NO. A06-0153

STATE OF MINNESOTA

IN SUPREME COURT

Croixdale, Inc.,

Relator,

v.

County of Washington,

Respondent.

Respondent's Brief and Appendix

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STATEMENT OF THE ISSUE

Was the evidence sufficient to support the findings of the Tax Court that the subject property failed to meet its burden of proof in its claim that it qualified for exemption from real estate taxes on the grounds that it is as an institution of purely public charity?

Tax Court held: In the affirmative.

STATEMENT OF THE CASE

The sole issue before the Court in this appeal from the decision of the Tax Court is a claim by the taxpayer seeking a partial exemption for the subject property from the payment of real property taxes. (T.4)[1] The appellant contends that the assisted living portion of the subject property should be exempt from real estate taxes on the grounds that it is an institution of purely public charity, as defined by Minn. Stat. § 272.02, subd. 7. (T.5, 8) At trial two main arguments were advanced by the appellant. First was its contention that this property was different from all other assisted living facilities located in Washington County in that it has a mission benevolence program that assists the residents in the payment of rent and expenses incurred to live at the premises if they have exhausted all other financial means. Its second argument was that because the appellant received substantial contributions in the form of grants from foundations for construction capital, this has allowed it to charge rents that are significantly lower and thereby making the property affordable for more individuals. (T.5)

The Respondent contends that the subject property is essentially and functionally no different than all of the other assisted living facilities in Washington County, and perhaps even the east metropolitan area, and that all of those facilities are properly subject to and pay real property taxes. (T.8) The Respondent also contends that the use of mission benevolence funding is minimal from a purely public charity perspective and that the rents charged at the premises are market rate rents and, therefore, no "charity" is

[1] "T" refers to the trial transcript. "Ex" refers to the exhibits introduced at trial.

provided to the property tenants. (T.9, 10) The Tax Court ruled that appellant had failed to meet its burden of proof and had not established its eligibility for tax exempt status for its assisted living facility. It is from that ruling that Appellant comes to this Court for relief.

STATEMENT OF FACTS

Most of the procedural history of this case and the subject property is not in dispute. The Croixdale property was initially built in two phases in 1960 and 1981 and provided assisted living facilities as well as independent living facilities. (T.16, 64) For many years of operation, indeed until the late 1990's when Croixdale began to work more closely with the organization known as Presbyterian Homes, the operation was run in what could best be described as a very loose manner. (T. 16, 17) It was almost in the nature of a personal charity of various members of the Andersen family of Bayport, Minnesota, who were principle owners in the Andersen Window Company. (T.16) The Andersen family and its series of extensive foundations and charitable entities are well-known in the St. Croix Valley for their philanthropy. (T. 16) Croixdale property appears to have been a favorite project of one of the principals of the Andersen family, that being Katherine or Kitty Andersen. (T.17, 18, 64) There was little or no formalized budgeting in operations for the property as it existed up through the 1990's. (T.17) As described by Board member Mark Campbell, the facility did not have a copy machine or fax machine or similar office equipment. (T. 51) To use such equipment Croixdale staff would simply walk across the street to the Andersen Window Corporation and use their office resources. On an annual basis as revenues fell short, Mrs. Andersen would issue a check for approximately $100,000 each year to make up for the shortfalls. (T.19) There was no means testing or other need based assessment to determine which residents received any charitable benefits. (T. 29) All residents without regard to need received whatever benefits were available. In light of the operational situation for the Croixdale premises as

they then existed, it was treated as a public charity for several purposes, including exemption from real property taxation. (T. 457, 458)

In the late 1990's the Board of Directors of Croixdale began to explore alternatives to the existing method of operation as well as the physical plant of the premises. (T.19) As to the assisted living facility, the physical plant was becoming very outmoded, not only in terms of the structure itself, but also relative to the competitive market place. (T.19, 22) The assisted living portion of the facility as it then existed was at best described as a dormitory style. The rooms were approximately 180 square feet and had no private baths. (T.20, 25, 50) Services that could be provided to the residents were extremely limited, as were amenities. (T.20, 21, 32) The premises were becoming no longer competitive with other assisted living facilities that were being developed in the area and vacancies significantly increased. (T.20, 50, 66)

Starting in the mid-1990's, the Board of Directors at Croixdale entered into an ever-expanding agreement and alliance with Presbyterian Homes. (T.19, 75, 77, 82) Presbyterian Homes is a relatively large organization that operates numerous housing facilities, not only in the Twin Cities metropolitan area, but throughout the upper-Midwest in the area that corresponds to the synod for the Presbyterian Church. (T.87) In Washington County it operates several senior housing facilities, all of which pay property taxes, including Boutwell's Landing in Oak Park Heights, which is about three miles from Croixdale, St. Andrew's Village in Mahtomedi and Echo Ridge in the City of Oakdale, as well as Summer House in Woodbury. (T.33, 75, 111, 112, 113, 114) It is expanding into Cottage Grove and also has premises in other parts of the Twin Cities

metropolitan area. (T.115) Presbyterian Homes sees the eastern metropolitan area as a rapidly growing market with a strong market demand for senior housing. (T.115, 116) Presbyterian Homes has taken over the management of Croixdale, including marketing, mode of delivery of services, and nearly all aspects of day to day and longer term management. (T.77, 78, 80, 86, Ex. 12) Croixdale initially received a $2000 per month management fee but now receives a 5 percent of revenues management fee in exchange for its operational control of Croixdale. (T.79, 99, 117) That rate is a standard fee consistent with a market rate commercial rate management fee. (T.117)

In approximately 2000 the Board of Directors of Croixdale underwent extensive analysis as to the future of the facility. (T.22) The Board made the decision to run Croixdale "more as a business." (T.30, 51, 88, 122, 123) After a number of alternatives and options were explored, the decision was ultimately made to tear down the existing structure and build a totally new facility. (T.13, 27) The new facility would involve both assisted living and independent living apartments. (T.146)

A financial analysis was undertaken and a decision was made to attempt to reduce the amount of debt that would be carried for the facility by engaging in a capital campaign. (T. 49) The capital campaign involved soliciting funds for creating both a new independent living facility and a new assisted living facility. (T.55) In the course of the capital campaign no distinction was made in fund raising or in any other manner between capital contributions and expenditures for either the assisted living or the independent living portions of the facility. (T.55, 106, 126, 128) The price structure has not been modified as to rents for either of the two units to reflect any special emphasis on the

assisted living. (T.102) Any price benefits to prospective tenants in terms of lower rent to reflect these capital contributions have been applied equally to both the independent and assisted living facilities. (T.141) The overall cost of the total new structure was approximately $18,000,000. (T.91) There is no evidence in the record designating how much of those funds were spent for what part of the facility. In addition to the independent living and assisted living areas, which also includes a memory care unit, there is a common area that is available for use by both components of the facility and its tenants. (T.146) The common area includes recreational areas, dining areas, and numerous other enjoyable amenities. (T.222, 224, Ex.18, 19) Construction on the new assisted living facility was completed in late 2003 and the existing assisted living tenants were moved into the facility during that time. (T.146, 151) Since that time, the fifty-three units of assisted living and memory care[2] essentially became and remained by the time of trial, fully occupied. (T.176, 191) Construction was completed shortly prior to trial on the independent living apartments. By the time of trial, they had become nearly fully occupied.

At trial the Appellant presented testimony in the form of Mark Campbell, a long term member of the Board of Directors of Croixdale (T.13), Daniel Lindh, the CEO of Presbyterian Homes (T.72), Duane Larson, an operative for Presbyterian Homes involved in Croixdale (T.143), Gavin Collins, a statistician who attempted to use statistical analysis to establish market rate analysis for certain real estate (T.250), certified public accountant Jeff Vrieze, who attempted to act as an expert witness to argue in favor of

[2] Collectively referred to in this document as "assisted living."

property tax exemption (T.323) and Patty McCullough who attempted to use a non-real estate based analysis to establish comparable market rates for Croixdale and other similar properties as she defined them in her analysis. (T.388) The Respondent presented the testimony of Rollie Huber, Deputy Washington County Assessor. (T. 455) Mr. Huber conducted a real estate based market analysis of the subject property and its rents. (T.461, Ex.37, 38) He also reviewed for the Court similar and comparable properties, all of which are currently paying real property taxes for their assisted living facilities. (T. 463, 479) His expert opinion was that the subject property charged rents to its tenants that were within the market range for comparable properties. (T. 482, 483) He further concluded that if the capital campaign and donations had been able to reduce the rental rates charged to the tenants, that reduction served only to reduce the rates to within market range, not below it. (T.486)

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TAX COURT FINDINGS THAT THE APPELLANT FAILED TO MEET ITS BURDEN OF PROOF THAT IT QUALIFIED FOR EXEMPTION FROM REAL ESTATE TAXES AS AN INSTITUTION OF PURELY PUBLIC CHARITY.

A. LEGAL STANDARD

1. Standard of Review of Tax Court Decisions

As this Court reviews the decision of the Tax Court, it must keep in mind the limited scope of and nature of such review. Under Minn. Stat. § 271.10, the Supreme

Court's review of a Tax Court decision should be limited to the issues of whether the Tax Court is without jurisdiction to hear the matter, if the decision of the Tax Court was not justified by the evidence or not in conformity with the law, or if the Tax Court committed other error of law. If the decision of the Tax Court is reasonably supported by competent evidence and the permissible inferences drawn from that evidence, this Court is obligated to sustain its decision. *Gonzales v. Commission of Revenue*, 706 N.W. 2d 909 (Minn. 2005); *Bond v. Commissioner of Revenue*, 691 N.W. 2d 831 (Minn. 2005); *Wilson v. Commissioner of Revenue*, 656 N.W. 2d 547 (Minn. 2003); *Jefferson v. Commissioner of Revenue*, 631 N.W. 2d 391 (Minn. 2001). This Court should reverse the Tax Court's factual findings only if, based upon a review of the entire record, it finds clear error has been made. *Wybierala v. Commissioner of Revenue*, 587 N.W. 2d 832 (Minn. 1998); *Evans v. County of Hennepin*, 548 N.W. 2d 277 (Minn. 1996); *T.M.G. Life Insurance Company v. County of Goodhue*, 540 N.W. 2d 848 (Minn. 1995).

A review of the transcript and the lengthy decision and memorandum of the Tax Court, establishes that Judge Ramstad engaged in extensive and thorough evaluation of the evidence presented before the Court. In several areas there were significant issues of witness credibility and directly contrasting issues, such as the testimony of the Petitioner's experts and witnesses as to what constitute market rent vs. the Respondent's expert witness in that regard. The Court specifically addressed the details of the testimony of the Petitioner's witnesses in contrast with any expert testimony of the County's witness Rollie Huber, and found his testimony to be more worthy of belief and

credible. (A.19, 20)[3] When the findings in the Memorandum of the Tax Court are viewed in light of this standard, is clear that the appeal must be rejected.

2. Framework for Court's Analysis.

It has long been the law that all real property is presumptively subject to the payment of property taxes. Taxation is the presumption and statutes exempting property from taxation are to be strictly construed against exemption and in favor of taxation. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412 (Minn. 2005); *Care Institute of Roseville, Inc. v. County of Ramsey*, 612 N.W.2d 443 (Minn. 2000). *Westbrook Health Center v. County of Cottonwood*, Tax Court File CX-03-128 (Dec. 14, 2004). The taxpayer bears the heavy burden of proof to establish that a property is exempt from taxation. Exemption may be granted only upon presentation of persuasive evidence demonstrating that one of the limited statutory exceptions to the presumption of taxation is present. *Ideal Life Church of Lake Elmo v. Washington* County, 304 N.W.2d 308 (Minn. 1981); *Christian Business Men's Committee of Minneapolis v. State*, 38 N.W.2d 803 (Minn. 1949). In the case before this Court the sole and exclusive claim of exemption from taxation is that the assisted living facility of Croixdale is operated as and constitutes an institution of purely public charity, as defined by Minnesota statutes.

The Minnesota Supreme Court, supported by the Tax Court, long ago established and maintained a clear framework for analysis in determining whether or not the taxpayer has met its burden of proof in establishing that a parcel of real estate can be classified as an institution of purely public charity. The classic test that remains the standard to be

[3] References are to the Tax Court's decision found in the Appendix to Petitioner's Brief.

employed is established in the decision of this court in *Northstar Research Institute v. County of Hennepin*, 236 N.W.2d 754 (Minn. 1975). As recently as the decision of the Tax Court on December 14, 2004 in the decision in *Westbrook Health Center v. County of Cottonwood*, supra, the Tax Court reiterated the viability and vitality of the *Northstar* standard. As reflected by the *Northstar* test, the Appellant has failed in its burden of proof and the decision of the Tax Court must be affirmed.

B. ANALYSIS

The *Northstar* test establishes six factors for the Court to consider in conducting its analysis. The Tax Court used those factors and correctly concluded that the Appellant did not meet its burden of proof. In using the *Northstar* test, the Tax Court considered:

(1) Whether the stated purpose of the undertaking is to be helpful to others without the immediate expectation of material award;

(2) whether the entity involved is supported by donations and gifts in whole or in part;

(3) whether the recipients of the charitable benefits are required to pay for the assistance in whole or in part;

(4) whether the income received from gifts and donations and charges to users produces a profit to the charitable institution;

(5) whether the beneficiaries of the charity are restricted or unrestricted and if restricted, what do the class of persons to whom the charity is made available as having a reasonable relationship to the charitable objectives;

(a) whether the organization's undertaking lessens the burden of government;

(6) whether dividends in the form of substance or assets upon dissolution are available to private interests.

The Tax Court found that in several of these areas the Appellant did not meet its burden of proof and, in particular it failed to satisfy factors 3, 4 and 5. The Tax Court then concluded that the Appellant failed to meet its burden of proof and denied the exemption. As noted below, its decision was clearly correct.

1. WHETHER THE STATED PURPOSE OF THE UNDERTAKING IS TO BE HELPFUL TO OTHERS WITHOUT THE IMMEDIATE EXPECTATION OF MATERIAL REWARD.

While it is conceded that the stated purpose of Croixdale is to provide housing for a specific clientele, (T.14) the reality is that there is clearly an immediate expectation of material reward, at least in the form of compensation for housing and services provided. This reality is evidenced by the fact that substantial fees and rents, as more fully discussed below, at commercial market rates, are charged for housing and the other services that are provided to the residents of the facility. There is a published rental rate and each resident is required or expected to meet that rental payment on a monthly basis. Each resident must sign a residency agreement that is simply a lease. (T.165, 219, Ex. 26) The rental rate is dependent on the size and configuration of the particular apartment, as well as the level of services that are provided to the resident. There is a direct fee for service connection between what the resident pays and what the resident receives. While

the stated purpose is to be helpful to others, in this regard the reality of what Croixdale does is no different than the stated purpose of nearly every other such tax-paying facility that exists in that its stated purpose is to provide a comfortable, positive and wholesome environment for the elderly to live in during the later years of their life. (T.213, 214, 285) To accomplish this goal Croixdale has clearly adopted a business practices commercial model, including a marketing plan, that is radically different from the softer and more clearly charitable orientation and organizational structure that it had in past years. (T.30, 57, 58, Ex.11) The record reflects that less than 2 percent of all income generated to pay for the rent and services comes from charitable source contributions, leaving 98 percent of those revenues to come from the residents themselves or third party payers. Croixdale has now become self-funded and has made a conscious decision that it has not and will not seek any charitable contributions for ongoing operational expenses. (T.29) Therefore, while it may not seek "material reward" that one typically associates as "profit," it clearly seeks material reward to the point that it wishes to not lose any money and at a minimum, break even on an economic basis.

If the Tax Court made any error in analysis as to this factor it is an error not of the Tax Court's making, but a demonstration of an emerging problem with the use of the North Star analysis as presently formulated. The Tax Court found, consistent with precedent, that essentially the taxpayer can establish the existence of this factor by simply having documents that ***state*** (emphasis added) its purpose is to be helpful to others without expectation of material reward without consideration of the underlying realities of what really happens. In this era of an exploding number of Internal Revenue

authorized 501(C)(3) non-profit corporations, it is relatively easy for almost any and all non-profit corporations to meet the requirement of Factor 1, because as presently formulated, this Court does not require any analysis behind the bland assertion of the organizational documents. Following the same lines, Factor 6, discussed later in this brief, is equally losing its utility since nearly every non-profit corporation will also declare its dividends to be distributed to other non-profits at the time of dissolution. It is respectfully suggested that while Tax Court properly engaged in analysis of Factors 1 and 6 of the North Star test under existing law, the Court should use this opportunity to clarify these factors and either create one new Factor to the effect that the alleged purely public charity qualifies as a charity for Federal tax purposes, or that it authorize the Tax Court in the future to look behind the reality of the claims of the taxpayer as to whether or not it truly satisfies this factor.

2. WHETHER THE ENTITY INVOLVED IS SUPPORTED BY DONATIONS AND GIFTS IN WHOLE OR IN PART.

This part of the analysis has two different components. The first of those components is the building and capital campaign that resulted in the construction of the new facility. The second component is donations and gifts being provided on an ongoing and operational basis.

Relative to the capital aspect of the facility, the evidence shows that the structure cost approximately $18,000,000 to build at commercial construction rates. Approximately ten million dollars of that money was raised through donations from

foundations, with most of those foundations being part of the interlocking and connected Andersen complex of foundations. (T.28, 36) Additional financing was provided through the City of Bayport by issuance of tax exempt revenue bonds. (T.123, 124) Thus, while a little over one-half of the construction costs were covered by gifts or donations, there was not any effort whatsoever by the Appellant to establish how much of that capital contribution was utilized for assisted living, for which it seeks tax exemption, and independent living, for which it does not. (T.55, 56, 102) It is, therefore, at best, misleading or incomplete for the Appellant to argue about the size of the capital contribution when the Appellant has not or cannot make any distinction between the capital contributions being used for property it seeks to declare as tax exempt and property that it does not. (T.56, 126)

Additionally, as discussed below, notwithstanding all of the capital contributions, the effect of the capital contributions has not been to result in the assessment of rental rates that are substantially below the commercial rental market. Rather, only because of the substantial capital contributions have the rents charged by Croixdale been able to be reduced to the point where they are within market range, rather than substantially above it. Therefore, while there were substantial capital contributions, they fail to meet this criteria.

It is also clear from an ongoing operational perspective that there is virtually no receipt of contributions or donations. Unlike the situation in *Westbrook Health Center*, *supra* in which there was a formal plan of ongoing solicitation of contributions and gifts for operating expenses, Croixdale has made a conscious decision that it will no longer

seek such contributions. (T.35, 36, 235, 236) As related by Mark Campbell, foundations and other sources for which Croixdale has historically gone to for operating revenue are simply not interested in providing these contributions. (T.29) Therefore, the only gifts or donations for ongoing operational activities of any significance are the investment proceeds generated from the mission benevolence fund foundation.

Also, unlike the situation in *Westbrook Health Center, supra.* where contributions accounted for over one-half of their operating revenue, the evidence shows that Mission Benevolence Funds contributions are minimal when compared to the overall revenues of Croixdale. Total mission benevolence funding used to assist in rental payments for residents of the entire Croixdale property in 2004 were in the amount of $42,200 (T.371). This is less than half of what was spent as mission benevolence in 2001. (T.370) Additionally, even that $42,200 is a deceptive figure in that it does not distinguish between mission benevolence funding paid on behalf of persons in assisted living, as opposed to independent living, and there are individuals in independent living units that receive some of these benefits. Therefore, even less than $42,200 on an annual basis is being provided in gifts and donations for the direct benefit of any residents of the portion of the property that is the subject of these proceedings. This is less than two percent of the revenue received by Croixdale. When the vast bulk of revenues comes from the persons who use the services or premises, this factor is not met. *Camping and Education Foundation v. State*, 164 N.W.2d 369 (Minn. 1969). Thus, on an ongoing basis there is next to nothing that is being provided in the form of gifts and donations to the alleged purely public charity.

While the Tax Court found that the taxpayer had satisfied the second element, the Respondent believes the Tax Court was wrong. As acknowledged by the Tax Court (A.16), the evidence presented did not support the Petitioners argument that its Mission Benevolence Funding for any ongoing payments of rent and making up of deficiencies resulted from donations. The Tax Court also noted that contrary to other precedents, the Appellant had no plan in place in the future to solicit charitable contributions and essentially ruled that it met this criteria because it had a history of being a beneficiary of substantial charitable contributions. However, the trial evidence further established that this long historical practice was ending and that the long standing practice of receiving contributions from the conglomeration of Andersen related foundations was ending. Thus, contrary to the Tax Court's findings, Appellant was deficient in its proof relative to this second factor.

3. WHETHER THE RECIPIENTS OF THE CHARITABLE BENEFITS ARE REQUIRED TO PAY FOR THE ASSISTANCE IN WHOLE OR IN PART.

The Tax Court correctly concluded that the Appellant had failed to meet its burden of proof to establish the existence of this factor. As reflected at A.18 to 20 of the Tax Court Memorandum, the Court found, that the Appellant operates on essentially a fee for service basis and on therefore this third factor cannot be met.

In determining whether the third factor is met this Court has noted it should consider whether or not a general class of people benefit from the organization's activities to an extent greater than if the organization were simply competing with or

acting as part of the private market. *Skyline Preservation Foundation v. County of Polk*, 621 N.W.2d 727 (Minn. 2001). The Petitioner must prove that the facility provides its services or rent free of charge or at "considerably reduced rates." *Rio-Vista Non-Profit Housing Corporation v. County of Ramsey,* 277 N.W.2d 187 (Minn. 1979); *Community Memorial Home at Osakis, Minnesota, Inc. v. Douglas County*, 573 N.W.2d 83 (Minn. 1997). Using that standard as more fully discussed herein and relative to factor five, this factor is clearly absent.

The evidence overwhelmingly demonstrates that the recipients of the "charitable benefits," i.e. the residents of the 53 units of assisted living, are required to pay for virtually all of their benefits, either directly out of pocket or through third party payers, such as medical assistance and Medicare programs. The taxpayer specifically modified its license for the purpose of increasing its revenues from government assistance programs. (T.63) This Court has long held that payment by third party payers or recipients do not constitute either a gift or donation and are attributable as payments made on behalf of the alleged beneficiary of the charity. *Care Institute, Inc.-Maplewood v. County of Ramsey*, 578 N.W.2d 734 (Minn. 1998).

The evidence shows that of the 53 residents in assisted living, all 53 are billed for the rental component of their living arrangements. They also are billed for at least a level 1, basic level of service. A very large number who need additional care are billed on a fee for service basis for costs incurred above and beyond those benefits. The Appellant's witness who created the entire "points of care" fee structure candidly admitted the entire design is to have the residents "pay for what they are getting." (T.305) To the extent

they receive additional amenities, such as hair cuts or beauty parlor treatments, those are also paid out of pocket by the so-called beneficiaries and are paid for by them on an ala carte basis. (T.307) This situation clearly is not "charity" as defined by either statute or the courts. In *Community Memorial Home at Osakis, Minnesota, Inc. v. County of Douglas*, *supra* the court noted that the term "charity" is broadly defined as a gift for the benefit of a number of persons. See, also *White Earth Land Recovery Project v. County of Becker*, 544 N.W.2d 778 (Minn. 1996). Thus, this element of "charity" is totally lacking.

Even those recipients who may receive some form of charitable benefit through mission benevolence funding receive that benefit only as a last resort. Persons who seek such charity must complete a formal application and provide extensive financial information about themselves. (T.118, Ex.14, 15) As a condition of receiving mission benevolence funding, the so-called beneficiaries of this charity are required to exhaust personal resources, as well as all available governmental resources. (T.121, 212) The evidence reflects that in at least one case, a person who did not pay rent because they were the victims of theft by a relative, was threatened with eviction from the premises. (T.215, 216, Ex.24) Additionally, every resident of the facility who is receiving any benefits from living at the facility is required to enter into a written month to month lease agreement that looks strikingly similar to any other apartment or multi-family housing lease or rental living arrangement. While such an arrangement and documentation may well be good business practice, it certainly is not evidence of the charitable nature of the

Croixdale operation. It is instead evidence of its commercial and market nature as the Tax Court so found.

4. WHETHER THE INCOME RECEIVED FROM GIFTS AND DONATIONS AND CHARGED TO USERS PRODUCES A PROFIT TO THE CHARITABLE INSTITUTION.

The evidence shows that as of 2004 Croixdale was experiencing a positive cash flow in the approximate amount of $24,000. (T.90) The 2005 budget also projects a positive cash flow of $25,000 (T.152, 157) While testimony presented on behalf of the Appellant indicates that, at least under some accounting principles, that this is not a true reflection of cash flow in that it does not take into account the full level of depreciation, (T.89) it certainly demonstrates the generation of revenue in excess of expenses. Additionally, the evidence reflects that Croixdale has positioned itself through its investment and connection with Presbyterian Homes so that in eight to ten years it will be receiving a positive cash flow from other real estate interests that it has acquired in the form of revenue generated through the Presbyterian Homes' very large entity known as Boutwell's Landing. (T.76, 99, 100) As Presbyterian Homes' CEO Lindh testified, Croixdale will be seeing revenue arrive in the future from this source. Croixdale has a 10 percent equity interest in the operations of Boutwell's Landing. Boutwell's Landing is a massive entity that will continue to expand its campus. It already has assisted living, independent living, memory care and business shops, will now be adding a nursing home facility and the revenues that are generated through that operation. (T.223, 224)

Croixdale in its transition from a small informal operation to a much more business oriented facility has also moved to a cash generating operation, rather than a negative cash flow operation.

Contrary to the Appellant's assertion, the Tax Court's decision was internally inconsistent between the various North Star factors. Careful review of the Tax Court findings, particularly the memorandum at pages 21 and 22 shows a well thought out analysis by the Court. As the Tax Court found, while exclusion of so called contributions from calculations would indicate that the taxpayer has suffered a significant negative cash flow for many years, when the non-operating revenues, including those contributions that were used to help prove satisfaction of factor 2 are included, the Petitioner has experienced a gain for ten of the past 14 years. The Appellant's audited financial statement for the fiscal year ending 2004 reflects in excess of several million dollars of revenues over expenses even after depreciation and the 2006 budgets estimates a positive cash flow. As the Tax Court also found, the Appellant's Pro Forma prepared in late 2003 establish a positive cash flow ranging between $100,000 and $300,000 for all but the first of the next five years, and there are nearly $2,000,000 in outstanding pledges from the Capital Campaign still to be receipted by the Appellant. The Tax Court's decision and finding that factor 4 was not satisfied is clearly supported by the evidence, and this Court should so find.

5. WHETHER THE BENEFICIARIES OF THE CHARITY ARE RESTRICTED OR UNRESTRICTED AND IF RESTRICTED WHAT DO THE CLASS OF PERSONS

TO WHOM THE CHARITY IS MADE AVAILABLE IS HAVING A REASONABLE RELATIONSHIP TO THE CHARITABLE OBJECTIVES.

As the Tax Court found, this factor is completely lacking in this case. (A.23, 24) Croixdale does nothing to lessen the burden of government. Indeed, its entire financial structure is predicated on maximizing all government sources of revenue. One of Presbyterian Homes' first actions when it began to assist in Croixdale management was to negotiate with the government to increase the payments made by the government to it to house its residents. (T.85) Mission benevolence funding is not available unless and until an individual has exhausted all possible forms of government assistance and third party payments for housing and services. (T.29) Thus, to that extent no burden is lessened to government resources. It appears that Presbyterian Homes' CEO Lindh attempted to assert that, at least indirectly, Croixdale's operations would lessen the burden of government because it would reduce the risk that an individual would be moved from that facility to a property tax exempt nursing home. (T.84, 108) However, few nursing homes, and none in Washington County, are exempt from payment of property taxes. Therefore, its argument is fundamentally flawed in that regard.

The record is clear that the so-called beneficiaries of the charity are highly restricted. As far as paying less for rent goes, at most the only potential beneficiaries of this so-called charity are the 53 people who are living on the premises at any given point. (T.196) This is a very restricted and narrow class of beneficiaries. Additionally, to the extent one wishes to examine the mission benevolence funding resource as a class of

persons to which charity is available, the numbers shrink to even an incredibly smaller number. As of September 2005 only 13 residents had incomes so low that they received government assistance. (T.178, 210, 211, Ex.21) Of that group testimony reflects that only eight persons living in assisted living housing are the recipients of any level of mission benevolence funding. (T.207, 208, Ex.17) The record reflects that for several of those individuals the funding is a very small amount of approximately $160 per month.

Even the number of those eligible for consideration for mission benevolence funding under the policies and procedures implemented at Croixdale is a very small group. In order to be eligible for consideration, not only do all financial resources have to be exhausted, but the applicant must have some type of relationship with Croixdale, such as being a volunteer, board member, current or former employee or donor or other beneficiary. (T.121, 181, 196, 197, Ex. 14, 15) The universe of potential recipients of this charity has shrunk so drastically under the policies and procedures of mission benevolence funding that it is virtually non-existent to the world at large.

The world at large is not even aware of the availability of this potential resource. No non-resident of Croixdale receives Mission Benevolence Funds. (T.194, 195) The existence of the mission benevolence funding is a closely guarded secret of the organization. It is not discussed in any marketing material, nor is it presented in any of the literature made available to the public. (T.72, 134, 135, 181, Ex. 16) Indeed, candid testimony by representatives of the taxpayer stated that individuals who first come into the Croixdale property virtually never need any of this charity, since they have financial resources to pay the rent. (T.192, 193, 195) That same witness admitted that mission

benevolence was "never intended" to be promoted to or for persons not already a part of the Croixdale system. (T.181) The charity is made available only when all other resources are gone in an effort to keep this individual from having to move from the property. (T.43, 63, Ex.7, 8, 9, 10) This incredibly small number of potential beneficiaries of the charity demonstrates beyond any question that factor 5 is not and cannot be met by the taxpayer. See, *Community Memorial Home at Osakis, Minnesota, Inc. v. County of Douglas, supra* and *White Earth Land Recovery Project v. County of Becker, supra.* in which the court noted that charity by its very definition refers to an indefinite and significant number of people.

The other fundamental argument as to the extent of the charity advanced by the Appellant has to do with the pricing structure of the services and facilities provided by Croixdale. The Appellant argues that because of the large receipt of capital contributions, it is able to reduce the price of its rental units by $400-$500 per month. (T.89, 91, 92, 334) The Appellant extrapolates from that analysis that, therefore, it is $400-$500 under market and this is a great benefit to the residents.

The Appellant's witness in this area was its $285 per hour C.P.A., who has a business relationship with Appellant's counsel and perceives it is his role as an expert witness not to testify objectively, but to "argue" the Appellant's case. (T.353, 356, 357) He presented his argument by trying to reconstruct a financial analysis long after the fact and involving decisions that he had nothing to do with to justify the rental rates charged by the subject property (T.352, 353, 358, 382). He possessed virtually no direct knowledge of these underlying items and the primary, if not exclusive, source of his data

was the advocacy and public relations documents of his client. (T.383, 384, Ex. 33) The written report he submitted was done with the editing aid of Appellant's trial counsel and the document was written for the sole purpose of this trial. (T.362, 363)

Relative to this argument, it should first be noted that even if true, once again the only beneficiaries of the charity would be the residents of the facility. In that regard the Appellant has made no distinction between the taxable independent living units and the proposed tax exempt assisted living units. (T.38, 67, 107, 140, 141, 335, 374, 375) Therefore, what the Appellant appears to argue is that it solicited capital funds under the perspective of charitable activities and utilized those funds for the benefit of independent living individuals. This becomes particularly interesting in that the Appellant acknowledged through its witnesses that from a market perspective the independent living facility has never been thought of as problematic, renting under market or even as part of the charitable operation. (T.48, 54, 57) However, beyond this anomaly, the analysis is even more fundamentally flawed.

Only one witness, Deputy Washington County Assessor Rollie Huber, presented any credible knowledge, information or background expertise to testify about what is market rent and market rates for these units. While the CPA retained by the Appellant "argued" his opinion that because of the capital contributions rents were $400 or $500 lower than they would otherwise have been, that is an interesting piece of information that actually tells the Court nothing. Assuming without conceding that the CPA's argumentative testimony is correct, that simply states that the rent is lower than it would have been than if a higher mortgage and greater debt service had to be dealt with. That

evidence does not prove that the rental rates that are currently being charged are below market rates.

To overcome this deficiency the Appellant also attempted to present the testimony of Patty McCullough who did a non-real estate analysis of the rents being charged at Croixdale and what she perceived to be comparable property. (T.388) Along those same lines, a statistical analysis was attempted by Mr. Gavin Collins to determine the price of rent per square foot for Croixdale property versus other properties. (T.255)

Mr. Collins engaged in an interesting statistical exercise, but it was both factually flawed and utterly incapable of conducting a valid market analysis to determine market rent and Croixdale's place in the market. This analysis did little more than try to determine a per square foot rental rate. (T.285) In part it relied on data hand picked by representatives of the Appellant in making rate comparable comparisons (T.257) Even with this flawed data, Croixdale's rates were such that several other facilities charged lower rates (T.262, 316, Ex.30, 32) It would appear that Mr. Collins confused average price with market rate (T.275), but this is not a concept ever endorsed by this court or the Tax Court. His study included inappropriate facilities, such as a single family group home. (T.461, 477) Unlike Mr. Huber, Mr. Collins had no clear definition of what "market rate" was (T.286). Many of the physically closest comparable properties, especially those run by Presbyterian Homes, appear to have been intentionally excluded from his "market analysis." (T.287, 288, 289) The study Mr. Collins did was done for the sole purpose of an ex post facto, court-oriented effort to create trial evidence (T.291, 361) and for that reason alone its relevancy and probative value was suspect and not found

credible by the Tax Court. Mr. Collins candidly admitted his analysis is not of the type used by any real estate appraiser in conducting a market analysis (T.295, 296). The data used for comparables relied only on published rates, even though the witness knew that such properties as Croixdale sometimes charge less than those rates. (T.301, 302)

Both the analysis of Ms. McCullough and Mr. Collins were fundamentally flawed in that they did not validly measure any kind of market rent. Mr. Collins simply engaged in a per square foot calculation and yet made not a single adjustment for the various factors that would typically be considered in determining what a market rent rate is when comparing two pieces of real property. He freely acknowledged this to be true. His candor was refreshing in that regard, but it also demonstrated the essential irrelevancy of all of his analysis and testimony.

This leaves as the only proof attempted by the Appellant that the rents charged at Croixdale are "substantially below market" as the testimony of Ms. McCullough. (T.407) She acknowledged that her analysis has nothing to do with any real estate valuation principles. (T.421, 425, 426, 432) Ms. McCullough attempted to essentially "eye-ball" the level of services provided at various other assisted living facilities and what she perceived to be the market area, added that to the published rental rates and then attempted to determine whether or not Croixdale rent was substantially below market. Her evidence demonstrated that it is not.

Even if the Court takes into account the foundational inadequacies in terms of an expert opinion for Ms. McCullough's ability to determine market rates, as the Tax Court did, the exhibits that she generated establish that Croixdale does not charge substantially

below market rents. Indeed, Ms. McCullough's testimony conceded on both direct testimony and on cross examination that Croixdale is on the low end of the market. (T.407, 408, 427, Ex. 32, 34, 35) There are other similarly situated properties that charge less for essentially the same housing and benefits package. (T.427, Ex.32, 34, 35) The fact that Croixdale assisted living is essentially 100 percent occupied, while the other facilities appear to have a lower occupancy level as demonstrated by the evidence submitted to the Tax Court, does nothing more than demonstrate that Croixdale has made a marketing decision to be on the low end of comparable market rates in order to ensure a higher level of occupancy. That is certainly a valid and appropriate business decision, but it hardly constitutes evidence of the charitable nature of Croixdale's operations.

Only a single witness testified from a credible real estate perspective as to what the true market comparable rates for Croixdale and similar type properties were. The Tax Court has recognized that such an analysis, rather than some rent price per square foot, is the proper method to determine market rate and rent for purposes of *Northstar* analysis. *Westbrook Health Center, supra.* That witness was Deputy County Assessor Rollie Huber. (T.455)

Mr. Huber has been involved for over 30 years in real estate analysis and market evaluation. Mr. Huber testified at length, using recognized real estate appraisal and valuation techniques as to what the market and market rent would be for the various types of properties, such as one bedroom versus two bedroom, and the first level of services provided. (T.465, 466, 467, Ex.38) Mr. Huber also was the only witness who defined "market rent" using any conventionally recognized definition. (T.471) Market rent is the

most probable rent that a property should bring in an open and competitive market. (T.471) Mr. Huber's analysis, in order to determine market rates, should be compared to and used in conjunction with the analysis of Ms. McCullough. (T.513) When that is accomplished, what it vividly demonstrates is that Croixdale was able to use its substantial capital contributions and reduced debt service not to price itself at substantially below market rates, but rather to price itself within the market range.

While much effort was made to impeach the testimony of Mr. Huber on cross examination on the grounds that his analysis was for property valuation purposes, that cross examination effort fell drastically short in the ability to impeach the validity of his testimony. The fundamental reality is that the purpose of real estate valuation for tax purposes is no different than the purpose of real estate valuation for any other real estate purpose, that is, to determine the fair market value of the property and any corresponding features, such as fair market value associated with rental of the units of the property. Mr. Huber's analysis complied with professionally recognized standards as established by USPAP documents. (T.468, 469) His testimony was neither impeached nor even challenged through cross examination in that regard. His testimony remained pristine and unrefuted as to the professionally appropriate analysis that he conducted. His analysis demonstrated beyond any doubt that Croixdale rents, along with the basic service package for the assisted living facility was within the range of the current market rates in the St. Croix Valley and Washington County area. (T.482, 483, 486) In that regard this property should be subject to taxation, just as are all other assisted living facilities and nursing homes located in Washington County. (T.463, 504, 511)

What Mr. Huber's testimony, when taken in conjunction with the testimony presented by the taxpayer in the form of its witnesses, demonstrated was what Mark Campbell intuitively knew all along. As Mr. Campbell testified, the Board of Directors of Croixdale felt that if they could not obtain substantial contributions to be used to reduce the amount of mortgage and debt service needed to rebuild Croixdale, that the Croixdale rebuild and continuation would not be financially feasible. (T.28, 35, 36, 67) He was right. If Croixdale would have had to carry as a mortgage and debt service the entire $18,000,000, it simply would have priced itself out of the market. At that point, it would have been more expensive than even the property known as Boutwell's Landing, which testimony has described as being a high end facility nearly in the nature of "a castle." The fact that by obtaining these substantial capital contributions Croixdale was able to position itself to be within the market range absolutely fails to prove that it has created any form of charitable operation for any of its residents. Factor 5 is totally lacking in the case before the Court. As the Tax Court found, the taxpayer has utterly failed to meet its burden of proof in this regard.

6. WHETHER DIVIDENDS IN THE FORM OR SUBSTANCE OR ASSETS UPON DISSOLUTION ARE AVAILABLE TO PRIVATE INTERESTS.

While early documentation in terms of the Articles of Incorporation of the taxpayer were silent as to this issue, with the recodification and establishment of Amended Articles, the Respondent conceded before the Tax Court that the written documentation and Articles of Incorporation indicate that upon dissolution of Croixdale, its assets would be transferred to another non-profit facility. (T.15, Ex.1)

CONCLUSION

By applying the classic *Northstar* test to the evidence, the Tax Court properly concluded that the Appellant has failed to meet its heavy burden of proof to justify its claim for exemption from real property taxes for its assisted living facility. While the taxpayer received substantial capital contributions in terms of donations from foundations, such contributions have not been transferred into any form of charitable operation for the requisite wide range of beneficiaries of the charity. The reduced debt service that resulted from these contributions did nothing more than permit the taxpayer to charge rental and service rates that are within the normal market rates for comparable properties in the market area. The operating funds provide virtually no charitable benefits of any significance to any number of individuals. In every way, shape, form, method of operation and clientele, the subject property is no different than every other property tax paying assisted living facility throughout Washington County. The taxpayer

has failed to meet its burden of proof and its request for tax exempt status of the property. The Tax Court so found and its decision should be affirmed.

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Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).