

REPRESENTATIVE FOR PETITIONER:

Stacy K. Somers, Beers, Mallers, Backs & Salin, LLP

REPRESENTATIVE FOR RESPONDENT:

Candace D. Armstrong, Armstrong Law Offices

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Crestmark Health Care Management, LLC,	)	Petition Nos.: 56-013-10-2-8-00001
	)	56-013-11-2-8-00001
Petitioner,	)	
	)	Parcel No.: 56-05-12-441-015.000-013
v.	)	
	)	
Newton County Assessor,	)	County: Newton
	)	
Respondent.	)	Assessment Years: 2010 and 2011

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

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July 16, 2012

**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:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### ISSUE

1. The issue presented for consideration by the Board is whether the Petitioner's real property is exempt from taxation in 2010 and 2011, pursuant to Indiana Code § 6-1.1-10-16, because it is owned, occupied and used for charitable purposes.

### PROCEDURAL HISTORY

2. On May 3, 2010, Dwight A. Ott, Secretary and Treasurer of Crestmark Health Care Management, LLC (Crestmark Management), filed a Form 136, Application for Property Tax Exemption on behalf of the Petitioner, seeking an exemption for a skilled nursing facility owned by Crestmark Management and operated by Crestmark Healthcare Operations Company (Crestmark Operations) for the 2010 assessment year. On October 6, 2010, the Newton County Property Tax Assessment Board of Appeals (PTABOA) issued a Form 120, Notice of Action on Exemption Application, finding the Petitioner's real property to be 100% taxable. On November 4, 2010, Stacy K. Somers of Beers, Mallers, Backs & Salin, LLP, filed a Form 132, Petition for Review of Exemption, claiming the Petitioner's real property should be 100% exempt under Indiana Code § 6-1.1-10-16.
3. On May 11, 2011, Mr. Ott filed a Form 136, Application for Property Tax Exemption on behalf of the Petitioner, seeking an exemption for the skilled nursing facility owned by Crestmark Management and operated by Crestmark Operations as Autumn Hills for the March 1, 2011, tax assessment. On September 16, 2011, the PTABOA issued a Form 120 finding the Petitioner's real property to be 100% taxable. On October 14, 2011, Mr. Somers filed a Form 132 claiming the Petitioner's real property should be 100% exempt under Indiana Code § 6-1.1-10-16.

## HEARING FACTS AND OTHER MATTERS OF RECORD

4. Pursuant to Indiana Code § 6-1.1-15-4, Carol S. Comer, the duly designated Administrative Law Judge (ALJ) authorized by the Board under Indiana Code § 6-1.5-3-3 and § 6-1.5-5-2, held a hearing on April 25, 2012, in Kentland, Indiana.
5. The following persons were sworn as witnesses at the hearing:

For the Petitioner:

Dwight A. Ott, Secretary and Treasurer, Crestmark Management,  
Crestmark Operations, and Tender Loving Care  
Management Company  
Benjamin Gehrman, Health Facility Administrator, Crestmark  
Management  
William G. Seck, Controller, Tender Loving Care Management  
Company

For the Respondent:

Kristen L. Hoskins, Newton County Assessor

6. The Petitioner submitted the following exhibits:

Petitioner Exhibit 1-1 – The March 1, 2010, Application for Property Tax Exemption – Form 136, for “Crestmark Health Care Management, LLC, and Crestmark Healthcare Operations Company, LLC,”  
Petitioner Exhibit 1-A – Petitioner’s memorandum in support of a property tax exemption,  
Petitioner Exhibit 1-B – List of services provided by Crestmark Health and Rehabilitation Center,  
Petitioner Exhibit 1-C – “Consumer Report” for Crestmark Health and Rehabilitation Center, dated August 13, 2009,  
Petitioner Exhibit 1-D – Financial reports for the period ending December 31, 2007, December 31, 2008, and December 31, 2009, for Crestmark Health Care Management, LLC,  
Petitioner Exhibit 1-E – Financial reports for the period ending December 31, 2007, November 30, 2008, and December 31, 2009, for Crestmark Healthcare Operations Company, LLC,

- Petitioner Exhibit 1-2 – Indiana Secretary of State Certificate of Organization and Articles of Organization for Crestmark Health Care Management, LLC,
- Petitioner Exhibit 1-3 – Operating agreement for Crestmark Health Care Management, LLC,
- Petitioner Exhibit 1-4 – Articles of Organization and Certificate of Organization for Crestmark Healthcare Operations Company, LLC,
- Petitioner Exhibit 1-5 – Operating agreement for Crestmark Healthcare Operations Company, LLC,
- Petitioner Exhibit 2-1 – The March 1, 2011, Application for Property Tax Exemption – Form 136 for Crestmark Health Care Management, LLC, and Crestmark Healthcare Operations Company, LLC (Autumn Hills),
- Petitioner Exhibit 2-2 – Five photographs of the subject property,
- Petitioner Exhibit 2-3 – Petitioner’s memorandum in support of a property tax exemption,
- Petitioner Exhibit 2-4 – Brochures for Autumn Hills and Creative Health Solutions,
- Petitioner Exhibit 2-5 – Tender Loving Care Management mission statement,
- Petitioner Exhibit 2-6 – Monthly calendars of events from May 2010 through April 2011,
- Petitioner Exhibit 2-7 – State Department of Health Comprehensive & Residential Care License for Crestmark Healthcare Operations Company, LLC, d/b/a Autumn Hills Health and Rehab Center,
- Petitioner Exhibit 2-8 – “Consumer Report” for Autumn Hills Health and Rehab Center, dated December 16, 2010,
- Petitioner Exhibit 2-9 – Autumn Hills’ employee breakdown from March 2010 through February 2011,
- Petitioner Exhibit 2-10 – Facility admission agreement packet and TLC Management Residential Rights,
- Petitioner Exhibit 2-11 – 2010 and 2011 room rates for Autumn Hills,
- Petitioner Exhibit 2-12 – Financial reports for the period ending November 30, 2008, December 31, 2009, and December 31, 2010, for Crestmark Health Care Management, LLC,
- Petitioner Exhibit 2-13 – Financial reports for the period ending November 30, 2008, December 31, 2009, and December 31, 2010, for Crestmark Healthcare Operations Company, LLC,
- Petitioner Exhibit 2-14 – Indiana Secretary of State Certificate of Organization and Articles of Organization for Crestmark Health Care Management, LLC,
- Petitioner Exhibit 2-15 – Operating agreement for Crestmark Health Care Management, LLC,

- Petitioner Exhibit 2-16 – Articles of Organization and Certificate of Organization for Crestmark Healthcare Operations Company, LLC,
- Petitioner Exhibit 2-17 – Operating agreement for Crestmark Healthcare Operations Company, LLC,
- Petitioner Exhibit 3 – Crestmark Health Care Management, LLC, change of ownership and membership,
- Petitioner Exhibit 4 – Crestmark Healthcare Operations Company, LLC, change of ownership and membership,
- Petitioner Exhibit 5 – Lease agreement between Crestmark Health Care Management, LLC, and Crestmark Healthcare Operations Company, LLC, dated April 1, 2007,
- Petitioner Exhibit 6 – Management agreement between Crestmark Healthcare Operations Company, LLC, and Tender Loving Care Management, Inc. (TLC Management),
- Petitioner Exhibit 8 – List of repairs and improvements at Autumn Hills.<sup>1</sup>

7. The Respondent submitted the following exhibit:

- Respondent Exhibit 1-A – TLC Management’s “Mission/Overview,”
- Respondent Exhibit 1-B – TLC Management’s website description of Autumn Hills Health & Rehabilitation Center,
- Respondent Exhibit 2 – Notice of Action on Exemption Application – Form 120,
- Respondent Exhibit 3 – Indiana Secretary of State Certification of Incorporation, Initial Declaration and Articles of Incorporation for Tender Loving Care Management, Inc.

8. 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,
- Board Exhibit B – Notices of Hearing on Petitions,
- Board Exhibit C – Hearing sign-in sheet.

9. The property under appeal is a skilled nursing facility on a 4.759 acre parcel of land located at 10352 North 600 East, Demotte, in Newton County.

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<sup>1</sup> The Petitioner’s counsel did not submit Petitioner Exhibit 7 as part of the Petitioner’s evidence.

10. The ALJ did not conduct an on-site inspection of the property.
11. For 2010 and 2011, the PTABOA determined the Petitioner's real property was 100% taxable.
12. For 2010 and 2011, the Petitioner contends that its real property should be 100% tax-exempt.

### **JURISDICTIONAL FRAMEWORK**

13. The Indiana Board of Tax Review is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property, (2) property tax deductions, (3) property tax exemptions, and (4) property tax credits 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 Indiana 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**

14. The general rule is that all property is subject to taxation. Ind. Code § 6-1-1-2-1. 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.
15. 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 a property owner 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).

16. 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 at 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)).
17. The taxpayer seeking exemption bears the burden of proving that the property is entitled to the exemption by showing that the property falls specifically within the 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).

#### **PETITIONER'S CONTENTIONS**

18. The Petitioner contends that its real property is eligible for 100% exemption pursuant to Indiana Code § 6-1.1-10-16, because the property was owned, occupied and used for charitable purposes in 2010 and 2011.
19. The Petitioner presented the following evidence in regard to this issue:
  - A. The Petitioner's counsel argues that the subject property is owned for a charitable purpose. *Somers argument*. According to Mr. Somers, the Indiana Tax Court has found that the critical issue when evaluating a property tax exemption is the use of a property and not whether the person seeking the exemption makes a profit from the use. *Petitioner's Exhibits 1-A at 1 and 2-3 at 1*. The Indiana Tax Court has also held that a charitable exemption may extend beyond "traditional 'giving to the

poor,” where it can be shown that the public benefits are “sufficient to justify the loss of tax revenue.” *Id.*, citing *Sisters of St. Francis Health Services, Inc. v. Lake County Property Tax Assessment Board of Appeals*, 868 N.E.2d 1224 (Ind. Tax Ct. 2007).

- B. The Petitioner’s counsel further argues that the Indiana Tax Court has explicitly held the care of elderly people constitutes a charitable use of property in *Knox County Property Tax Assessment Board of Appeals v. Grandview Care*, 826 N.E.2d 177 (Ind. Tax Ct. 2005); *Raintree Friends Housing, Inc. v. Indiana Department of State Revenue*, 667 N.E. 2d 810 (Ind. Tax Ct. 1996); *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Board of Appeals*, 782 N.E.2d 483 (Ind. Tax Ct. 2003); and *Wilson v. Dexter*, 192 N.E.2d 469 (Ind. Ct. App. 1963). *Petitioner’s Exhibits 1-A at 1 and 2-3 at 1 and 2; Petitioner’s memorandum of law at 7.* Mr. Somers argues that the subject property is properly licensed to house, care for, and provide for the safety of the elderly. *Somers argument.*
- C. The Petitioner’s witness, Dwight Ott, testified that Crestmark Management purchased the subject property with the knowledge that the property was built for, designed for, and used as a nursing home facility. *Ott testimony.* According to Mr. Ott, Crestmark Management leased the subject property to Crestmark Operations on April 1, 2007. *Ott testimony; Petitioner Exhibit 5.* Crestmark Operations leased the property for the purpose of operating a “comprehensive health care facility.”<sup>2</sup> *Petitioner Exhibit 5.* According to the lease, Crestmark Operations “shall not use the Leased Premises for any other purpose without the prior written consent” of Crestmark Management. *Id.* In fact, Mr. Ott testified, the property is a special use property. *Ott Testimony.* “I don’t know what else it could be used for.” *Id.*

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<sup>2</sup> Crestmark Operations operated the subject property under the name of Crestmark Health & Rehabilitation Center until it changed its name in 2010 to Autumn Hills Health and Rehab Center (Autumn Hills). *Ott testimony; Petitioner Exhibits 1-C and 2-7.*



- D. Mr. Ott further testified that Crestmark Operations entered into a management agreement with Tender Loving Care Management, Inc. (TLC Management), on March 15, 2007. *Ott testimony; Petitioner Exhibit 6.* According to the agreement, TLC Management provides “Management support which includes monthly management meetings with the Administrator and providing financial controller support, computer support, and accounting support for accounts receivable, accounts payable, and payroll. Monthly budgets, in addition to the profit and loss statements.” *Petitioner Exhibit 6.* In addition, Mr. Ott testified, TLC Management provides nursing consultants to oversee the facility and to assure the property is in compliance with state regulations and statutes. *Ott testimony.* They also act as dietary consultants and attend to the maintenance and grounds of the facility. *Id.*
- E. Mr. Ott testified that Crestmark Management, Crestmark Operations, and TLC Management share common ownership. *Ott testimony.* According to Mr. Ott, as of March 17, 2010, the Connie Ott Revocable Trust owned 47.5%, Lawrence and Anita Maxwell WROS owned 47.5% and Dwight Ott owned 5% of Crestmark Management and Crestmark Operations.<sup>3</sup> *Id.; Petitioner Exhibits 3 and 4.* Similarly, Mr. Ott testified that TLC Management is owned by Gary Ott and Larry and Anita Maxwell, each having 47.5% interest and Dwight Ott owns the remaining 5% interest. *Ott testimony; Petitioner’s memorandum of law at 3.* While Crestmark Management and Crestmark Operations do not own or operate any other facilities than the property at issue in this appeal, the individual owners of Crestmark Management own and operate a number of nursing homes. *Ott testimony.* Similarly, TLC Management manages several facilities, in addition to the subject property. *Id.* In response to cross examination, Mr. Ott admitted that Crestmark Operations’ (i.e. Autumn Hills) only website presence is a link through TLC

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<sup>3</sup>While Mr. Ott testified as to the common ownership structure between TLC Management and Crestmark Management and Crestmark Operations, it was clarified that the ownership interest of two of the members has changed legal names. Specifically, Gary Ott’s 47.5% interest is now titled in the Connie Ott Revocable Trust (Connie Ott is Garry Ott’s wife) and Larry and Anita Maxwell’s 47.5% is now titled in TLC Planning LTD (which is understood to be owned by Larry and Anita Maxwell). *Ott testimony; Petitioner Exhibits 3 and 4.*

Management's website and that TLC Management handles all of Autumn Hills' marketing. *Ott testimony.*

- F. Mr. Ott testified that the common ownership between Crestmark Management, Crestmark Operations, and TLC Management allows Crestmark Operations to continue to operate the nursing home facility despite the property's losses. *Ott testimony.* Mr. Ott admitted that Crestmark Operations had paid all its bills to outside companies and that Crestmark Management was current on its mortgage. *Ott testimony.* However, according to Mr. Ott, from December 31, 2007, to December 31, 2010, Crestmark Operations accrued \$413,803.25 in rent and management fees that it had not paid. *Ott testimony; Petitioner Exhibits 2-12 and 2-13.* In addition, in 2007, TLC Management loaned Crestmark Operations \$300,445, interest free, which as of December 31, 2010, it had been unable to pay back. *Id.* Moreover, the members of the company have contributed approximately \$700,000 to Crestmark Operations to keep the nursing home operational. *Ott testimony.*
- G. Mr. Ott argues that it is the mission of Crestmark Operations to care for the elderly, but without financial assistance from Crestmark Management and TLC Management, it would not have been possible and the nursing home would have closed. *Ott testimony.* According to Mr. Ott, Crestmark Operations has never been profitable and has never made any distribution to its members. *Ott testimony.* Mr. Ott admitted however that because he and his brother, Gary Ott, own a number of "small community facilities," they believed they could increase the occupancy at the subject property and make the facility profitable. *Id.* In fact, Mr. Ott agreed that the goal of Crestmark Operations was "to be profitable" at the site. *Id.* And Mr. Ott admitted that TLC Management is a profitable entity that makes distributions to its members. *Id.*
- H. In addition, Mr. Ott testified that TLC Construction, which is another business owned by Gary Ott, Dwight Ott, Larry Maxwell and another partner, Randy Ott, was hired to perform work at the site. *Ott testimony.* Although Mr. Ott was unsure

whether Crestmark Management or Crestmark Operations paid the bills, Mr. Ott confirmed that TLC Construction was paid for its work on the facility. *Id.* Further, while Mr. Ott characterized TLC Construction as a “break even” company, he admitted that it has made at least one distribution to its owners. *Id.* Similarly, PSI Pharmacy, which TLC Management has an ownership interest in, supplies the prescription and over-the-counter drugs to residents at the subject nursing home facility. *Ott testimony; Petitioner Exhibit 8.*

- I. Mr. Seck, the controller of TLC Management, testified that Crestmark Operations exclusively occupies and uses the subject property. *Seck testimony.* According to Mr. Seck, the per census daily cost of running the facility is \$14,200 or \$245 per resident. *Seck testimony; Petitioner’s memorandum of law at 5, 7 and 8.* The subject facility has approximately seventy residents and is currently receiving an average of \$215 per resident per day. *Id.* Therefore, the facility is losing \$30 per resident, or approximately \$2,100 per day. *Id.* Mr. Seck testified that the operating deficit is made up through loans and TLC Management foregoing its management fee.<sup>4</sup> *Seck testimony.* Mr. Seck testified, however, that the facility was not at capacity. *Id.* Moreover, if the management fees and the loan amount are not included, Mr. Seck testified, the cost per patient is about \$112. *Id.*
  
- J. Mr. Seck further testified that 86% of the facility’s revenue comes directly from government sources such as Medicare, Medicaid, state programs and the Veteran’s Administration. *Seck testimony.* The remaining 14% of funding comes indirectly from government sources through Medicare replacement policies. *Id.* According to Mr. Seck, because the nursing home receives funds from the government, there are charges for certain items that cannot be collected from the patients; therefore they are written-off. *Id.* For example, if a patient changes from private pay to Medicaid, the difference in expenses is not collectable. *Id.* Also, if an indigent patient is on Medicaid and has Medicare as co-insurance, the nursing home is not allowed to

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<sup>4</sup> Mr. Seck testified that TLC Management’s 2011 financial records show that it wrote-off approximately \$500,000 in management fees owed by Crestmark Operations. *Seck testimony.*

collect the unpaid portion. *Id.* Mr. Seck admitted, however, that other facilities managed by TLC Management have write-offs too. *Id.*

- K. Finally, Mr. Gehrman, the administrator of Autumn Hills Health and Rehab, testified that, in 2012, the facility employed 95 employees, including a Director and Assistant Director of nursing, a clinical nursing staff, a Social Service Director, an Activities Director, and a therapist, all of which are licensed by the state. *Gehrman testimony.* The facility also employs State Department of Health certified nursing assistants. *Id.* According to Mr. Gehrman, the employees assist residents with daily living activities, such as eating, transportation, recreational activities, social activities, exercise programs, medication management and rehabilitation therapy. *Id.; Petitioner Exhibits 2-4 and 2-6.* Mr. Gehrman testified that there is a state procedure for discharging a patient that is unable to pay, but that it had not happened at the Petitioner's nursing home as long as he had been at the facility. *Gehrman testimony.* Mr. Gehrman admitted, however, that he had only been with the facility for three months. *Id.*
- L. In response to cross examination, Mr. Gehrman testified that his "mission," as directed by Crestmark Operations, is to "control costs, to boost census and become compliant with the State of Indiana regulations," which he contends are the "three Cs" of running a profitable nursing home. *Gehrman testimony.* Mr. Gehrman admitted that the problems with the census is an issue being experienced "across the board" throughout the State of Indiana. *Id.* However, Mr. Gehrman testified, the trouble with running a nursing home is the fixed costs that the owners have no control over. *Id.* Moreover, Mr. Gehrman testified, the Petitioner's nursing home had to be competitive with not-for-profit facilities and the Petitioner's facility was subject to the same licensing and administrative requirements as not-for-profit nursing homes. *Id.*

## Respondent's Contentions

20. The Respondent contends that the Petitioner's property is not entitled to an exemption under Indiana Code § 6-1.1-10-16 because the Petitioner has not shown that the property is owned, occupied and used for a charitable purpose. *Armstrong argument.*
21. The Respondent presented the following evidence in support of its contentions:
- A. The Respondent's counsel argues that Crestmark Management and Crestmark Operations are for-profit businesses which, although separate entities, share common ownership. *Armstrong argument; Respondent's post-hearing brief (Respondent's brief) at 6.* According to Ms. Armstrong, Crestmark Management was formed to purchase the subject property and Crestmark Operations was formed to operate the nursing home at issue in this appeal. *Armstrong argument; Respondent's brief at 4.* Thus, Ms. Armstrong argues, because there is a split of ownership and use of the property, both Crestmark Management and Crestmark Operations must show that it has a charitable purpose. *Armstrong argument; Respondent's brief at 6, citing Hamilton County Property Tax Assessment Board of Appeals v. Oaken Bucket Partners, LLC, 938 N.E.2d 654, 657 (Ind. 2010).*
- B. The Respondent's counsel argues that Crestmark Management has not shown that it has a charitable purpose in the ownership of the property under appeal. *Armstrong argument; Respondent's brief at 7.* In fact, Ms. Armstrong argues, the lease agreement between Crestmark Management and Crestmark Operations demonstrates that Crestmark Management is like any other landlord that expects lease payments and can invoke a penalty interest rate of ten percent per annum on all amounts due or unpaid. *Armstrong argument; Respondent's brief at 13.* The mere fact that its tenant has financially been unable to make all of the payments, Ms. Armstrong argues, is not evidence Crestmark Management has a charitable purpose. *Id.* The lease payments are still owed and outstanding with the expectation of eventual payment. *Id.*

- C. Similarly, the Respondent’s counsel argues, Crestmark Operations has failed to show it has a charitable purpose. *Armstrong argument; Respondent’s brief at 8.* Ms. Armstrong admitted that caring for the elderly is a noble and worthy cause and that nursing homes, in certain circumstances, have been exempt from property taxation. *Id.* However, Ms. Armstrong argues, the Indiana Tax Court has recognized that there is no per se rule or bright-line test that a nursing home is automatically considered exempt from taxation. *Armstrong argument; Respondent’s brief at 10, citing Tipton County Health Care Foundation, Inc. v. Tipton County Assessor, 961 N.E.2d 1048, 1051 (Ind. Tax Ct. 2012).* The Tax Court looks to whether “public benevolence” exists, and here, Ms. Armstrong argues, Crestmark Operations operates with an expectation of profit and not as a public benevolence. *Armstrong argument; Respondent’s brief at 10.*
- D. The Respondent’s counsel argues that whether Crestmark Management or Crestmark Operations has yet to make a profit does not make the subject property charitable. *Armstrong argument.* According to Ms. Armstrong, Crestmark Management and Crestmark Operations’ financial history covers less than four years in business. *Id.; Respondent’s brief at 10.* During that period of time, the National Bureau of Economic Research determined that the United States was in a recession. *Armstrong argument; Respondent’s brief at 10.* Therefore, Ms. Armstrong argues, Crestmark Management’s and Crestmark Operations’ lack of profits is more likely to be due to new ownership and tough economic times than any “charitable purpose” of the entities. *Id.*
- E. Moreover, the Respondent’s counsel argues that, because TLC Management is under common ownership with Crestmark Management and Crestmark Operations, whether TLC Management has “heavily” subsidized the facility by making an interest-free loan and waiving its management fees does not demonstrate a charitable purpose. *Armstrong argument; Respondent’s brief at 11.* According to Ms. Armstrong, the Petitioner’s witness testified that the funds owed to TLC

Management are carried on Crestmark Operations' books and have not been forgiven. *Id.* In addition, Mr. Ott testified no interest was charged on the loan between TLC Management and Crestmark Operations because there was no tax advantage. *Id.*

- F. Similarly, the Respondent's counsel argues that, although Crestmark Management and Crestmark Operations have not been able to generate distributions to its members, these entities still provide a financial benefit to their members. *Armstrong argument; Respondent's brief at 12.* According to the Respondent's counsel, the members of Crestmark Management and Crestmark Operation have ownership interest in TLC Construction and PSI Pharmacy, both of which are paid for the services they provide to the subject property. *Id.* In addition, Crestmark Management and Crestmark Operations are taxed as "pass-through" companies while TLC Management is taxed as an "S corporation." *Id.* Ms. Armstrong argues that these tax elections generally allow owners to off-set the profits of one company with losses from another company. *Id.* Thus, Ms. Armstrong concludes, Crestmark Management's and Crestmark Operations' lack of profit on a cash flow basis does not mean there has not been a financial or tax benefit to their members. *Id.*

### **Analysis of the Issue**

22. Indiana 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." Ind. Code § 6-1.1-10-16(a). Further, "a tract of land ... is exempt from property taxation if: (1) a building that is exempt under subsection (a) or (b) is situated on it; [or] (2) a parking lot or structure that serves a building referred in subdivision (1) is situated on it." Ind. Code § 6-1.1-10-16(c).
23. Exemption statutes are strictly construed against the taxpayer. *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).

24. An exemption requires probative evidence that a property is owned, occupied, and used for an exempt purpose. While the words “owned, occupied and used” restrict the activities that may be conducted on the property that can qualify for exemption, they do not require a single entity to achieve a unity of ownership, occupancy and use. Rather, these words are used to ensure that the particular arrangement involved is not driven by a profit motive. *Sangrlea Boys Fund, Inc. v. State Board of Tax Commissioners*, 686 N.E.2d 954, 959 (Ind. Tax Ct. 1997) (“Sangrlea does not own the property as investment property or with a motive of profit. The use and occupation of the property by the Lessees is in furtherance of Sangrlea’s exempt purposes.”). Once these three elements are met, the property can be exempt from property taxation. *Knox County Property Tax Assessment Board of Appeals v. Grandview Care, Inc.*, 826 N.E.2d 177, 183 (Ind. Tax Ct. 2005).
25. “The evaluation of whether property is owned, occupied, and predominately used for an exempt purpose,” however, “is a fact sensitive inquiry; there is no bright-line test.” *Jamestown Homes of Mishawaka, Inc. v. St. Joseph County Assessor*, 914 N.E.2d 13 (Ind. Tax Ct. 2009) (citation omitted). Thus every exemption case “stand[s] on its own facts” and on how the parties present those facts. See *Indianapolis Osteopathic Hospital, Inc. v. Department of Local Government Finance*, 818 N.E. 2d 1009, 1018 (Ind. Tax Ct. 2004); and *Long v. Wayne Township Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005)



(explaining that a taxpayer has a duty to walk the Indiana Board through every element of its analysis; it cannot assume the evidence speaks for itself).

26. The Indiana Court of Appeals first addressed the issue of care for the aged as a charitable purpose in the *State Board of Tax Commissioners v. Methodist Home for the Aged*, 241 N.E.2d 84 (Ind. Ct. App. 1968). In that case, the Court recognized that the senior population had special needs, “namely relief of loneliness, boredom, decent housing that has safety and convenience and is adapted to their age, security, well-being, emotional stability, attention to problems of health, etc.” 241 N.E.2d at 86. In finding a non-profit retirement home exempt, the Court held that “it is now common knowledge that the aged require care and attention entirely independent of financial needs, and that present day humanitarian principles demand that those in their declining years have the opportunity to live with as much independence as their strength will permit, in as pleasant and happy surroundings as their finances will reasonably justify.” *Id.* at 89.
27. The Indiana Court of Appeals decision in *Methodist Home* has been followed numerous times by the Indiana Tax Court. See *Raintree Friends Housing, Inc. v. Indiana Department of State Revenue*, 667 N.E.2d 810 (Ind. Tax Ct. 1996); *Wittenburg Lutheran Village Endowment Corporation v. Lake County Property Tax Assessment Board of Appeals*, 782 N.E.2d 483 (Ind. Tax Ct. 2003); and *Knox County Property Tax Assessment Board of Appeals v. Grandview Care, Inc.* 826 N.E.2d 177 (Ind. Tax Ct. 2005).
28. In *Raintree Friends*, the facility at issue was funded almost exclusively by tenant rents and fees, although the property received non-financial support and services from local Quaker congregations. 667 N.E.2d at 812. In supporting its determination that the property owner was subject to gross income, sales and food and beverage taxes, the Department of Revenue argued that the properties were “not operating for a charitable purpose because the services they offer are no different than those offered by traditional apartment complexes.” *Id.* The Court, in granting an exemption, held:

The Housing Corporations provide beneficial and worthwhile services to the aged population. Indeed, the mission statement of each Retirement

Home articulates that its goal is to assist residents in living as independently as possible for as long as possible. The Retirement Homes provide a benefit to society by catering to the specific needs of their aged residents and by providing community, security, and assisted living for those in need.

*Id.* at 815. The Court further found that “The fact that the Retirement Homes charge a fee for the services they provide is not a bar to their charitable status, as charities often need to charge reasonable and sufficient fees to cover the cost of their operation.” *Id.*

29. Further, in *Wittenburg Lutheran Village*, the property at issue was an integrated retirement community which included a nursing home, an assisted living facility and eighteen four-unit residential apartment buildings known as the “Villas.” 782 N.E.2d at 483. The Lake County PTABOA argued that because the Villas did not cater to the ill or infirm, the facility was “nothing more than a traditional apartment complex.” *Id.* at 487. The Court found that:

In addition to providing the amenities found in traditional apartment living, the Villas offer many unique and special services to its residents. For instance, each apartment is equipped with safety features (such as bathroom grab bars) and is wheelchair accessible. All units are built on a crawl-space foundation, providing less stress on elderly bones and joints than slab foundations. Chaplaincy and worship services are available to all Villa residents. Villa residents may participate in a wide range of free planned group activities and have free access to exercise equipment within the Village. They may use the Village mini-bus for regularly scheduled shopping, planned group outings, and health-related appointments at nearby medical facilities. In addition, Villa residents may volunteer in the assisted living facility or the nursing home.

*Id.* at 485. Thus, the Tax Court concluded that “contrary to the PTABOA’s rational, the needs of senior citizens are not exclusively financial, nor are they merely health-related.” *Id.* at 488. Seniors “need a sense of community and involvement.” *Id.* They need social interaction and supportive services “that enable them to live more independently for a longer period of time.” *Id.* They need a sense of security and they need to “function at active levels.” *Id.* Because the Villas met these needs, the Court found the property to be “owned occupied and used for a charitable purpose.” *Id.*

30. In *Grandview Care*, although the nursing home was owned by a not-for-profit entity, the facility was managed by a for-profit organization, Trilogy Health Services, which was paid a monthly fee for its management services. 826 N.E.2d at 179. The Knox County PTABOA denied the property owner’s application for exemption because, it held, Grandview’s contract with Trilogy meant the facility was being operated for profit. *Id.* The Tax Court disagreed, finding that Trilogy was an “operating expense” and that there was no evidence that Grandview was deriving a profit from the operation of facility or that the fees charged by Grandview were more than necessary to pay its expenses. *Id.* at 185.
31. Most recently, the Tax Court had its first opportunity to review a nursing home operated by a for-profit entity. In *Tipton County Health Care Foundation, Inc. v. Tipton County Assessor*, 961 N.E.2d 1048 (Ind. Tax Ct. 2012), the owner of the nursing home at issue, Tipton County Health Care Foundation, leased the facility to Miller’s Merry Manor, a for-profit corporation that owns and operates numerous nursing homes and assisted living communities. 961 N.E.2d at 1049. The Petitioner argued that, because the property at issue was an assisted living facility that provided for the needs of the elderly, “no other evidence [was] necessary to show that it [was] entitled to a charitable purpose exemption.” 961 N.E.2d at 1051. The Tax Court disagreed finding that “neither the language of one case, nor an apparent trend from several cases has established a per se rule that an assisted living facility that cares for the elderly is automatically considered exempt by the mere character of its deeds.” *Id.* at 1052.
32. Moreover, the Tax Court rejected the Petitioner’s contention that Miller’s mission statement evidenced the lessee’s “charitable purpose.” *Tipton County Health Care Foundation*, 961 N.E.2d at 1052. According to Judge Wentworth, “while the mission statement indicates that Miller’s is in the business of providing for the needs of the elderly, it does not indicate that public benevolence is its reason for operation. Indeed, Miller’s mission statement focuses on its operational goals and what it does, which seems more like an advertisement of its operating style rather than a declaration that it operates solely to advance a charitable purpose.” *Id.* at 1052-1053. Likewise, the judge dismissed

the provisions of the lease which required Miller's to use the property solely as an assisted living facility. *Id.* at 1053. "When reviewed in its entirety... the Lease seems like another example of a commercial triple net lease, with nearly identical provisions to those in Oaken Bucket." *Id.*, citing *Hamilton County Property Tax Assessment Board of Appeals v. Oaken Bucket Partners, LLC*, 938 N.E.2d 654, 655 (Ind. 2010).

33. Finally, the Petitioner in *Tipton County Health Care Foundation* argued that the Assessor bore the burden to prove that Miller's lease resulted in some private benefit, "given that Miller's for-profit status does not show that Miller's actually profited from the arrangement." *Tipton County Health Care Foundation*, 961 N.E.2d at 1053. The Court noted, however, that "although an entity's for-profit status alone is not sufficient to show that a lease arrangement will result in private benefit, its status is germane." *Id.* "Given that the record in this case simply does not indicate whether Miller's has a charitable purpose or a profit motive, the Court concludes that the Indiana Board's finding that the Foundation failed to raise a prima facie case that Autumnwood is entitled to a charitable purposes exemption under Indiana Code § 6-1.1-10-16 is supported by substantial evidence." *Id.*
34. Despite the Tax Court's ruling in *Tipton County Health Care Foundation*, the Petitioner here claims it is entitled to 100% exemption in 2010 and 2011. There is no dispute that Crestmark Management is a for-profit entity that purchased the subject property as part of its business plan. According to the Petitioner's witness, because the property was experiencing low occupancy, the owners felt they could increase occupancy and make the property profitable. Crestmark Management leased the property to Crestmark Operations, which is also a for-profit entity owned by the same investors as Crestmark Management. The lease shows that Crestmark Operations is required to pay the debt service on Crestmark Management's mortgages, in addition to the taxes, utilities, insurance and repairs to the buildings.
35. The Articles of Organization for Crestmark Management and Crestmark Operations do not contain any limiting language and the Petitioner has presented no operating document

or other corporate document restricting the activities of either entity to charitable purposes.<sup>5</sup> And while the lease may require the lessee to operate the property as a healthcare facility, the lease allows a written request to be made for a change of use and, the lease states, consent to such request can not be unreasonably withheld.<sup>6</sup> Moreover, given the ownership structure of Crestmark Management and Crestmark Operations, the members or officers of Crestmark Operations that might make such a request are the same members or officers of Crestmark Management that would have to approve the request.

36. Further, like the lessee in *Tipton County Health Care Foundation*, the lease between Crestmark Management and Crestmark Operations appears to be a standard “triple net” lease. Also similar to the lessee in *Tipton County Health Care Foundation*, the Petitioner’s mission statement fails to “indicate that public benevolence is its reason for operating.” 961 N.E.2d at 1052-1053. According to the Petitioner’s witness, Crestmark Management and Crestmark Operations “use the TLC Management general purpose” mission statement, which states: “TLC Management has earned the reputation of being a leading health care provider. After its incorporation in 1987, TLC struck out on a mission to build the business by applying traditional values along with key principles of leadership and a quest for quality service. This successful mission has been implemented throughout TLC’s business portfolio.” *Respondent Exhibit 1A*.
37. The Petitioner argues that Crestmark Operations has never made a profit on the property and therefore the fact that Crestmark Management continues to own the property and Crestmark Operations continues to operate the property as a nursing home is evidence of the Petitioner’s charitable intent. “The failure to make a profit, however, does not convert a business into a charitable institution.” *Cullitan v. The Cunningham Sanitarium*,

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<sup>5</sup> “The Company shall have unlimited power to engage in an[d] do any lawful act concerning any or all lawful business for which limited liability companies may be organized according to the laws of the State of Indiana, including all powers and purposes now and hereafter permitted by law to a limited liability company.” *Petitioner Exhibit 1:2 and Petitioner Exhibit 1:4*.

<sup>6</sup> “The Lessee shall not use the Leased Premises for any other purpose without the prior written consent of the Lessor, and the Lessor shall not unreasonably withhold its consent.” *Petitioner Exhibit 5*.

16 N.E.2d 205, 207 (Ohio 1938). *See also Topeka Presbyterian Manor, Inc. v. Board of County Commissioners of Shawnee County, Kansas*, 402 P.2d 802, 807 (Kan. 1965) (“we recognize that the failure to make a profit does not convert a business into a charitable institution.”), *reversed on other grounds, Lutheran Home, Inc. v. Board of County Commissioners of Dickinson County, Kansas*, 505 P.2d 1118 (Kan. 1973). In fact, Mr. Ott, as an owner and officer of both Crestmark Management and Crestmark Operations, agreed that the goal of Crestmark Operations was “to be profitable” at the site. Similarly, Ben Gehrman, an administrator for Crestmark Management, testified that he is focused on the “three Cs” for running any profitable nursing home: cost, census and compliance. More specifically, Mr. Gehrman testified, his goal is to ensure that costs are controlled, the census is increased and the business is in compliance with all state laws. Thus, the evidence does not support a finding that Crestmark Management owns the property or Crestmark Operations operates the property without any “expectation” of profit.

38. Moreover, there is some evidence that Crestmark Management’s and Crestmark Operations’ failure to make a profit is attributable to the state of the economy during the relevant time period. According to Mr. Ott, both companies were formed in 2007 and the Petitioner only offered financial reports through December 2010. *Ott testimony; Petitioner Exhibit 2-12 and 2-13*. Thus, the financial history covers less than the companies’ first four years – during which, the National Bureau of Economic Research determined that the United States economy was in a recession. *Armstrong argument; Respondent’s brief at 14*.
39. In addition, the evidence shows that the three owners of Crestmark Management and Crestmark Operations own TLC Management which is a for-profit corporation that manages the subject property, among other properties. When asked if Crestmark Operations had made any management payments to TLC Management, Mr. Ott could not answer: “I would have to go back through the five years and see if they did.” *Ott testimony*. Moreover, Mr. Ott testified that the funds owed to TLC Management are currently still on the books of Crestmark Operations and may be paid. *Id.* The loan from TLC Management is likewise still reflected as a debt of Crestmark Operations and TLC

Management has not forgiven this debt. *Id.* In addition, the members may derive other financial and tax benefits from Crestmark Management and Crestmark Operations.<sup>7</sup> The mere lack of profit on a cash flow basis at Crestmark Management or Crestmark Operations does not indicate there has not been, and will not be, financial or other benefit to their members.

40. Perhaps most relevant to the Board's consideration is that the owners of Crestmark Management and Crestmark Operations own TLC Construction Company with another brother, Randy Ott and the owners of Crestmark Management and Crestmark Operations, through their ownership of TLC Management, have a partial interest in PSI Pharmacy. TLC Construction was hired to perform significant work on the subject property.<sup>8</sup> The Petitioner's witness admitted that TLC Construction was paid in full for its work and that, despite Mr. Ott's characterization of TLC Construction as a "break even company," TLC Construction has made at least one distribution to its shareholders. Likewise, PSI Pharmacy was hired to provide all prescription and over-the-counter drugs to residents at the nursing home and was paid for its services. The owners of Crestmark Management and Crestmark Operations therefore benefit from their interest in PSI Pharmacy through TLC Management. Moreover, even if the property is not able to generate a profit to its owner or operator, the owners of Crestmark Management and Crestmark Operations are current on their mortgage and therefore the owners are building equity in the real estate.
41. Because of the interwoven network of businesses owned by Gary Ott, Dwight Ott, and Larry Maxwell, or their spouses or siblings, whether Crestmark Management or Crestmark Operations individually has realized a profit fails to sufficiently show that the owners of Crestmark Management and Crestmark Operations receive no private benefit from their ownership of the subject property. The Board therefore finds that the

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<sup>7</sup> Mr. Ott testified that Crestmark Management and Crestmark Operations are taxed as "pass-through" companies while TLC is taxed as an S Corporation. These tax elections generally allow the owners to off-set profits of one company with losses from another.

<sup>8</sup> Mr. Ott was unclear as to the total value of the projects performed by TLC Construction Company; however, he confirmed that TLC Construction was paid \$164,000 for the facility updates to the Alzheimers unit, \$46,700 for the sprinkler system and performed additional labor at the facility. *Ott testimony.*

Petitioner failed to raise a prima facie case that its property was owned, operated and used for charitable purposes for the 2010 and 2011 assessment years.

42. Where the Petitioner has not supported its claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. v. Department of Local Government Finance*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

### **Summary of Final Determination**

43. The Petitioner failed to raise a prima facie case that its property was entitled to a charitable exemption pursuant to Indiana Code § 6-1.1-10-16. The Board therefore finds in favor of the Respondent and holds that the Petitioner's real property is 100% taxable for the March 1, 2010, and March 1, 2011, assessment years.

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

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Chairman,  
Indiana Board of Tax Review

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Commissioner,  
Indiana Board of Tax Review

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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 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 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/bills/2007/SE0287.1.html>.**