

REPRESENTATIVES FOR PETITIONER:

Richard J. Deahl, Barnes & Thornburg  
Joseph S. Dzwonar, President of Hamilton Communities

REPRESENTATIVES FOR RESPONDENT:

Terrance Wozniak, Deputy County Attorney for St. Joseph County  
Ross A. Portolese, Rosemary Mandrici, and David Wesolowski, PTABOA members

**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

HAVEN HUBBARD d/b/a	)	Petition No.: 71-017-02-2-8-00001
HAMILTON COMMUNITIES,	)	Parcel: 121041054303
	)	
Petitioner,	)	Petition No.: 71-017-02-2-8-00002
	)	Parcel: 121041054301
v.	)	
	)	County: St. Joseph
ST. JOSEPH COUNTY	)	Township: Olive
PROPERTY TAX ASSESSMENT	)	
BOARD OF APPEALS,	)	Assessment Year: 2002
	)	
Respondent.	)	

Appeal from the Final Determination of  
St. Joseph County Property Tax Assessment Board of Appeals

**April 20, 2004**

**FINAL DETERMINATION**

The 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

### Issues

1. The issues presented for consideration by the Board were:

ISSUE 1– *Whether the fifteen (15) acre limitation on property applies to Hamilton Communities, Inc.*

ISSUE 2 – *Whether the four (4) “Villa units,” which are owned by Hamilton Communities and provided to senior residents for independent living, are exempt from property tax.*

### Procedural History

2. Pursuant to Ind. Code § 6-1.1-11-7, Barnes & Thornburg, on behalf of Hamilton Communities, filed Form 132 Petitions for Review of Exemption, petitioning the Board to conduct an administrative review of the above petitions. The Form 132s were filed on January 8, 2003. The determination of the PTABOA was issued on December 9, 2002.

### Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on October 23, 2003, in South Bend, Indiana before Ellen Yuhan, the duly designated Administrative Law Judge authorized by the Board under Ind. Code § 6-1.5-5-2.

4. The following persons were present at the hearing:

For the Petitioner:

Richard J. Deahl, Barnes & Thornburg  
Joseph S. Dzwonar, President, Hamilton Communities

For the Respondent:

Terrance Wozniak- Deputy County Attorney for St. Joseph County  
Ross A. Portolese - Member, St. Joseph County PTABOA  
Rosemary Mandrici – President, St. Joseph County PTABOA  
David Wesolowski – Secretary, St. Joseph County PTABOA

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

For the Petitioner:

Joseph S. Dzwonar, President, Hamilton Communities

For the Respondent:

Terrance Wozniak- Deputy County Attorney for St. Joseph County

Ross A. Portolese - Member, St. Joseph County PTABOA

Rosemary Mandrici – President, St. Joseph County PTABOA

David Wesolowski – Secretary, St. Joseph County PTABOA

6. The following exhibits were presented:

For the Petitioner:

Petitioner's Exhibit 1- Form 136, Application for Property Tax Exemption, for parcel 12-1041-054301

Petitioner's Exhibit 2 – Form 136, Application for Property Tax Exemption, for parcel 12-1041-054303

Petitioner's Exhibit 3 - Form 120, Notice of Action on exemption Application, for parcel 12-0141-054301

Petitioner's Exhibit 4 - Form 120, Notice of Action on exemption Application, for parcel 12-0141-054303

Petitioner's Exhibit 5 - Form 132, Petition to the Indiana Board of Tax Review for Review of Exemption, for parcel 12-1041-054301

Petitioner's Exhibit 6 - Form 132, Petition to the Indiana Board of Tax Review for Review of Exemption, for parcel 12-1041-054303

Petitioner's Exhibit 7 – Memorandum in Support of Exemption

Petitioner's Exhibit 8 – Property record cards for both parcels

Petitioner's Exhibit 9 – Copy of conveyance documents for Haven Hubbard

Petitioner's Exhibit 10- Articles of Association, Articles of Amendment, Certificate of Assumed Name, Articles of Acceptance, Agreement and Plan of Merger, and other corporate documents

Petitioner's Exhibit 11 - Documents describing the property and services provided by Hamilton Communities

Haven Hubbard d/b/a Hamilton Communities

Findings & Conclusions

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Petitioner's Exhibit 12 - Copy of House Enrolled Act 2005

Petitioner's Exhibit 13 - Certificate and license issued by the Indiana State  
Department of Health

Petitioner's Exhibit 14 - Indiana Tax Court cases:

*Wittenberg Lutheran Village Endowment Corporation v. Lake County PTABOA; Raintree Friends Housing, Inc. v. Indiana Department of State Revenue; State Bd. of Tax Comm'rs, et al v. Methodist Home for the Aged; Lincoln Hills Development Corp. v. Indiana State Bd. of Tax Comm'rs*

For the Respondent:

The Respondent attempted to submit six (6) photographs of various buildings in the complex. The Petitioner objected to any exhibits presented by the Respondent, as they had not been submitted in accordance with the procedural rules. The photographs are excluded and have no bearing on the determination of the issues considered in this hearing.

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

Board Exhibit A – Copy of the Form 132

Board Exhibit B – Notice of Hearing dated September 22, 2003.

8. The subject property is a continuing care facility for senior citizens including specialized health care/nursing facilities, assisted living units, and independent living units.

9. For 2002, the PTABOA determined parcel 12-1041-054301, which is 215 acres with improvements to be:

Land: 92% taxable

Improvements: 2% taxable.

Parcel 12-1041-054303, which is 10.2 acres with no improvements, was determined to be:

Land: 100% taxable.

### **Jurisdictional Framework**

10. This matter is governed by the provisions of Ind. Code §§ 6-1.1, 6-1.5, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.
11. The Board is authorized to issue this final determination, findings of fact and conclusions of law pursuant to Indiana Code § 6-1.5-4-1.

### **State Review and Petitioner's Burden**

12. The Board does not undertake to reassess property, or to make the case for the petitioner. The Board bases its decision upon the evidence presented and the issues raised during the hearing. *See Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1118-1119 (Ind. Tax Ct. 1998).
13. The petitioner must submit 'probative evidence' that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. *See Whitley Products*, 704 N.E.2d at 1119; *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890, 893 (Ind. Tax Ct. 1995).  
['Probative evidence' is evidence that serves to prove or disprove a fact.]
14. The petitioner has a burden to present more than just 'de minimis' evidence in its effort to prove its position. *See Hoogenboom-Nofzinger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024-1025 (Ind. Tax 1999). ['De minimis' means only a minimal amount.]
15. The petitioner must sufficiently explain the connection between the evidence and petitioner's assertions in order for it to be considered material to the facts. 'Conclusory statements' are of no value to the Board in its evaluation of the evidence. *See generally, Heart City Chrysler v. State Bd. of Tax Comm'rs*, 714 N.E.2d 329, 333 (Ind. Tax Ct.

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

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

### **Constitutional and Statutory Basis for Exemption**

17. 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.
18. Article 10, §1 of the Indiana Constitution is not self-enacting. The General Assembly must enact legislation granting the exemption.
19. In Indiana, the use of property by a nonprofit entity does not establish any inherent right to exemptions. The grant of federal or state income tax exemption does not entitle a taxpayer to property tax exemption because income tax exemption does not depend so much on how property is used, but on how money is spent. *Raintree Friends Housing, Inc. v. Indiana Dep’t of Revenue*, 667 N.E.2d 810, 813 (Ind. Tax Ct. 1996) (not-for-profit corporation status does not automatically entitle a taxpayer to tax exemption). In determining whether property qualifies for an exemption, the predominant and primary

use of the property is controlling. *State Bd. of Tax Comm'rs v. Fort Wayne Sport Club*, 258 N.E.2d 874, 881 (Ind. Ct. App. 1970); Ind. Code § 6-1.1-10-36.3.

### **Basis of Exemption and Burden**

20. 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.
21. 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. When property is exempted from taxation, the effect is to shift the amount of taxes it would have paid to other parcels that are not exempt. *See generally, Nat'l Assoc. of Miniature Enthusiasts v. State Bd. of Tax Comm'rs*, 671 N.E.2d 218 (Ind. Tax Ct. 1996).
22. The transfer of this obligation to non-exempt properties should never be seen as an inconsequential shift. This is why worthwhile activities or noble purpose alone is not enough for tax exemption. Exemption is granted when there is an expectation that a benefit that will inure to the public by reason of the exemption. *See Foursquare Tabernacle Church of God in Christ v. State Bd. of Tax Comm'rs*, 550 N.E.2d 850, 854 (Ind. Tax Ct. 1990).
23. The taxpayer seeking exemption bears the burden of proving that the property is entitled to the exemption by showing that the property falls specifically within the statute under which exemption is being claimed. *Monarch Steel Co. v. State Bd. of Tax Comm'rs*, 611 N.E.2d 708, 713 (Ind. Tax Ct. 1993); *Indiana Assoc. of Seventh Day Adventists v. State Bd. of Tax Comm'rs*, 512 N.E.2d 936, 938 (Ind. Tax Ct. 1987).

## Discussion of Issues

ISSUE 1: *Whether the fifteen (15) acre limitation on property applies to Hamilton Communities, Inc.*

24. The Petitioner contends that all of the subject land should be 100% exempt from property taxation.
25. The Respondent contends that only fifteen (15) acres are exempt from property taxation.
26. The applicable rule(s) and case law governing this Issue are:

### **IC 6-1.1-10-16(a)**

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.

### **IC 6-1.1-10-16(c)** (Effective until July 1, 2003.)

A tract of land, including the campus or athletic grounds of an educational institution, is exempt from property taxation if a building which is exempt under subsection (a) or (b) is situated on it and the tract does not exceed fifty (50) acres in the case of an educational institution or a tract that was exempt on March 1, 1987 or fifteen (15) acres in all other cases.

### **IC 6-1.1-10-16(c)** (As amended by Pub. L. No. 264-2003, effective July 1, 2003.)<sup>1</sup>

(c) A tract of land, including the campus and athletic grounds of an educational institution, is exempt from property taxation if:

- (1) a building that is exempt under subsection (a) or (b) is situated on it;
- (2) a parking lot or structure that serves a building referred to in subdivision (1) is situated on it; or
- (3) the tract:
  - (A) is owned by a nonprofit entity established for the purpose of retaining and preserving land and water for their natural characteristics;
  - (B) does not exceed five hundred (500) acres; and
  - (C) is not used by the nonprofit entity to make a profit.

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<sup>1</sup> "IC 6-1.1-10-16 . . . as amended by this act appl[ies] only to property taxes first due and payable after December 31, 2002." Pub. L. No. 264-2003, SECTION 15(a).

**IC 6-1.1-10-36(a)**

Property is predominately used or occupied for one of the stated purposes if it is used or occupied for one or more of those purposes during more than 50% of the time that it is used or occupied in the year that ends on the assessment date of the property.

27. Evidence and testimony considered particularly relevant to this determination include the following:
- A. The subject property was exempt on March 1, 1987, and is not subject to the 15-acre limitation on exemption from property tax. *Deahl argument; Petitioner's Exhibit 7.*
  - B. Section 15 of House Enrolled Act 2005 removed the 15-acre limitation. This change relates to property taxes that become due and payable after December 31, 2002. Therefore this relates to assessments as of March 1, 2002. *Deahl argument; Petitioner's Exhibit 12.*

Analysis of Issue 1

28. The parties agree that Haven Hubbard is a charitable organization and entitled to exemption from property taxes. It is the amount of exemption that is in contention.
29. The Petitioner stated that the subject land should be tax exempt for two reasons: (1) the subject property was exempt on March 1, 1987; and (2) House Enrolled Act 2005 (Pub. L. No. 264-2003) removed the 15-acre limitation on exemption.
30. The Respondent followed prior law and applied the 15-acre limitation to the combined parcels, as they are contiguous parcels. This resulted in only fifteen (15) acres of the Petitioner's total 225.2 acres being treated as exempt.
31. The Petitioner is correct in stating that Pub. L. No. 264-2003, deleted the 15-acre limitation. Ind. Code § 6-1.1-10-16 (2003). Under current law, a tract of land may be exempt if, *inter alia*, it has an exempt building on it. Ind. Code § 6-1.1-10-16(c)(1).

32. A “tract” of land is defined as “any area of land that is under common ownership and is contained within a continuous border.” Ind. Code § 6-1.1-1-22.5. The two parcels at issue in this case are under common ownership and are contained within a continuous border. *Portolese testimony; Petitioner’s Exhibit 8*. The Board finds that these parcels constitute a tract of land.
33. As the tract of land has exempt buildings upon it, and the charitable use of the property is not disputed, the Board finds that the entire tract of land (parcel 12-1041-054301 and parcel 12-1041-054303) is exempt. Ind. Code § 6-1.1-10-16(c) (2003). A change is made in the assessment as a result of this issue.

*ISSUE 2 – Whether the four (4) “Villa units,” which are owned by Hamilton Communities and provided to senior residents for independent living, are exempt from property tax.*

34. At issue are four (4) single-family residential dwellings known as the Villas, which comprise 2% of the assessment for improvements. The PTABOA did not contest the charitable exemption as it applied to Hamilton Communities’ other improvements.
35. The Petitioner contends that 100% of the improvements should be tax-exempt.
36. The Respondent contends that the Villas are taxable because they are single-family homes and do not cater to the ill or the infirm.
37. The applicable law governing this issue is:
- IC 6-1.1-10-16(a)**  
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.
- IC 6-1.1-10-36.3(a)**  
[P]roperty is predominately used or occupied for one (1) or more of the stated purposes if it is used or occupied for one (1) or more of those purposes during more than fifty percent (50%) of the time that it is used or occupied in the year that ends on the assessment date of the property.

**IC 6-1.1-10-18.5(b)**

Tangible property is exempt from property taxation if it is:

- (1) owned by an Indiana nonprofit corporation; and
- (2) used by that corporation in the operation of a health care facility licensed under IC 16-28, or in the operation of a residential facility for the aged and licensed under IC 16-28, or in the operation of a Christian Science home or sanatorium.

38. Evidence and testimony considered particularly relevant to this determination include the following:
- A. The Villas in Hamilton Communities are independent living units marketed on the basis of a refundable life-use fee. Title does not transfer to the residents of the Villas but is held by Hamilton Communities. *Dzwonar testimony.*
  - B. The residents of the Villas have full availability of all of the services of Hamilton Communities. The residents can participate in any activities that they so desire. They have access to the dining facilities, access to the chaplain/worship services, and transportation services. *Dzwonar testimony; Petitioner's Exhibit 13.*
  - C. The Villa services consist of building maintenance, all grounds upkeep, property insurance and taxes, an appliance care program, select utilities, 24-hour security, scheduled transportation, and an emergency response system. *Dzwonar testimony; Petitioner's Exhibit 13.*
  - D. The occupants of the Villas have priority admission for any level of service that Hamilton Communities might be able to offer. This provides for a full continuum of care. *Dzwonar testimony.*
  - E. Respondent contends that there is no difference between the Villas and any other residential property, no matter how the title is held. An individual can purchase the protection services and health services. An individual can buy in proximity to what ever they determine they may want to use in the future. These homes are no different than other villas except that they have put themselves under the umbrella of a nonprofit organization so they can be tax-free. *Wozniak argument; Portolese testimony.*

F. The distinction made in the *Wittenberg* case is whether the type of property and type of service provides a continuum of care for the retirement of elderly individuals.  
*Deahl argument.*

### Analysis of Issue 2

39. The Petitioner first claims the Villas are exempt under Ind. Code § 6-1.1-18.5(b). That section states that property is exempt from taxation “if it is (1) owned by an Indiana nonprofit corporation; and (2) used by that corporation in the operation of . . . a residential facility for the aged licensed under IC 16-28.” Ind. Code § 6-1.1-18.5(b).
40. The Petitioner is an Indiana nonprofit corporation and is licensed under IC 16-28 to conduct and maintain a 156-bed comprehensive care and a 27-bed residential care facility (*Petitioner’s Exhibit 13*). However, the license issued by the Indiana State Department of Health does not cover the single-family residential dwellings (the Villas). Thus, the Villas are not exempt under Ind. Code § 6-1.1-10-18.5.
41. The Petitioner also claims the Villas are exempt under IC 6-1.1-10-16, which states, “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.”
42. The PTABOA determined the Villas to be taxable because they are not multiple unit complexes, but single-family dwellings. While the occupants may avail themselves of certain amenities, there is no difference between those amenities and the benefits that any other neighborhood association or community may provide to its residents.
43. The Petitioner contends that the facts in *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Bd. of Appeals*, 782 N.E.2d 483 (Ind. Tax Ct. 2003), *review denied*, are very similar to this property in that the units were for independent living with services provided which are very similar to the services provided to the Villa residents of Hamilton Communities. The Tax Court found that the Villas in

*Wittenberg* were owned, occupied and used for a charitable purpose and therefore fully exempt.

44. Indiana courts broadly construe the term “charitable” as the relief of human want and suffering in a manner different from the everyday purposes and activities of man in general. *Nat’l Assoc. of Miniature Enthusiasts v. State Bd. of Tax Comm’rs*, 671 N.E.2d 218, 221 (Ind. Tax Ct. 1996).

45. In *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Bd. of Appeals*, 782 N.E.2d 483 (Ind. Tax Ct. 2003), *review denied*, the Tax Court stated:

[c]aring for the aged is a recognized benefit to the community at large and society as a whole. Indiana law recognizes 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 justify. Thus, by meeting the needs of the aging, namely relief of loneliness and boredom, decent housing that has safety and convenience and is adapted to their age, security, well-being, emotional stability, and attention to problems of health, a charitable purpose is accomplished.

*Id.* at 488-489 (citing *Raintree Friends*, 667 N.E. 2d at 814-15).

46. Petitioner presented evidence that Hamilton Communities provides social services and activities for its elderly residents that fall under the charitable purposes outlined in *Wittenberg Lutheran Village*. The Villas’ services include building maintenance, all grounds upkeep, appliance care, 24-hour security, scheduled transportation, an emergency response system, a “comprehensive continuum of wellness and health care programs and accommodations,” general fitness evaluations, and priority access to Hamilton Communities’ assisted living and health care programs. *See Dzwonar Testimony; Petitioner Exhibit 11.*

47. Respondent attempted to distinguish Hamilton Communities' Villas from those in Wittenberg on the basis that they "look like residential homes" and are independent and separate from the extended care facilities. *Wozniak argument*. The Board finds this argument unpersuasive and irrelevant to the question of whether the use meets the definition of charity. The Villas are marketed specifically to be more independent and separate from the other facilities for residents that are more able to live independently. *Dzwonar Testimony; Petitioner Exhibit 11*. The fact that a resident is in the Villas at one stage does not prevent them from transferring to another type of unit should their health or ability decline. *Dzwonar Testimony*. Further, all services and amenities are available to residents of the Villas upon request. *Dzwonar Testimony*. Therefore, the Board finds that the Villas meet the statutory requirements of being owned, used, and occupied for a charitable purpose.
48. In this case, the Petitioner did, by a preponderance of the evidence, meet its burden to prove that the current exemption assessment is incorrect. The Respondent did not rebut Petitioner's testimony and evidence that the Villas are used in a charitable manner. Accordingly, there is a change in the assessment as a result of this appeal.

## Summary of Final Determination

Determination of Issue 1: *Whether the fifteen (15) acre limitation on property applies to Hamilton Communities, Inc.*

49. The entire tract of land (including parcel 12-1041-054301 and parcel 12-1041-054303) is 100% exempt. A change is made as a result of this determination.

Determination of Issue 2: *Whether the four (4) "Villa units," which are owned by Hamilton Communities and provided to senior residents for independent living, are exempt from property tax.*

50. In this case, the Petitioner did, by a preponderance of the evidence, meet its burden to prove that the Villas are owned, used, and occupied for a charitable purpose and entitled to an exemption. The Villas are exempt under Ind. Code § 6-1.1-10-16. Accordingly, there is a change in the assessment as a result of this appeal.

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

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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. 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.