fraternal beneficiary association

45. In its post hearing brief, the Lodge claims an exemption pursuant to Ind. Code § 27-11-7-4. *See Lodge’s Post Trial Brief at 2, 6-12*. The Lodge, however, did not make such a claim either on its Form 136 application or on its Form 132 petition to the Board. On its Form 136 application, the Lodge identified two statutes under which it sought and

⁵ The Lodge presented no evidence whatsoever regarding the use of its personal property. In fact, the Lodge does not identify the personal property it seeks to exempt. Thus, even if the Board were to find that the Lodge was entitled to a partial exemption for portions of the lodge building, the Lodge would not be entitled to any exemption for its personal property.

exemption – Ind. Code § 6-1.1-10-16 and Ind. Code § 6-1.1-10-23. *See Board Ex. A; Pet'r Ex. 6.* Similarly, on its Form 133 petition, the Lodge identified the same two statutes as well as Ind. Code Ind. Code § 6-1.1-10-36.3. *Board Ex. A.* Moreover, in Petitioner's Reply in Support of Summary Judgment, the Lodge made the following statement: "It is also Petitioner's position that Respondent improperly linked the Title 27 exemption provisions with the Title 6 exemption provisions. *Petitioner is seeking an exemption under I.C. 6-1.1-10-23 not under Title 27.*" *Petitioner's Reply in Support of Summary Judgment, at 10 (emphasis added).* Thus, the Lodge has waived any claim for exemption under Ind. Code § 27-11-7-4, and the Board will not specifically address the merits of the Lodge's contentions in that regard.⁶

46. The Lodge, however, has not waived its claim for exemption pursuant to Ind. Code § 6-1.1-10-23. That statute provides:

- (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.

Ind. Code § 6-1.1-10-23.

47. Ind. Code § 6-1.1-10-23 does not define the term "fraternal beneficiary association." At least one case, however, has defined the term in interpreting the predecessor statute to Ind. Code § 6-1.1-10-23. *See State Bd. of Tax Comm'rs v. Fort Wayne Sports Club, Inc.*, 147 Ind. App. 129, 258 N.E.2d 874, 880 (1970). In *Fort Wayne Sports Club*, the court explained that the term "fraternal beneficiary association has a very limited and definitive meaning." 258 N.E. 2d at 880. The court found that meaning set forth in Ind. Stat. Anno. § 39-4401(b), which was part of a larger statute governing the regulation of

⁶ That is not to say that Ind. Code § 27-11 is irrelevant to the Board's determination. Indeed, as discussed below, reference to that statute is necessary in determining whether the Lodge is a fraternal beneficiary association entitled to an exemption pursuant to Ind. Code § 6-1.1-10-23.

fraternal beneficiary associations under the Indiana Insurance Law. *See id.* Ind. Stat. Anno. § 39-4401(b) provided, in relevant part:

The term ‘fraternal benefit society’ or ‘fraternal beneficiary association’ shall mean any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit and having a lodge system and representative form of government, *and which shall make provision for the payment of [death] benefits in accordance with this act.*

Forty Wayne Sports Club, 258 N.E.2d at 880 (quoting Ind. Stat. Anno. § 39-4401(b))(emphasis added). In many ways, the definition of “fraternal beneficiary association” set forth in Ind. Stat. Anno. § 39-4401(b) mirrors the language currently found in its successor statute, Ind. Code § 27-11-1-1,⁷ which identifies the types of fraternal organizations to which Indiana’s insurance laws apply. Although Ind. Code § 27-1-1 now refers to those organizations solely as “fraternal societies,” the legislative intent behind Ind. Code § 6-1.1-10-23 appears to have been to provide an exemption to fraternal organizations covered by the Indiana’s insurance laws. That remains true despite the slight difference in terminology between Ind. Code § 27-1-1 and its predecessor statutes.

48. Thus, in order to demonstrate entitlement to an exemption under Ind. Code § 6-1.1-10-23, a taxpayer must prove (1) that it is an organization described in Ind. Code § 27-11-1-1, and (2) that it occupies and uses the property sought to be exempted exclusively for the purposes for which the taxpayer was organized or incorporated.
49. The parties do not dispute that the Lodge meets the majority of the elements set forth in Ind. Code § 27-11-1-1. Indeed, as reflected in the Board’s factual findings, the Lodge presented undisputed evidence that it is organized as a not-for-profit entity, without capital stock, that it operates on lodge system with a representative form of government and a ritualistic form of work. The PTABOA, however, contends that the Lodge does not

⁷ Ind. Code § 27-11-1-1 provides: “This article applies to any incorporated society, order, or supreme lodge without capital stock, whether incorporated or not, conducted solely for the benefit of its members and their beneficiaries and not-for-profit, operated on a lodge system with ritualistic form of work, having a representative form of government, and that provides benefits in accordance with this article.”

pay benefits as contemplated under the relevant section of the Insurance Code and that it is not organized and carried on solely for the benefit of its members.

50. As to the former, the PTABOA points out that the Lodge's bylaws identify only two types of benefits - a funeral benefit paid to qualified members in an amount ranging from \$150 to \$250, and a floral arrangement or other form of tribute not to exceed \$50. The PTABOA acknowledges that Ind. Code § 27-11-6-1 specifically contemplates the payment of "death benefits," but argues that the funeral benefits and floral arrangement benefits paid by the Lodge do not equate to "death benefits."
51. Neither Ind. Code § 27-11 nor its predecessor statute defines the term "death benefit." Moreover, the parties do not point the Board to any other authority defining that term. Nonetheless, the payment of funeral expenses is expressly referenced under Ind. Code § 27-11-6-2 as one of the types of benefits that organizations regulated under Title 27 may provide. Ind. Code § 27-11-6-2 ("A society may make provision for the payment of funereal benefits to the extent that such portion of any payment under a certificate as might reasonably appear to be due to any person equitably entitled thereto by reason of having incurred expense occasioned by the burial of a member.").
52. The PTABOA further contends that, even if the funeral benefits paid by the Lodge equate to "death benefits" within the meaning of Ind. Code § 27-11-6-1, the Lodge is excluded from coverage under § 27-11 because of the nominal amount of those benefits. Indeed, the statute expressly provides that nothing in Ind. Code § 27-11 shall be construed as affecting or applying to "domestic societies or associations of a purely religious, charitable, or benevolent description that provide for death benefits of not more than four hundred dollars (\$400) . . . to any one person in any one year, or both." Ind. Code § 27-11-9-4(a)(4)
53. While the record supports a finding that the Lodge provides funeral benefits in amounts up to \$250 for eligible members, it is bereft of information concerning the frequency with which the Lodge provides those benefits. Thus, it is not entirely clear whether the Lodge

falls within the exclusion set forth in Ind. Code § 27-11-9-(a) (4). Regardless, the PTABOA's position is well taken. The Lodge bears the burden of showing that it made provisions for payments of benefits in accordance with Ind. Code § 27-11. Thus, the Lodge was required to demonstrate that it acted as an insurer regulated by the Indiana Department of Insurance. The Lodge easily could have done so by presenting a copy of a certificate of authority authorizing it to transact business under Ind. Code § 27-11. In fact, such a certificate would have constituted prima facie evidence of the existence of the Lodge as a fraternal beneficiary association as of the date of that certificate. *See* Ind. Code § 27-11-4-6 (“Upon presentation of satisfactory evidence that the society has complied with all the provisions of the law, the commissioner shall issue to the society a certificate of authority authorizing the society to transact business under this article. The certificate of authority is prima facie evidence of the existence of the society at the date of the certificate.”). The Lodge failed to do so. Thus, the Lodge failed to meet its burden of proving that it is a “fraternal beneficiary association” within the meaning of Ind. Code § 6-1.1-10-23.

54. Perhaps in an effort to avoid its failure to show that it acted as an insurer regulated by the Department of Insurance under Title 27, the Lodge argues that there exists a separate “common law” definition of “fraternal beneficiary association” and that it is entitled to an exemption if it meets the common law definition independently of any statutory definition of “fraternal beneficiary association” contained in Ind. Code § 6-1.1-10-23 or Ind. Code § 27-11. In support of its position, the Lodge points to an opinion of the Indiana Attorney General from 1944. 1944 Op. Atty. Gen. 262. The Lodge then points to an excerpt from that opinion indicating that it had been the practice in Indiana to exempt property owned by organizations such as the Elks, Masons, Odd Fellows and Knights of Pythia where the property was used for the purposes of the organizations. *Id.* at 270.
55. The Lodge's position lacks merit for numerous reasons. First, there can be no “common law” basis for exemption of property in Indiana. Article 10 section 1 of the Indiana Constitution grants the Indiana General Assembly the exclusive authority to provide for

exemptions from property taxation. Second, the Indiana Attorney General explicitly referred to a predecessor statute of Ind. Code 27-11, not on common law, in identifying what entities were entitled to an exemption under the prior version of Ind. Code § 6-1.1-10-23. 1944 Op. Atty. Gen. At 265 (“[T]he words ‘fraternal beneficiary association, incorporated organized or licensed under the laws of this state’ . . . refers to an association incorporated or organized under the laws of the state relating to fraternal beneficiary associations, which laws expressly define such a fraternal beneficiary association.”). Finally, the excerpt quoted by the Lodge to the effect that property is exempt when used by a fraternal organization for the purposes for which the organization was formed does not relate to an organization’s eligibility under the statutory exemption for fraternal beneficiary associations. That excerpt instead relates to whether property of fraternal organizations should be exempt based upon charitable use under a predecessor statute to Ind. Code § 6-1.1-10-16. 1944 Op. Atty. Gen. at 266-72.⁸

Issue 3

Whether the actions of the Morgan County Property Tax Assessment Board of Appeals (PTABOA), which the Lodge characterizes as arbitrary and capricious, entitle the Lodge to relief in a proceeding before the Board

56. The Lodge makes several claims regarding what it views as procedural irregularities relating to the hearing before the PTABOA. First, the Lodge claims that the PTABOA did not rule upon its request for exemption under Ind. Code § 6-1.1-10-23. The Lodge bases its claim on the fact that the PTABOA did not expressly refer to its claim under that statute in its Form 120 Notice and on Ms. Brittain’s testimony that the PTABOA neither considered nor denied the Lodge’s claim under Ind. Code § 6-1.1-10-23. The Lodge further argues that the notice of hearing published by the PTABOA indicates that the Lodge’s application was to be heard on July 23, 2004, but that the PTABOA denied the Lodge’s Form 136 application prior to that date.

⁸ As explained in the Board’s discussion of the preceding issue, Indiana courts subsequently have held that purely social and recreational activities do not constitute a charitable use, even if they generally further an organization’s stated purpose of promoting brotherly love. *See Indianapolis Elks Bldg.*, 261 N.E.2d at 878. In fact, the court in *Indianapolis Elks Bldg.*, rejected the taxpayer’s argument that it was entitled to an exemption based upon the very same Attorney General opinion relied upon by the Lodge in this case and the doctrine of legislative acquiescence. *Id.* at 541.

57. The Board rejects all of the Lodge's claims concerning the actions of the PTABOA. As an initial matter, whether the PTABOA based its decision on the correct legal standard or committed the procedural errors alleged is irrelevant to the issues on appeal. Proceedings before the Board are *de novo*. See Ind. Code § 6-1.1-15-4(m) ("A person participating in a hearing [before the Board] is entitled to introduce evidence that is otherwise proper and admissible without regard to whether that evidence has previously been introduced at a hearing before the county property tax assessment board of appeals."); see also Ind. Admin. Code tit. 52, r. 2-5-3(a) ("The board may not limit the scope of the issues raised in the appeal petition to those presented to the PTABOA unless all parties agree to the limitation of issues.).
58. Moreover, the Board finds as a factual matter that the PTABOA provided prior notice of the meeting at which the PTABOA denied the Lodge's application when it published its notice of its meetings in a local newspaper. See *Pet'r Ex. 13*. Nothing in the Ind. Code § 6-1.1-11, the statute governing the exemption application and appeal process, requires a county property tax assessment board of appeals to hold an evidentiary hearing concerning a taxpayer's application for exemption. The statute instead requires the property tax assessment board of appeals to approve or deny each application after careful examination and the county assessor to mail notice to the taxpayer if its application is denied. Ind. Code § 6-1.1-11-8. The taxpayer may then appeal the denial of its application to the Board in accordance with Ind. Code § 6-1.1-15-3. *Id.* The Lodge's reference to the "hearing" on its application, therefore, is more properly understood as a reference to the public meeting at which the PTABOA took action on the Lodge's Form 136 application. The Lodge's own exhibit, however, demonstrates that the PTABOA published notice that it would be meeting the week of July 19, 2004, through July 23, 2004, to consider, among other things, applications for property tax exemptions. *Pet'r Ex. 13*. The PTABOA acted to deny the Lodge's application on July 21, 2004, within the period specified in the published notice.

59. The only claimed procedural error that might affect the Board's determination in the instant case is the Lodge's contention that the PTABOA did not actually deny its application for an exemption under Ind. Code § 6-1.1-10-23. The Indiana Board would not have jurisdiction to address the Lodge's claim regarding its entitlement to an exemption under Ind. Code § 6-1.1-10-23 if the PTABOA had not first issued a determination on the Lodge's application in that regard. *See* Ind. Code § 6-1.5-4-1 (providing the Board with jurisdiction to "conduct an impartial review of all appeals concerning . . . exemptions that are *made from a determination by* . . . a county property tax assessment board of appeals) (emphasis added). The PTABOA, however, did issue a determination regarding the Lodge's application for an exemption pursuant to Ind. Code § 6-1.1-10-23. The Lodge claimed both its charitable and fraternal exemptions on the same Form 136 application. The PTABOA clearly marked the application as "denied." *Pet'r Ex. 6 at 2.*

Issue 4

Whether the PTABOA's denial of the Lodge's exemption application while granting the applications of other fraternal organizations denied the Lodge equal protection and due process of law

60. The Lodge does not present any authority to support its claim that the PTABOA's actions in denying its application for exemption violated the Lodge's rights to equal protection and due process of the law. In fact the Lodge does not even cite to the relevant constitutional provisions much less explain their application to the instant case. The Board therefore denies the Lodge's claims in that regard.

Issue 5

Whether the Lodge is entitled to an award of attorney fees and costs

61. Finally, the Lodge requests that the Board enter an award of attorney fees and costs based on what it describes as the PTABOA's "lawless" actions and its "dereliction of duty." The Lodge bases its claim largely on the actions of the PTABOA as described in the preceding paragraphs. The Lodge also points to the fact that counsel for the PTABOA

engaged in a whispered colloquy with Ms. Brittain while Ms. Brittain was testifying under oath at the hearing.

62. The Board is a creation of the legislature and therefore has only those powers conferred by statute. *Matonovich v. State Bd. of Tax Comm'rs*, 705 N.E.2d 1093, 1096 (Ind. Tax Ct. 1999). Moreover, any doubts regarding the power of a governmental agency, such as the Board, are resolved against the agency. *State ex rel. ANR Pipeline Co. v. Indiana Dep't of State Revenue*, 672 N.E.2d 91, 94 (Ind. Tax Ct. 1996). The Lodge does not identify, nor does the Board find, any statute granting the Board the authority to award attorney fees or costs. Consequently, the Board lacks the authority to enter such an award on behalf of the Lodge. Even if the Board possessed statutory power to award attorney fees, there is a general policy against assessing penalties and attorney fees against governmental entities. *Cox v. Town of Rome*, 764 N.E.2d 242, 249 n.4 (Ind. Ct. App. 2002). That is particularly true with regard to awards based upon governmental entities having engaged in bad faith or obdurate conduct. *See State v. Hicks*, 465 N.E.2d 1146, 1149-50 (Ind. Ct. App. 1984)(reversing award of attorney fees against State of Indiana). Such entities do not have “minds” that can be deterred. *Id.* Moreover, the people sought to be protected by such awards - citizen taxpayers – are the ones that ultimately bear the burden of those awards. *See id.*

63. As to the Lodge’s contention regarding the colloquy between counsel for the Respondent and Ms. Brittain, the Board agrees that such actions were improper. The ALJ sustained the Lodge’s objection, which served as an admonishment to counsel. While the Lodge did not move to strike any subsequent testimony by Ms. Brittain, the colloquy impacts upon the credibility of Ms. Brittain’s subsequent testimony. Ms. Brittain’s testimony, however, focused almost exclusively on the PTABOA’s subjective reasons for denying the Lodge’s Form 136 application. As explained above, the proceedings before the Board are *de novo*, which renders Ms. Brittain’s testimony largely irrelevant.

SUMMARY OF FINAL DETERMINATION

64. The Petitioner, Fraternal Order of Eagles #3988, Inc. failed to establish its entitlement to an exemption under Ind. Code § 6-1.1-10-16, Ind. Code § 6-1.1-10-23 or Ind. Code § 27-11-7-4. The Board therefore finds for the Respondent.

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 pursuant to the provisions of Indiana Code § 6-1.1-15-5. 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. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Trial Rules are available on the Internet at <http://www.in.gov/judiciary/rules/trial_proc/index.html>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>.