STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Bay Harbor Yacht Club
Petitioner,
v MTT Docket No. 298777

City of Petoskey,
Respondent. Tribunal Judge Presiding
Sherry A. Lee

OPINION AND JUDGMENT

INTRODUCTION

A hearing on the briefs of the real property assessment matter in the above-captioned case was held before the Michigan Tax Tribunal on June 30, 2005 in its Lansing, Michigan offices. Petitioner, Bay Harbor Yacht Club, was represented by attorney James T. Ramer. Respondent, City of Petoskey, was represented by attorney Bridget Brown Powers. The parties submitted into evidence a Statement of Stipulated Facts and Exhibits, totaling 38 exhibits which were admitted and included Petitioner's appraisal, prepared by Oetzel Williams Group, and Respondent's appraisal, prepared by Allen & Associates. Petitioner is appealing the assessed values for 2003 and 2004, contending that the assessments and resulting increase in taxable values for the subject property are invalid because an improper procedure was used to determine the valuations at issue and that subject property should be accorded a zero or nominal value as a "common amenity" resulting from the proper economic effect of the substantial restriction limiting the use of the subject property to a private yacht club for its members. Respondent contends that its assessments are proper and do not exceed applicable statutory limitations as there was a transfer of ownership of the subject property in 2001 and that the impact of the 2002 Emmet County Circuit Court's ruling regarding the membership structure of the yacht club combined with the

Bylaws of BHYC, Inc. established subject property as "separate property" subject to its own taxation.

SUMMARY OF CASE

The subject property consists of 6.85 acres of land owned by Bay Harbor Yacht Club (BHYC), a Michigan non-profit corporation and used as a private yacht club, including a club house, tennis courts, swimming pool, beach and other related facilities, located adjacent to Lake Michigan within Bay Harbor in Emmet County, Michigan. Bay Harbor is a planned resort community comprised of 25 separate condominium communities created between 1994 and 2003. The development for the yacht club was provided by Bay Harbor Company, the developer of Bay Harbor, and required that any person purchasing condominium property in those condominium communities was required to apply for membership in the yacht club, as specified by covenants within the Master Deeds of the condominiums in Bay Harbor. The plan for the use and control of the yacht club was contained in the Membership Plan published by the developer. The Membership Plan called for control of the yacht club to be conveyed to the members on the date that members had paid initiation fees of $4.5 million to the developer, or, if earlier, on April 30, 2006. However, pursuant to an agreement reached with the developer, the control passed to the members on September 1, 2001. Petitioner's claims that the events occurring in 2001 was not a transfer of ownership and that substantial restrictions on the use and sale of the common amenity yacht club, required and imposed by the developer as part of the early transfer of control in September, 2001, cause the subject property to have a zero or nominal value were heard and decided by the Tribunal. The Tribunal found the conveyance of property associated with the events occurring in 2001 is a transfer of ownership and, in accordance with MCL 211.27a(3), the subject property's taxable value must be uncapped in 2002, the year following the transfer. The

Tribunal concluded although the restrictions at issue may have an effect on the value of the subject property, they do not necessarily render the value to be zero or nominal.

FINDINGS OF FACT

The property in contention is owned by Bay Harbor Yacht Club, a Michigan nonprofit corporation, incorporated on June 8, 1988. The subject property consists of 6.85 acres of land, including a club house, platform tennis courts, regulation size tennis courts with restrooms, parking facilities, and a beach area and beach house. Subject property is classified as commercial real property and is described as parcel identification number 24-52-18-10-152-017. The property's assessed value, state equalized value and taxable value was $2,450,000, $2,450,000, and $2,430,450 for 2003 and $2,450,000, $2,450,000 and $2,450,000 for 2004.

The plan for the use and control of the subject property was contained in a document first published by the Developer in May, 1996, entitled "Membership Plan." During the years 1997-1999, the Petoskey Assessor treated the BHYC as common amenity property. The subject property is not a common element of a condominium as defined in the Condominium Act.

PETITIONER'S CONTENTIONS AND EVIDENCE

Petitioner contends that for the tax years 2003 and 2004 the subject property has a true cash value of $0 and, therefore, state equalized and taxable values of $0. Petitioner further contends that subject property should be accorded a zero or nominal value by reason of restrictive covenants on the use of the property as a private yacht club for persons residing within the Bay Harbor community; and, that the subject property is common property as the value of the yacht club is already included in the sales prices of the property sold in Bay Harbor. Petitioner argued that the assessments and resulting increase in taxable values for the subject property are invalid

because an improper procedure was used to determine the valuations at issue. First, the assessor reported a transfer in 2001 and uncapped the taxable value of the subject property, increasing it in 2002 from $10,000 to $30,000, as a result of the transfer. Then, the assessor, as a result of the Order of the Emmet County Circuit Court, again uncapped the taxable value in 2003 from $30,000 to $2,430,450. However, the events occurring in 2001 evidenced a transfer of control, not a transfer of ownership. Therefore, the uncapping of taxable value on the subject property for the tax year 2003 was improper.

The subject property is owned by Bay Harbor Yacht Club ("BHYC"), a Michigan non-profit corporation, incorporated on June 8, 1998. BHYC consists of its members who are the owners of property in Bay Harbor. Membership in the BHYC is tied to ownership of property in Bay Harbor by covenants within the Master Deeds of condominium units in Bay Harbor and by a Declaration of Restrictions recorded against the BHYC properties. Bay Harbor Company, the developer of Bay Harbor, provided for the BHYC as a common amenity for the owners of property within Bay Harbor. The plan for the use and control of the BHYC was contained in a document published by the developer, entitled "Membership Plan." The Membership Plan specified that only property owners in Bay Harbor were eligible to be members of the BHYC. For 22 of the 25 condominium developments in Bay Harbor, Bay Harbor Company required that any person purchasing property in those developments was required to apply for membership in BHYC. There are currently 472 Regular and Founding members of the BHYC and all are property owners in Bay Harbor. There are 54 ancillary members of the BHYC that have either direct ownership of property in Bay Harbor or a substantial nexus to property in Bay Harbor. The Membership Plan called for control of BHYC to shift to the members on the date members had

paid initiation fees of $4.5 million to the developer or, if earlier, on April 30, 2006. However, in 2001, the members of BHYC undertook a major legal and financial effort to take control of the administration of the BHYC from the developer earlier than contemplated by the Membership Plan. Therefore, the control of the yacht club passed to the members on September 1, 2001. As a part of the transfer of control to the members of the yacht club, the developer required an agreement with the member controlled BHYC which restricted the use of the BHYC facilities to owners of property in Bay Harbor and restricted the use of the BHYC facilities to a private club for its members. The Bylaws of BHYC restate the Membership Plan with amendments that were approved by a requisite number of members, as provided in the Membership Plan.

The beneficial use of the subject property was transferred to the owners of property in Bay Harbor in 1996, when the Membership Plan for the subject property was promulgated. Although the Membership Plan called for payments of initiation fees to be made to Bay Harbor Company, these payments were essentially installment payments for BHYC under a land contract in which the beneficial use of the subject property passed to the members, being the property owners in Bay Harbor, in 1996. Although deeds of conveyance to the BHYC for the subject property were executed and delivered in 1999 and 2001, these deeds of conveyance were in fulfillment of the land contract contained in the Membership Plan. Under 211.27a(6)(b), the giving over of a deed pursuant to a land contract is not a transfer of ownership. Therefore, the General Property Tax Act does not authorize the uncapping of taxable value. As neither the transfer of control to the members, nor the issuance of deeds of conveyance in 2001 was a transfer of ownership as defined in MCL 211.27a(6)(b), Respondent’s uncapping of the taxable value on the subject property for the 2003 tax year was improper.

The Declaration of Restrictions that were imposed by the developer and required as part of the early transfer of control in September, 2001, limits the use of the subject property to a private yacht club for its members and requires that members of the yacht club must be owners of property in Bay Harbor. Although this latter requirement could be amended by BHYC, this provision would not be amended by BHYC. In addition to the limitation of use of the subject property to a private yacht club, there are other restrictions that apply, including the restrictions in the Master Deeds throughout Bay Harbor which require purchasers of property in Bay Harbor to apply for and join the BHYC. Petitioner contends it is the practical and title-embedded restrictions attendant to the subject property, none of which are likely to be waived or modified so as to permit its sale on the open market, that cause the subject property to have a zero economic value. Also, the more persuasive evidence supports Petitioner's position that the purchasers of property within Bay Harbor are paying value for the right to join and use the subject property as part of the purchase price, as the sales prices placed upon properties reflect a contribution to their value created by the existence of the subject property. The valuation section of Mr. Oetzel's appraisal states, in pertinent part, "[w]e have concluded that property owners in Bay Harbor have paid a substantial premium for the added amenities of the Bay Harbor Community (Yacht Club and private roads)." Therefore, Petitioner claims the rule of law supports a finding of nominal (zero) value in regard to BHYC or subject property.

RESPONDENT'S CONTENTIONS AND EVIDENCE

Respondent contends that for the tax years 2003 and 2004 the subject property has a true cash value of $3,980,000 and, therefore, state equalized and taxable values of $1,990,000. Respondent further contends there was a transfer of ownership of the subject property in 2001 and that the

transfer of ownership resulted in immediate litigation regarding the membership structure of the yacht club. As a result of the court ruling that certain property owners were no longer required to be members of the yacht club and with the addition of non-property owner memberships in the yacht club's Amended Bylaws of 2001, the status of the subject property was definitively established as "separate" property, subject to its own taxation, rather than any kind of "common element" property. This litigation was not concluded until July 12, 2002. Thus, the assessor waited for the outcome of the initial litigation regarding the sale before including it in his assessment, pursuant to MCL 211.27a(3). Therefore, in addition to being subject to a new assessment due to the transfer of ownership, the property was treated as "omitted real property," pursuant to MCL 211.34d(1)(b)(i), that had previously existed, but that had not been included on the tax rolls according to its true cash value, as the prior assessor, contradictory to the recommendations of the State Tax Commission, treated the yacht club as a "common amenity" whose value could be distributed to the condominium units in Bay Harbor owned by the members.

Respondent argued that the only valid transfer of ownership of subject property was from the developer to BHYC and occurred in September 2001. In 1996, the yacht club, as a limited partnership, was wholly owned and controlled by the developer. The complete ownership and control of the developer was emphasized in the Membership Plan of 1996. The unambiguous provisions of the Membership Plan made it clear that "[t]he clubhouse and fitness center, the swimming pool, the tennis courts and the beach will be owned by Bay Harbor Company and will be leased to the Yacht Club," and "[a] membership in the Yacht Club is only a right to use the Club Facilities and is not an investment in the Yacht Club." Therefore, neither the members nor

the yacht club received title to or anything close to a fee simple interest in any property of the developer. Rather, the members were given no ownership rights whatsoever. They were merely permitted use of the facilities, as explicitly stated in their Membership Plan. However, in contrast, BHYC is a new corporation, separate and distinct from the limited partnership yacht club of 1996, and owned by new equity members who began to acquire ownership interest in subject property in 2001. As soon as the transfer occurred in September 2001, the effect of the transfer was challenged in court by more than three dozen members of the former yacht club partnership. The assessor waited for the outcome of the litigation before assessing a large tax increase to the subject property. In July 2002, the Emmet County Court ruled that the property owners in Bay Harbor were not mandated to be members of BHYC, a factor considered in determining subject property's value as being other than a "common amenity" to the condominium developments in Bay Harbor. The assessor then properly determined subject property's true cash value for tax year 2003.

Respondent also argued that BHYC does not have to be operated for the benefit of only Bay Harbor property owners, nor does it require property ownership as a condition precedent to all memberships. The property owners' Master Deeds that seemed to require such membership depended entirely on the terms of the Membership Plan of 1996, which the court ruled had been breached in such a way that none of the property-owning members of the original yacht club were mandated to be members of the new yacht club. Further, the Declaration of Restrictions voluntarily entered into by Petitioner and the developer on September 1, 2001 and the Amended and Restated Bylaws of BHYC, effective as of September 1, 2001, allows three categories of members with no property ownership (or "nexus" to property). BHYC undeniably became a

separate entity with substantial value and it could no longer be considered a "common amenity" with only nominal value.

CONCLUSIONS OF LAW

The assessment of real and personal property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value, as equalized, and that beginning in 1995 the taxable value is limited by statutorily determined general price increases, adjusted for additions and losses.

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law...The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not...exceed 50%...; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. Const 1963, Art IX, Sec 3.

The Michigan Legislature has defined true cash value to mean the usual selling price.

> As used in this act, cash value means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. MCL 211.27(1); MSA 7.27(1).

True cash value is synonymous with fair market value. *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735 (1); MSA 7.650 (35)(1). The Tribunal's factual findings are to be supported by competent, material,

and substantial evidence. *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); *Dow Chemical Co v Dept of Treasury*, 185 Mich App 458, 462-463; 452 NW2d 765 (1990). Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. (Citations omitted) *Jones and Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

The petitioner has the burden of establishing the true cash value of the property.... MCL 205.737 (3); MSA 7.650 (37)(3). This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party. *Jones and Laughlin* at 354-355, citing: *Kar v Hogan*, 399 Mich 529, 539-540; 251 NW2d 77 (1976); *Holy Spirit Assn for the Unification of World Christianity v Dept of Treasury*, 131 Mich App 743, 752; 347 NW2d 707 (1984).

There are three traditional methods of determining true cash value, or fair market value, which have been found acceptable and reliable by the Tax Tribunal and the courts. They are: (1) the cost-less-depreciation approach, (2) the sales-comparison or market approach, and (3) the capitalization-of-income approach. *Meadowlanes Limited Dividend Housing Assn v City of Holland*, 437 Mich 473, 484-485; 473 NW2d 636 (1991); *Antisdale* at 276-277, n 1. The market approach is the only appraisal method that directly reflects the balance of supply and demand for property in marketplace trading. *Antisdale* at 276, n 1. Variations of these approaches and entirely new methods may be useful if found to be accurate and reasonably related to the fair market value of the subject property. *Meadowlanes*, at 485, referencing *Antisdale* at 277, n 1. It

is the duty of the Tribunal to select the approach that provides the most accurate valuation under the circumstances of the individual case. *Antisdale* at 277, citing *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968).

Under MCL 205.737(1); MSA 7.650 (37)(1), the Tribunal must find a property's true cash value in determining a lawful property assessment. *Alhi Development Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal may not automatically accept a respondent's assessment but must make its own findings of fact and arrive at a legally supportable true cash value. *Pinelake Housing Cooperative v Ann Arbor*, 159 Mich App 208, 220; 406 NW2d 832 (1987); *Consolidated Aluminum Corp v Richmond Twp*, 88 Mich App 229, 232-233; 276 NW2d 566 (1979).

The Tribunal is not bound to accept either of the parties' theories of valuation. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 377 NW2d 908 (1985). The Tribunal may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination. *Meadowlanes* at 485-486; *Wolverine Tower Associates v City of Ann Arbor*, 96 Mich App 780; 293 NW2d 669 (1980). A similar position is stated in *Tatham v City of Birmingham*, 119 Mich App 583, 597; 326 NW2d 568 (1982): The Tax Tribunal is not required to accept the valuation figure advanced by the taxpayer, the valuation figure advanced by the assessing unit, or some figure in between these two. It may reject both the taxpayer's and assessing unit's approaches.

Rulings on Objections

Pursuant to the Statement of Stipulated Facts and Exhibits, Respondent raised evidentiary objections to the admissibility of Exhibits J5 through J14, Exhibit J31 and Exhibit J38, under Michigan Rules of Evidence, on the basis that they are not relevant to the 2003 and 2004 tax appeals. Respondent also objected to the admissibility of Exhibit J28 and Exhibits J32 through J34 based on the lack of personal knowledge and/or improper lay testimony given by the respective affiants. Respondent, further, objected to Exhibits J1 and J37 on the basis that the appraiser misapplied law to facts and used an improper and incomplete methodology by which to appraise.

The Tribunal's Rules incorporate the Michigan Court Rules ("MCRs") where no specific TTR exists. The incorporation of the MCRs does not unlawfully expand the authority of the Tribunal beyond that provided in the Tribunal's enabling act (MCL 205.701 et seq). As Petitioner correctly states in its response, as provided by TTR 205.1283(1), "[t]he Tribunal may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Irrelevant, immaterial, or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law." Accordingly, the Tribunal has considered Respondent's objections and Petitioner's responses thereto under the criteria for both MCR and TTR and, based on the pleadings filed with the Tribunal in this case, the exhibits are found to be evidence in support of Petitioner's contentions and, therefore, they are relevant to its claims in this case. Therefore, given due consideration to the objections, the pleadings and the case file, the objections by Respondent to the admissibility of Exhibits J5 through J14, Exhibit J28, Exhibits J31 through J34 and Exhibit J38 are overruled. Regarding

Respondent's objection to Petitioner's appraisal evidence, the weight given to such valuation submissions is within the ambit of the Tribunal's review as a valuation disclosure. "Valuation disclosure" means documentary or other tangible evidence in a property tax appeal which a party relies upon in support of the party's contention as to the true cash value of the subject property or any portion thereof and which contains the party's value contentions and data, valuation methodology, analysis or reasoning in support of the contention. TTR 101(m). While a party's valuation disclosure may be substantially less comprehensive than an appraisal done in compliance with professional industry standards, any deficiencies in the valuation disclosure to establish the true cash value of property go to the weight accorded to it by the Tribunal as it considers evidence bearing on valuation issues within its jurisdiction. Therefore, notwithstanding Petitioner's appraisal evidence, to the extent that it describes or explains Petitioner's conclusions to establish the true cash value of the subject property, it is relevant to Petitioner's claims in this case. Therefore, Respondent's objection to the admissibility of Exhibit J1, Petitioner's appraisal evidence, is overruled. Further, in pursuance of TTR 283(3), as an expert witness is not precluded from rebutting another party's valuation evidence, Exhibit J37 is relevant to Petitioner's claims in this case and, therefore, Respondent's objection to its admissibility is overruled.

Issues and Applicable Law

A relatively high amount of controversy in this matter is attributable to the degree of ownership interest in or the beneficial use of the subject property by the members, being the property owners of Bay Harbor, in 1996. Also, among the issues in controversy is subject property's status as a common amenity of the various condominium developments located in Bay Harbor, as well as the actual effect of specific restrictions on the value of subject property. The issues,

then, to be resolved by the Tribunal are: (i) was the beneficial use of the subject property conveyed or passed to the members in 1996 by the Membership Plan or was there an ownership transfer of subject property in 2001, (ii) is subject property a common element of the various condominium developments located in Bay Harbor, and (iii) do the restrictions attendant to the subject property cause it to have a zero or nominal value? The issues will be addressed seriatim.

Beneficial Use Conveyed or Ownership Transfer

Petitioner claims that the Membership Plan was a land contract in which the beneficial use of subject property was transferred to the members, being the property owners of Bay Harbor, in 1996 when the Membership Plan was promulgated. Further, the Membership Plan called for control of BHYC to shift to the members on the date members had paid initiation fees of $4.5 million to the developer or, if earlier, on April 30, 2006. However, pursuant to an agreement reached with the developer, control passed to the members on September 1, 2001. Petitioner, therefore, describes the events occurring in 2001 as a "[l]egal and financial effort to take **control** of the **administration** of the BHYC from the developer earlier than contemplated by the Membership Plan." [Emphasis added].

Petitioner's Brief (PB), p 3. Petitioner, further, claims that although deeds of conveyance to the BHYC for the subject property were executed and delivered in 1999 and 2001, these deeds were in fulfillment of the land contract contained in the Membership Plan. PB, p 8. Respondent, in contrast, claims that "[t]here was a transfer of ownership in 2001," as indicated by Exhibit P-15, the deed of conveyance. Respondent's Brief (RB), p 5. Respondent, further, claims that in 1996, the yacht club was wholly owned and controlled by the developer and the members were given no ownership rights whatsoever and they were merely permitted use of the facilities, as explicitly stated in their Membership Plan. Respondent's Reply Brief (RPB), p 6.

A copy of the Membership Plan as originally adopted is admitted as Exhibit P8. PB, p 2. Reading the May, 1996 Membership Plan as a whole, the Tribunal finds that it is the entire description of the plan of the Yacht Club regarding membership, how members may use the club facilities (clubhouse and fitness center, swimming pool, tennis courts, beach and other facilities) and how, at the specified date, the Yacht Club will convey all of the club facilities and the land upon which the club facilities are located. The Membership Plan defines the Yacht Club as being Bay Harbor Yacht Club Limited Partnership, an entity owned and controlled exclusively by the Developer, Bay Harbor Company, LLC. (Exh J8-1). The Membership Plan provides for the developer to own, operate and control the Yacht Club, according to the terms of the Membership Plan, until the developer has received a total of $4.5 million in initiation fees or until April 30, 2006, whichever occurs earlier. At that time, the developer is obligated to "establish a Michigan nonprofit corporation that will be known as Bay Harbor Yacht Club, Inc. (the "Equity Yacht Club") and, at the specified date, the Yacht Club **will convey** all of the club facilities and the land upon which the club facilities are located to the Equity Yacht Club." [Emphasis added]. (Exh J8-8). Further, the Membership Plan established that "[a] member has a right to use the club facilities…[t]he club facilities are owned by the Yacht Club and the members do not have any right, title or interest whatsoever in or to the Yacht Club or the club facilities, except to use the club facilities…and the right to join the Equity Yacht Club." (Exh J8-5). According to the unambiguous language of the Membership Plan, the Tribunal finds that the developer maintained full ownership and control of the subject property and that the members were given no rights except for limited and conditional use. Such a description could not be more inapposite to Petitioner's characterization of the (May, 1996) Membership Plan as being a land contract. The

term “land contract” is commonly used in Michigan as particularly referring to “agreements for the sale of an interest in real estate in which the purchase price is to be paid in installments (other than an earnest money deposit and a lump-sum payment at closing) and no promissory note or mortgage is involved between the seller and the buyer.” *Zurcher v Herveat*, 238 Mich App 267, 291 (1999). It is well established that the material elements of a real estate contract are the identity of (i) the property, (ii) the parties and (iii) the consideration. *Giannetti v Cornillie*, 447 Mich 998; 525 NW2d 459 (1994). As signed by the respective parties, a valid land contract embodies all the essential terms: names the parties; accurately describes the property; provides for marketable title; fixes the contract price, the amount and time of installment payments, the rate of interest on unpaid sums and the adjustment of taxes and assessments. *Rathubn v Herche*, 323 Mich 160, 165-166; 35 NW2d 230 (1948). The amount and time of installment payments and the rate of interest as material terms were and **are** essential elements of a land contract. Emphasis added. *Zurcher, supra*. In addition, all essential terms of an agreement to sell real estate must be in a writing that is signed by the party or parties to be held to the agreement for that agreement to be enforceable. *Brotman v Roelofs*, 70 Mich App 719; 246 NW2d 368 (1976), lv den 399 Mich 801 (1977). The Tribunal finds that the Membership Plan did not contain the requisite provisions relating to marketable title, the contract price, the amount and time of installment payments, the rate of interest on unpaid sums and the adjustment of taxes and assessments as material or essential terms of a land contract. The Tribunal also finds that the Membership Plan as originally adopted, so far as it goes, does not contain the signature of the party to be charged. Pursuant to MCL 566.106, simply put, a contract for the sale of land must, to survive a challenge under the statute of frauds, (1) be in writing and (2) be signed by the seller or someone lawfully authorized by the seller in writing. *Zurcher, supra*. Consequently, the

Tribunal concludes that the Membership Plan, on its face, fails as being a land contract for the sale of subject property. Moreover, a land contract is an executory contract in which legal title remains in the seller/vendor until the buyer/vendee performs all the obligations of the contract. *Zurcher, supra*. However, that legal title remains in the vendor until full performance of all contractual obligations does not negate the fact that the vendee has already purchased the relevant property and acquires a present interest in the property that may be sold, devised or encumbered. *Graves v American Acceptance Mortgage Corp,* 469 Mich 608, 614 (2004). Therefore, a valid land contract provides right of **possession** in the vendee. Emphasis added. *Rathubn, supra*. Again, Petitioner claims that the Membership Plan was a land contract in which the "beneficial use" of subject property was transferred to the members. "Beneficial use" means the right to **possession**, use and enjoyment of property limited only by encumbrances, easements and restrictions of record. Emphasis added. MCL 211.27a(11)(b). For purposes such as the instant matter, "possession" is usually understood to mean (i) the general dominion and control of land, including occupying the land and making use of it, and (ii) excluding others from the land. Therefore, possessory rights in land are usually understood to include rights to general dominion and control, rights to use and occupy the land and rights to exclude others from it. From the Tribunal's reading of the Membership Plan, it is clear that members "had the right to use the club facilities" according to the rules and regulations established by the Yacht Club and, more importantly, that "the club facilities are owned by the Yacht Club and the members did not have any right, title or interest whatsoever in or to the Yacht Club or the club facilities, except for the right to use the club facilities." (Exh P8-5). Also, the clubhouse and fitness center, the swimming pool, the tennis courts and the beach will be owned by Bay Harbor Company and leased to the Yacht Club; the third floor of the clubhouse will not be leased to the Yacht Club

and will be used by Bay Harbor Company as executive and administrative offices. (Exh P8-2). Further, the right of a member to use the club facilities as described in the Membership Plan is referred to as the "Membership Interest"; a membership interest also permits reasonable use of the club facilities by the immediate family of each member; the immediate family of a member means only those lineal ancestors and descendants of a member or the spouse of a member who do not own property or who are not married children or who are not children who are age 22 or older; and, at any time and from time to time the Yacht Club may restrict the right of the immediate family (or any particular member of the immediate family) of any particular member to use the club facilities if the Yacht Club determines that the use of the club facilities by the immediate family of that member is not reasonable. (Exh P8-5). Thus, although the members who are owners of property in Bay Harbor had a right to limited use of the club facilities, it is apparent to the Tribunal that the Yacht Club, being Bay Harbor Yacht Club Limited Partnership, an entity owned and controlled exclusively by the Developer, Bay Harbor Company, LLC, exercised the most basic form of possession, general dominion and control and use of the subject property, including occupying it and making use of it, to the exclusion of others. As a result, the Tribunal concludes that the Membership Plan, at its heart, fails as being a land contract in which the beneficial use of the subject property passed to the members, being the property owners in Bay Harbor, in 1996. Therefore, the Tribunal finds that the 1996 Membership Plan is not a land contract as provided in MCL 211.27a(6)(b).

In the light of the foregoing discussion and the Tribunal's finding that the 1996 Membership Plan is not a land contract pursuant to MCL 211.27a(6)(b), it follows, contrary to what Petitioner argues, that the issuance of the deed in conveyance occurring in 2001 was not given in

fulfillment of a land contract. Rather, the timeline for the transfer of ownership was the earlier of April 30, 2006 or whenever Bay Harbor Company, LLC recuperated $4.5 million dollars in initiation fees. However, on September 1, 2001, an early transfer of the club facilities was completed. In connection with the early transfer, the developer-owned, operated and controlled Yacht Club, Bay Harbor Company, LLC, conveyed to Bay Harbor Yacht Club (the Equity Yacht Club), all of the club facilities and the land upon which the club facilities are located by way of quitclaim deed, dated and recorded on September 1, 2001. (Exh J15). The Tribunal finds such conveyance of property is a transfer of ownership and, in accordance with MCL 211.27a(3), the subject property's taxable value must be uncapped in 2002, the year following the transfer. In fact, with reference to the Notice of Assessment, the 2002 taxable value of subject property was uncapped, resulting in a change to $30,000 as a result of a transfer of ownership in 2001. PB, p 6. The Tribunal also finds that previous deeds, admitted into evidence as Exhibits J12 and J14, were not ownership transfers as defined by MCL 211.27a(6). On December 31, 1996, Bay Harbor Company, LLC transferred part or all of subject property to Bay Harbor Yacht Club Limited Partnership by quitclaim. On May 21, 1999, Bay Harbor Yacht Club Limited Partnership transferred part or all of subject property to Bay Harbor Yacht Club by quitclaim. As contained in the Tribunal's discussion, heretofore, Bay Harbor Company, LLC is the developer for the entire Bay Harbor development project. Bay Harbor Company, LLC is the limited partner in Bay Harbor Yacht Club Limited Partnership whose general partner is Bay Harbor Yacht Club. Therefore, pursuant to MCL 211.27a(7)(l), if the entities involved are commonly controlled, the transfer of property is not a transfer of ownership for purposes of taxable value uncapping. The question, if any, as to whether some aspects of the transfer of subject property in the transition from developer control to owner control occurred earlier than September 1, 2001 is mute. In

addition, the Tribunal finds that the increase in the taxable value of subject property from $30,000 to $2,430,450 for the tax year 2003 was not related to a transfer of ownership in 2002 resulting in a taxable value uncapping. (Exh J23). Rather, Respondent reconsidered the method of valuation of subject property as a "common amenity" when its ownership transferred in 2001 (RRB p 2-3), and, with the outcome and conclusion of litigation on July 12, 2002, Respondent determined subject's true cash value as "separate" property with the assessment for tax year 2003. (RB p 5).

Common Element or Separate

Petitioner claims that the subject property is a common amenity as "[t]he value of the common property is already included in the sales prices of the property sold in Bay Harbor." (PB p 1). Petitioner offers no support for this claim other than to point to the affidavit of Respondent's former assessor, Alan F. Behan (Exhibit J29), as well as the valuation theory advanced by Petitioner's appraisal expert, Terrell Oetzel, in his appraisal report that the value of subject property is reflected in the sales prices of property purchased in Bay Harbor. Petitioner argued that prior to 2003 the subject property had been assessed in recognition of the economic reality that the BHYC is a common amenity for the Bay Harbor property owners and in compliance with an understanding reached with the State Tax Commission. (PB p 4). In contrast, Respondent asserts that assessor Behan's method of treating BHYC as a common amenity whose value could be distributed to any property-owning members directly contradicted the recommendations of the State Tax Commission. (RRB p 2). Petitioner also argued, through its appraisal evidence, that as a common amenity, "[B]ay Harbor properties are significantly and positively impacted from the amenities that are included with the purchase of property within the development." (PB p 4-5). A party's valuation disclosure to establish the true cash value of property goes to the weight

accorded to it by the Tribunal as it considers evidence bearing on valuation issues. Therefore, notwithstanding Petitioner's appraisal evidence, because the Tribunal finds the first argument dispositive, we will address it alone.

Mr. Behan, through his affidavit, testified that he was the assessor for the City of Petoskey from 1975 to 1999; he determined that the subject property should be treated as a common amenity for property owners in Bay Harbor because the Master Deeds for the condominiums and lots in Bay Harbor required that each owner maintain membership in the Bay Harbor Yacht Club; he determined the assessed value of subject property, less the $10,000 he assessed to subject property itself, and apportioned subject's assessed value to each condominium lot and unit in Bay Harbor, except for three condominium projects that did not require membership in the Bay Harbor Yacht Club; he added $3,200 of assessed value to each condominium lot and unit as a result of subject property being treated as a common amenity and he made adjustments in the assessments for 1998 and 1999 as new condominium developments were included in the Bay Harbor PUD; and, State Tax Commission representatives Mr. David Reiser and Mr. William Renus agreed with the treatment of the subject property as common amenity property and that the assessment methodology he used for the Bay Harbor Yacht Club was adopted after he convened a meeting with them and Mr. David Johnson, the principal of Bay Harbor Company, the developer. (Exh J29). However, in his letter to Mr. Behan dated December 18, 1996, Mr. Reiser states, in pertinent part,

> [T]he master deed states that the members of the club will not have ownership or other interests, nor the right to manage the facilities, until the club is established as a nonprofit corporation, to which the facilities will be transferred at a future date…Mr. Platte and I concur that the yacht club property should be separately assessed because it is neither a common element of the various condominiums located at Bay Harbor, nor does it meet the conditions set forth in State Tax

> Commission Bulletin Number 1, February 8, 1990…My **original** recommendation that the property be **separately described and assessed** remains unchanged. [Emphasis added]. (Exh J30).

The separate assessment of the subject property is consistent with the correspondence from David Reiser from the State Tax Commission, which was found in the assessor's file. PB p 4). Clearly, from the evidence submitted, the recommendations of the State Tax Commission did not support Petitioner's method of treating the subject property as a common amenity but rather that subject property should be separately assessed. The Tribunal, therefore, finds that Respondent's assessor, Mr. Behan, erroneously assessed the subject property as a common amenity despite seeking and obtaining advice and guidance from the State Tax Commission to the contrary. The Tribunal also finds Respondent's continued treatment and assessment of the yacht club as a common amenity prior to the anticipated transfer, as set forth in the Membership Plan, to be contradictory to the factual recommendations of the State Tax Commission.

The Condominium Act, P.A. 59 of 1978, as amended, provides "upon the establishment of a condominium project each condominium unit, together with and inseparable from its appurtenant share of the common elements, shall be a sole property subject to **ownership**, mortgaging, taxation, **possession**, sale and all types of juridical acts, inter vivos or causa mortis independent of the other condominium units." [Emphasis added]. MCL 559.161. Unit owners have exclusive ownership rights to their unit and the right to share the common elements of the condominium project with the other co-owners. It appears to the Tribunal that the legislature intended that the common elements of a condominium project were to be valued as part of each individual condominium unit of a condominium project or development plan and not valued and assessed separately because the development is privately owned and maintained by the co-owners.

Further, the co-owners are responsible for governing the development and maintaining the common elements. From the Tribunal's reading of Mr. Reiser's letter of December 18, 1996 (Exhibit J30), it appears to the State Tax Commission that the members, being property owners in Bay Harbor, would have ownership of or other interest in the yacht club, including the right to manage the facilities, upon the date the facilities are transferred to the nonprofit corporation, as defined in the Membership Plan. Therefore, upon the date the club facilities are transferred or conveyed to the nonprofit corporation known as Bay Harbor Yacht Club, Inc. (the "Equity Yacht Club"), according to the terms of the Membership Plan, the club facilities could be assessed as a common element valued as part of each condominium unit and not valued and assessed separately. Reference to an ownership interest in the common elements is usually included in the condominium documents, i.e., the master deed, condominium subdivision plan, bylaws for the condominium project and any other documents referred to in the master deed or bylaws. In connection with the early transfer of the developer-owned, operated and controlled Yacht Club, Bay Harbor Company, LLC, conveyed to Bay Harbor Yacht Club (the Equity Yacht Club), all of the club facilities and the land upon which the club facilities are located by way of quitclaim deed, dated and recorded on September 1, 2001. (Exh J15). Use of common elements by co-owners in a condominium development is governed by the bylaws for the project. However, the club's original bylaws were amended and restated. The Amended and Restated Bylaws (Exhibit J19), effective as of September 1, 2001, altered the rights of BHYC members (the Equity Yacht Club) from those as provided for members of the developer-owned, operated and controlled Yacht Club under the Membership Plan. The master deed specifies which parts of a condominium development are designated as common elements. Therefore, originally, with the exception of the Bluffs Condominium, the master deeds for each condominium project in Bay

Harbor refer to and incorporate certain terms and provisions of the Membership Plan. Pursuant to the Membership Plan, application for membership in the developer-owned yacht club was mandatory for purchasers of condominium units in Bay Harbor and conditioned upon the establishment of the Equity Yacht Club. Each member, being a property owner in Bay Harbor, was **permitted** to acquire a share of stock of the Equity Yacht Club, be a member of the Equity Yacht Club and have the right to use the club facilities. Emphasis added. Rather, when the yacht club transferred from the developer to the members, the members were not required to become and remain members of the Equity Yacht Club. The Membership Plan, however, did not provide for an early transfer of control. Those members who did not agree to the effects of the early transfer of control filed a lawsuit in Emmet County Circuit Court. The decision of the Court, as affirmed on appeal (Exhibit J21), decided the Membership Plan "[f]ails to establish a mandatory requirement of continued membership in the Equity Yacht Club. To the contrary, it indicates clearly that each Member of the Yacht Club is entitled to choose whether to become a member of the Equity Yacht Club." (Exh J20, p 11). Therefore, the Tribunal reasons that the newly organized yacht club would consist of either all of the property owners in Bay Harbor or a smaller segment thereof consisting of those property owners in Bay Harbor electing to become members in the Equity Yacht Club. To this end, as the membership of the Equity Yacht Club would consist of 100% or less of property owners in Bay Harbor having ownership of or other interest in the yacht club, including the right to manage the facilities, it appears to the Tribunal that the club facilities could be assessed as a common element valued as part of each condominium unit and not valued and assessed separately. However, the club's bylaws were amended and restated to allow and include members beyond owners and purchasers of certain properties within Bay Harbor, as set forth in the various master deeds.

The Amended and Restated Bylaws (Exhibit J19), effective as of September 1, 2001, not only altered the rights of BHYC members (the Equity Yacht Club) from those as provided for members of the developer-owned, operated and controlled Yacht Club under the Membership Plan, it expanded membership in the club to include others with no ownership of property within Bay Harbor. "[T]here are currently 472 Regular and Founding Members of the BHYC and all are property owners in Bay Harbor. There are 54 ancillary members of the BHYC that have either direct ownership of property in Bay Harbor, or a substantial **nexus** to property in Bay Harbor." [Emphasis added]. PB pp 3-4. Petitioner defines the meaning of "nexus" through the affidavit of Kathleen Montgomery (Exhibit J28), General Manager of Bay Harbor Yacht Club since May 1996, as "a direct link, connection and relationship to specific property in Bay Harbor by some supporting ancillary members." PRB p16. According to Ms. Montgomery, Regular and Founding members are required to be property owners in Bay Harbor; Legacy members are required to be children or grandchildren of Regular or Founding members; Invitational members are required to be co-owners of property in Bay Harbor; Annual members are required to have a connection to Bay Harbor through employment, home rental, familial relationship or business activity in Bay Harbor; Honorary Founding members are the original developers of Bay Harbor; Honorary members are awarded membership as a tribute to their office or position; and, Corporate members are affiliated with the Developer of Bay Harbor. (Exh J28, 2-3). Therefore, of the eight membership categories currently in the BHYC, the Tribunal finds that Regular, Founding and Invitational memberships are tied to the ownership of property, i.e., condominium units, within Bay Harbor and that Legacy, Annual, Honorary Founding, Honorary and Corporate memberships are not tied to the ownership of property in Bay Harbor. As previously discussed,

the legislature intended that the common elements of a condominium project were to be valued as part of each individual condominium unit of a condominium project or development plan because the development is privately owned and maintained by the co-owners. In consequence of the BHYC membership that does not strictly consist of owners and purchasers of condominium units within Bay Harbor, the club facilities are not owned and maintained by the co-owners of the select condominium developments in Bay Harbor nor are they reserved for the use of the condominium unit owners. Rather, the club facilities are owned and maintained by the BHYC, which the Tribunal finds to be operated as a private yacht club for the use and benefit of all its members, consisting of both Bay Harbor property owners and those who do not own property within Bay Harbor. Thus, the Tribunal concludes that subject property is not a common element pursuant to The Condominium Act, P.A. 59 of 1978, as amended, as stipulated by the parties, and that it should be separately described and assessed.

Restrictions-Nominal Value or No

Petitioner claims subject property has a zero or nominal true cash value resulting from the effect of the Declaration of Restrictions (Exhibit J18) limiting the use of the subject property to a "private yacht club" and other restrictions that apply to the subject property, including the restrictions in the Master Deeds throughout Bay Harbor, which require purchasers of property in Bay Harbor to apply for and join the Bay Harbor Yacht Club. Petitioner argues that these restrictions are not likely to be waived or modified. PB p 11. Affidavits of John R. McFarland, William U. Parfet and Lawrence Oswald (Exhibits J32, J33 and J34, respectively), as directors and officers of BHYC having a keen familiarity with and understanding of the desires of the membership of the BHYC, contend that "[t]he membership would never permit an amendment to the restriction which limits the use of the subject property to a private yacht club; the

membership would never permit expanding the membership to include any person who does not have a nexus to real property in Bay Harbor; and, the membership would never approve a sale of the organization or the assets of BHYC." PB pp 11-12. The Declaration of Restrictions was imposed by the developer and required as part of the early transfer of control in September, 2001. PB p 9. David V. Johnson, president of Bay Harbor Company, the developer of Bay Harbor, through his affidavit, testified that the Declaration of Restrictions was important to Bay Harbor Company because the amenity of the BHYC and the provisions restricting the property to use as a private yacht club are essential to the marketing of properties in Bay Harbor, and they must remain in place for Bay Harbor Company to fulfill the representations Bay Harbor Company made to persons buying property in Bay Harbor. (Exh J31). Petitioner's expert witness, attorney Dennis Bila, II, an expert in real estate law and owner of a title company that operates throughout northern Michigan, attested that the Declaration of Restrictions is an enforceable covenant running with the land. PB p 13. The Declaration of Restrictions limits the use of the property to a private yacht club, which is to be devoted solely to owners of property in Bay Harbor. The property is without value to anyone but Petitioner's members. Therefore, Petitioner argues the rule of law in *Canada Creek Ranch Association, Inc v Montmorency Township*, 206 Mich App 498, 522 NW2d 690 (1994), lv den, 450 Mich 861, 539 NW2d 375 (1995), applies to the facts in this case. To the contrary, Respondent argues while its members were originally limited to Bay Harbor property owners, its members could and did amend this requirement on September 1, 2001 by allowing memberships (Annual, Legacy, Honorary and Corporate) with no property ownership in Bay Harbor required. RB p 8. The membership of BHYC in its Amended and Restated Bylaws permitted expanding the membership to include such members who do not have a nexus to real property in Bay Harbor. Respondent further

argues that the membership's self-serving declaration that it would never sell the property cannot be relied upon to negate the payment of property taxes. RRB pp 7-8. The court, in *Canada Creek*, stated "[s]uch self-imposed restrictions on marketability are not proper considerations in assessing property value…Neither a private individual nor a corporation may rely on self-imposed restrictions on the sale of property as a means of avoiding taxes." RB p 10. More important, Respondent contends Petitioner, Bay Harbor Yacht Club, signed onto the only real restriction that subject property must operate as a private yacht club for the benefit of its members, both in the declaration and in its bylaws. Petitioner in the tax case is the same party that agreed to the deed restrictions. As mirrored by the decision in *Oceana Beach Association v Township of Pentwater*, MTT Docket No. 189818 (1999), the restriction in this situation, then, was self-imposed and mutually agreed upon as opposed to having been earlier placed in the title by predecessors and embedded in the chain of title. RB p 11. The restriction is merely a factor to be considered in market value and "[t]he true cash value of the property can be determined with the restriction in place." RRB p 7. Petitioner, however, argues unlike the case in *Oceana Beach* where the Declaration was signed by the members of a non-profit corporation they controlled that held title to the land, "[i]n this case, Bay Harbor Company was the title holder and one party to the Declaration of Restrictions and BHYC was the grantee, the other party to the Restriction… The Declaration of Restrictions was signed as a requirement of, and in consideration of the early conveyance of the title to the subject property to the member-controlled BHYC, as called for under the Membership Plan **(land contract)**." [Emphasis added]. PRB p11.

Again, the Tribunal takes notice that Petitioner claims the Membership Plan was a land contract. Therefore, Petitioner suggests that when the Declaration was signed on August 31, 2001, Bay

Harbor Company, as vendor, continued being the title holder until BHYC, as vendee, performed all the obligations of the land contract, that being September 1, 2001, the date of the early transfer. Accepting that the Membership Plan was a land contract, arguendo, as the Tribunal previously discussed concerning the ownership transfer issue, the fact that legal title remains in the vendor until full performance of all contractual obligations does not negate the fact that the vendee has already purchased the relevant property and acquires a present interest in the property that may be sold, devised or encumbered. *Graves, supra*. Thus, again arguendo, where the quitclaim deed of September 1, 2001 was issued in fulfillment of the land contract contained in the Membership Plan, grantee, BHYC, was the title holder and one party to the Declaration of Restrictions and Bay Harbor Company was the grantor, the other party to the Restriction. Even so, notwithstanding Petitioner's argument here, the Tribunal concluded earlier in its discussion of the ownership transfer issue that the Membership Plan, on its face and at its heart, fails as being a land contract for the sale of subject property. Here and again, the Tribunal finds that the 1996 Membership Plan is not a land contract as provided in MCL 211.27a(6)(b).

It appears to the Tribunal that although the Declaration of Restrictions is dated September 1, 2000 and the quitclaim deed, given in evidence of the early transfer and conveyance of subject property, is dated September 1, 2001, the order of the recording was such that Petitioner's title to subject property, as recorded at Liber 807, Page 861, Emmet County Records (Exhibit J15), was claimed first on September 11, 2001 at 11:56 am and the limitation or restrictive covenant by the parties, as recorded at Liber 807, Page 880, Emmet County Records (Exhibit J18) was claimed subsequently on September 11, 2001 at 11:59 am. Based on the chronological order of the recording priority, constructive notice was given to evidence, first, ownership of the subject

property by Petitioner and, next, the restrictions on the land. Where two or more instruments relating to the same property or matter are in proper form and are properly recorded, the one first in point of time of recording takes priority over any which are subsequent in time of recording, insofar as the first recorded instrument constitutes constructive notice or provides evidence. *Bonninghausen v Hansen*, 305 Mich 595, 9 NW2d 856 (1943); *Cheyboygan County Const. Code Dept v Burke*, 148 Mich App 56, 384 NW2d 77 (1985). While the Declaration of Restrictions was prior in point of execution and the quitclaim deed was later in point of execution, the latter takes priority. Notwithstanding that the Declaration of Restrictions was signed as a requirement of and in consideration of the early conveyance of the subject property to the member-controlled BHYC, based on the order of the recorded claims, the Tribunal finds BHYC was the title holder to subject property and one party to the Declaration of Restrictions and Bay Harbor Company the other party to the restrictions. Therefore, the circumstances in this case are not substantively different from the *Oceana Beach* case and its holdings are not inapposite to the present case. The Declaration of Restrictions (Exhibit J18) states

> [i]t is the desire of Developer and Club to establish the following restrictions in respect of the property, and it is in respect thereof that Developer and Club do hereby declare that: the Property shall be used solely as a private yacht club, providing a restaurant, swimming pool(s), tennis courts, fitness facilities, a beach and docks for the benefit of its members and their guests and invitees.

Clearly, these restrictions were self-imposed and mutually agreed upon, in sharp contrast to restrictions which are placed by predecessors in title and imbedded in the chain of title. *Oceana Beach, supra*. However, while it has long been recognized that use restrictions found in a deed have some effect on market value, *Lochmoor Club v City of Grosse Pointe Woods*, 3 Mich App 524; 143 NW2d 177 (1966), such restrictions are only one factor to evaluate in determining the true cash value of the property. *Deerfield Village Community Association v West Bloomfield*

Township, 1978 WL 2694. The Tribunal concludes although the restrictions at issue may have an effect on the value of the subject property, they do not necessarily render the value to be zero or nominal. Hereafter, their effect on property value goes to the level of consideration given by the parties' valuation experts in their respective appraisal reports and, thereafter, depending on the degree of permanence of the restrictions, to the weight accorded by the Tribunal as it considers the evidence bearing on valuation issues.

Valuation Discussion and Analysis

Petitioner's appraiser, Mr. Oetzel, concluded the subject property cannot have a market value. According to Mr. Oetzel, the concept of market value assumes that the property being appraised is available for sale and sold at market value under a willing buyer/knowledgeable seller. As the property is legally restricted to the sole use of a private yacht club for the benefit of the property owners in Bay Harbor and cannot be sold without approval of those owners (the members of Bay Harbor Yacht Club), the property does not have value in the market. Rather, as the existing restrictions in effect prohibit a sale, the property is not marketable and, therefore, it does not have value in the market. Exh J1. Unlike Mr. Oetzel, Respondent's appraiser treated the subject property as if it were available for sale. However, Mr. Allen valued the fee simple interest subject to the existing restriction that limits the use of the land to a private club. Although all three traditional approaches to valuation were considered in the development of Respondent's valuation analysis, due to a lack of comparable private club sales with similar locations, the Sales Comparison Approach was not used. Therefore, only the Income and Cost approaches were applied. Under the Income approach, income for the subject property was derived from membership sales, annual membership dues, food and beverage sales, fitness center income and merchandise sales. The methodology was to project membership sales over a period of time

necessary to achieve a stabilized level and then to project revenue from annual fees over time, also until stabilized. Deductions for an appropriate collection loss/bad debt factor and typical costs associated with owning and operating the subject property, both variable and fixed operating expenses, were made. The projected cash flows were then discounted to present value by a discount rate reflecting the risks of ownership. The market value of the subject property, as of December 31, 2002, under the Income Approach was concluded to be $4,330,000. Respondent's Cost Approach was derived by adding the estimated value of the land to the current cost of constructing a reproduction or replacement for the improvements and then subtracting the amount of depreciation in the structure from all causes. Because there were no waterfront land sales with similar use restrictions available to establish land value under the Sales Comparison Approach, the subject's land value was estimated to be $1,900,000 using a land residual analysis, which is an accepted methodology for the valuation of land. This equates to a market value of $287,591 per acre or $6.60 per square foot for the subject's land area. As the subject property has extensive waterfront areas and some non-waterfront areas, several land sales within the Bay Harbor development were then analyzed. Mr. Allen found that waterfront land averages approximately $43.25 per square foot while non-waterfront land averages approximately $19.41 per square foot. Therefore, Mr. Allen concluded the lower land value of $1,900,000 or $6.60 per square foot, concluded under the land residual method, adequately accounts for the use restrictions associated with the subject site. Utilizing the Marshall Valuation Service cost estimate guide, the value of the improvements was then estimated, depreciated and added to the land value estimate to arrive at a conclusion of value, as of December 31, 2002, under the Cost Approach at $4,570,000. With equal reliance placed on the Income and Cost Approaches to value, Respondent's appraiser concludes that the fee simple market value of the

subject property, both real and personal property, is $4,450,000. Based on the personal property SEV of $234,400, the total personal property market value at $470,000, rounded, was deducted from this reconciled value conclusion. Therefore, Respondent's appraiser determined the real property value of the subject property to be $3,980,000. Exh J25.

Petitioner's counsel argues Petitioner does not hold a fee simple interest in the common property, free from limitations or restrictions. Rather, it holds a lesser estate rendering the market value of its common property less than if the property's uses were not restricted. Analogizing the case in *Muskegon Conservation Club v City of North Muskegon*, 5 MTT 161 (1987), because of restrictions as to use and prohibition as to sale, the Tribunal held the parcel had a nominal value only. PB p 14. Petitioner notes that Mr. Allen in his appraisal assumes that since the property could be sold, that the standard appraisal methodology can determine its value. However, as the Court of Appeals stated in the *Canada Creek* case, a correct analysis of valuation of such property also involves another factor: i.e., whether the property would be sold. It is the position of Petitioner that the Oetzel-Williams appraisal's estimate of value should be adopted by the Tribunal since it is the only one that truly accounts for the restrictions on use and sale of the property. PB p 15. Respondent's counsel argues the deed restriction only requires that subject property be used as a "private yacht club" and that it provide "a restaurant, swimming pool(s), tennis courts, fitness facilities, a beach and docks" for its members and guests, and there is no longer any requirement that membership must be tied to property ownership. Also, there is no reasonable basis for an assumption that another corporation could not come in, buy out the stock of the current membership and run the yacht club at a profit or expand the facilities or services, so long as they fit within those typically found in a "private yacht club." RB p 12. In *Canada*

Creek, the court stated, "[a]lthough the restrictions undoubtedly have an effect on the value of the property for assessment purposes, they do not necessarily render the property unmarketable or the value nominal." RB p 9. Mr. Oetzel's appraisal presumes that the restrictions automatically render the property valueless and it does not discuss or even utilize recognized valuation methods. It is Respondent's position that the appraisal prepared by Allen & Associates clearly recognized the correct emphasis to be placed on any restrictions on the yacht club. First, the deed restriction that limits the use of the subject land to a private yacht club prevents the use of the subject land to its highest and best use, residential development, and, therefore, the land value of the property is reduced. Further, as no documentation was located that stated the club could not be sold, it is reasonable to assume that the subject property could be sold. Therefore, Respondent has provided the Tribunal with substantial evidence of the true cash value of the subject property. RB pp 14-15.

In the opinion of the Tribunal, following the guidance of the courts, for any taxable property such as the property in this case, the effect of restrictions on the value of the property depends on the degree of permanence of the restrictions. While community property that is considered to have a zero value or to be at a nominal, token value shall be restricted by a permanent irrevocable plat dedication or deed restriction, the determination of value for unrestricted land can go to almost full value. In this case, the evidence before the Tribunal showed, although the use restriction could be amended, as Petitioner claims and the Tribunal agrees, that the Declaration of Restrictions between the developer and BHYT for use of the subject property to which they refer "solely as a private yacht club, providing restaurant, swimming pool(s), tennis courts, fitness facilities, a beach and docks for its members and their guests and invitees,"

evidences the parties' intention that this restriction runs with the land. Therefore, it is not likely to be waived or modified. Further, from Petitioner's perspective, "the membership would never approve a sale of the organization or the assets of BHYC," (PB p 12) and from Respondent's perspective, "the membership's self-serving declaration that it will never sell the property or that it has no good reason to sell the property right now certainly cannot be relied upon to negate the payment of property taxes. (RRB pp 7-8)." The evidence before the Tribunal showed only a practical restriction on the property's sale contained in the amended Bylaws, which state "only equity members shall be permitted to vote on matters related to the sale or dissolution and liquidation of the club." Exh J19 p 12. Therefore, no title embedded restriction on the sale of subject property exists. As to the title embedded use restriction, though self-imposed and given that it could be lifted, the Tribunal concludes that it has less than a remote likelihood that it would be lifted. As to the practical and non-title embedded restriction related to the sale of subject property, though it could be sold, the Tribunal concludes the likelihood that a sale would occur, to date, is remote. Consequently, the Tribunal finds the use and sale restrictions, taken separately or together, do not work to render the subject property as being not marketable and, therefore, not having a value in the market. Even so, as the restrictions are not permanent and irrevocable but binding and revocable, something more than zero or a nominal value but something less than full value is required. This valuation can only be determined by weighing all the factors normally entering into a determination of the value, including restrictions imposed on the land. *Lochmoor, supra*. Mr. Oetzel states in his appraisal that typically to value property similar to the subject's the Sales Comparison approach would be completed. However, after an extensive search to locate sales of properties with similar restrictions, no sales were found. Exh J1 p 11. Therefore, the Sales Comparison approach was not utilized in Petitioner's appraisal.

Also, no consideration was given to any other appraisal methodologies and the report did not include the rationale for omitting the income and cost approaches to value from the analysis. Rather, Mr. Oetzel asserts in his appraisal "with the current restriction, the subject property has no demand from the market." Exh J1 p 6. The appraisal evidence prepared by Mr. Oetzel in Petitioner's valuation case, then, consists of his opinion that as the existing restrictions in effect prohibit a sale, the property is not marketable and, therefore, it does not have a market value. Yet Mr. Oetzel states that it is not practical to assume the members would now turn around and sell or lease the property to a third party after completing a major financial and judicial initiative in 2001 to acquire control of the club. Exh J1 p 11. From such a statement, the Tribunal finds, although contingent on the willingness of the members to sell, that a market for the subject property must exist. However, Petitioner's evidence is not sufficiently documented to enable the Tribunal to conclude that the true cash value of the subject property is correct in the amount concluded by Petitioner.

Mr. Oetzel also concludes from comparing Bay Harbor sites to sites from other communities that strong support exists that Bay Harbor properties are significantly and positively impacted from the amenities that are included with the purchase of property within the development. Exh J1 p 13. From this conclusion, Petitioner advanced its contention that the subject property is common amenity property, as the value of the yacht club is already included in the sales prices of the property sold in Bay Harbor. To the extent that the value of property such as the subject property has been included as part of the value of its related condominium units, for it to be considered at zero value, the common or community property shall be restricted by a permanent irrevocable plat dedication or deed restriction. To the contrary, as discussed previously, the Tribunal found

that the restrictions associated with the yacht club property are not permanent and irrevocable but binding and revocable. Otherwise, for a zero value where the value of common property is already included in the sales prices paid by condominium owners, title to common property is included as part of, and is inseparable from title to the individual condominium units. As evidenced in this case, ownership of the subject property is in BHYC, Inc. and prior to September 1, 2001, subject property was owned by Bay Harbor Company, the developer of Bay Harbor. Therefore, the individual deeds of conveyance to condominium owners would not describe an ownership interest in the subject property as a common amenity where its value is included in the sales prices paid by Bay Harbor condominium owners. Although the existence of the yacht club may enhance the value of the condominium units within Bay Harbor such as any other location amenity, e.g., nearness to the lake, oceanfront, golf course or park, access to shopping, cultural facilities, etc., the Tribunal finds that its actual value is not included as a contribution to the sales prices of individual condominium units. Thus, Petitioner has failed in its burden of proof to present convincing evidence of value. Overall, the Tribunal finds while Petitioner's appraiser concluded the property does not have value as a result of the restrictions, Respondent's appraiser determined a market value while working within the restrictions. Therefore, the proofs presented on behalf of Respondent are the more persuasive. Even so, Respondent's value determination was not sufficiently satisfactory so as to allow Respondent to prevail in full.

The Tribunal fails to find that any value reflecting a negative influence from the use restriction was actually measured by Mr. Allen in terms of how the restriction detracts from the market value of the subject property. There were no waterfront land sales with similar use restrictions

available for comparison. Exh J25 p 74. Mr. Allen, therefore, suggests because the current sale price trend for land within Bay Harbor is significantly higher than the market value he concluded for the subject site, his lower land value conclusion adequately accounted for the use restriction associated with the subject site. However, where the subject's land area is 6.85 acres or approximately 298,386 square feet and the land sales within the Bay Harbor development indicate an average size of 26,228 square feet for waterfront locations and 34,387 square feet for non-waterfront locations, no adjustments were made to account for such major differences in land size. Because larger parcels often sell for less per square foot than smaller parcels, simply comparing the $6.60 per square foot land value for the subject, as determined under the land residual technique, to the sale of much smaller parcels, located elsewhere within Bay Harbor, at $43.25 and $19.41 per square foot and adopting the lower land value does not account for the negative value influence for the use restriction associated with the subject site. The fact remains that the impact of the restriction must be considered and applied to the valuation of the subject's site. While the comparable evidence presented by Respondent is not precise, it is the best available to the Tribunal. Because sales of different sizes may have different unit prices and in trying to determine an amount for the value of the restriction that can be supported by market activity, the Tribunal will use the given market information to write an algebraic proportion (26,228**:**298,386 = ?**:**$43.25) to solve for the equivalent price per square foot for subject's larger size. Therefore, the Tribunal finds that the average size of waterfront land at 26,228 square feet is 8.8% of the size of the subject site at 298,386 square feet; 8.8% of $43.25, the average sale price per square foot of waterfront land, is $3.81 per square foot; and, that $3.81 per square foot, the sales price for waterfront land adjusted for size, is nearly 60% of $6.60 per square foot, Respondent's unit value of the subject site under the land residual technique. Therefore, the

Tribunal finds that a 40% reduction to Respondent's land value determination of $1,900,000 for the subject site or a reduction of $760,000 should be made in consideration of the restriction in use associated with the subject property. Thus, the value of the restricted subject land is determined by the Tribunal to be $1,140,000.

Based on the foregoing discussion, the Tribunal finds the value of subject property under Respondent's Cost Approach now to be $3,822,000. With equal reliance placed on Respondent's Income Approach and amended Cost Approach, the Tribunal finds that the reconciled value of subject's total business assets is $4,076,000 and by removing the value of personal property at $470,000, results in a real property value of $3,600,000, rounded, for the subject property.

The Tribunal further concludes for tax years 2003 and 2004 that the true cash values and revised assessments of the subject property are as follows:

The original state equalized, assessed and taxable values on the roll for the subject property are:

Property Tax Code	Year	Original T.C.V.	Original S.E.V.	Original Assessment	Original Taxable Value
24-52-18-10-152-017	2003	$4,900,000	$2,450,000	$2,450,000	$2,430,450
24-52-18-10-152-017	2004	$4,900,000	$2,450,000	$2,450,000	$2,450,000

The revised true cash, state equalized, assessed and taxable values for the subject property are:

Property Tax Code	Year	Revised T.C.V.	Revised S.E.V.	Revised Assessment	Revised Taxable Value
24-52-18-10-152-017	2003	$3,600,000	$1,800,000	$1,800,000	$1,800,000
24-52-18-10-152-017	2004	$3,600,000	$1,800,000	$1,800,000	$1,800,000

JUDGMENT

IT IS ORDERED that the subject property's true cash, assessed and taxable values shall be revised for the tax years at issue as provided in the "Conclusions of Law" section of this Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Order within 20 days of the entry of this Order. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Order. As provided in 1994 PA 254 and 1995 PA 232, being MCL 205.737, as amended, interest shall accrue for periods after March 31, 1985, but before April 1, 1994, at a rate of 9% per year. After March 31, 1994, but before January 1, 1996, interest shall accrue at an interest rate set monthly at a per annum rate based on the auction rate of 91-day discount treasury bill rate for the first Monday in each month, plus 1%. After January 1, 1996, interest shall accrue at an interest rate set each year by the Department of Treasury. Pursuant to 1995 PA 232, interest shall accrue (i) after December 31, 1995, at a rate of 6.55% for calendar year 1996, (ii) after December 31, 1996, at a rate of 6.11% for calendar year 1997, (iii) after December 31, 1997, at a rate of 6.04% for the calendar year 1998, (iv) after December 31, 1998, at a rate of 6.01% for the calendar year 1999, (v) after December 31, 1999, at a rate of 5.49% for the calendar year 2000, (vi) after December 31, 2000, at a rate of 6.56% for

calendar year 2001, (vii) after December 31, 2001, at a rate of 5.56% for calendar year 2002, (viii) after December 31, 2002, at a rate of 2.78% for calendar year 2003, (ix) after December 31, 2003, at a rate of 2.16% for 2004, (x) after December 31, 2004, at the rate of 2.07% for calendar year 2005 and, (xi) after December 31, 2005, at the rate of 3.66% for calendar year 2006.

This Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: May 2, 2006 By: Sherry A. Lee, Tribunal Judge