STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Toll Northville, LP and Biltmore Wineman LLC,
Petitioners,

MTT Docket No. 284952

v

Township of Northville,
Respondent.

Tribunal Judge Presiding
Victoria L. Enyart

**OPINION AND JUDGMENT**

Introduction

Petitioners, Toll Northville, LP and Biltmore Wineman LLC ("Toll") appeal the assessed value levied by Respondent, Township of Northville, as well as the increase in taxable value for public service improvements against the real property owned by Petitioners for the 2001 and 2002 tax years. Myles B. Hoffert and David B. Marmon, attorneys, appeared on behalf of Petitioners. Nevin Rose and Laura M. Hallahan, attorneys, appeared on behalf of Respondent. Witnesses appeared on behalf of both parties. Petitioners' witnesses were David Bur, MAI; Michael Noles, land development vice president for Toll Brothers, Midwest region; Matthew Cezars, assistant controller for Toll Brothers; and Jeremiah Fink, professional land surveyor. Respondent's witnesses were Holly A. Adams, CMAE 3, and John McLenaghan, CMAE 3.

The proceedings were brought before this Tribunal on May 26, 2010, and continued for six hearing days ending July 20, 2010, to resolve the taxable value dispute. The parties on the last morning of the hearing placed on the record their agreement to stipulate to

the true cash value, state equalized value, and taxable value of the 2001 parent parcel 77-059-0002-711 and the 2002 resulting 184 condominium units. In addition, the parties stipulated to the 2001 and 2002 true cash value of every parcel under appeal in this matter and filed a stipulation, which was entered August 19, 2010. The only matter to resolve is whether the taxable value was properly calculated during the splits and combination of parcels and whether the taxable value added for public service improvements in a year not under appeal should be removed for the years that are under appeal.

At issue before the Tribunal is the determination of the taxable value of Petitioners' real property for the 2001 and 2002 tax years. The subject property for the 2001 tax year contained 353 residential lots, and 229 residential lots for tax year 2002. The Tribunal attaches the final values at the end of this opinion in the form of a spreadsheet due to the number of parcels at issue.

The Court of Appeals determined that it is unconstitutional to include public service improvements consisting of public infrastructure located on utility easements or land that ultimately becomes public as an "addition" to the taxable value[1]. The Supreme Court affirmed the landmark decision in 2008[2]. The Tribunal concludes that the Supreme Court *Toll* decision is not retroactive and that the Tribunal has no authority over the 1999 and 2000 tax years when the infrastructure was added to the property. Therefore, the remaining question before this Tribunal is whether to extract the

[1] *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006). Court of Appeals, 132466, October 3, 2006.
[2] *Toll Northville, Ltd v Northville Twp* 480 Mich 6; 743 NW2d 902 (2008).

identifiable additions to the taxable value for infrastructure and recalculate on a prospective basis the taxable value for the tax years for which the Tribunal has authority. The Tribunal further concludes the taxable value can be recalculated as the Supreme Court determination in *Toll* is found not to be retroactive. This recalculation constitutes a ministerial act that would not result in a reappraisal or re-valuation of subject property, which has been precluded by the Courts of this State. This results in a decrease in taxable value for Petitioners.

## Background

Petitioners filed this appeal on July 2, 2001 for 465 residential lots, a golf course, and a 40-acre vacant acreage (later developed into Villa Condominiums). On October 29, 2002, a Partial Consent Judgment was granted for the Northville Hills Golf Club Subdivision (1, 2, and 3), clubhouse, and surrounding residential lots for a total of nine parcel identification numbers. On September 12, 2003, the Tribunal placed the case in abeyance pending the issuance of a final decision by the Wayne County Circuit Court. On March 27, 2008, the Tribunal issued an order removing the case from abeyance given a ruling by the Wayne County Circuit court in *Toll Northville LP v Twp of Northville*, Wayne County Circuit Case No. 03-326658-CZ. This decision ruled that the infrastructure improvements should not be included as an addition to taxable value. The Wayne County Circuit Court decision was appealed to the Michigan Court of Appeals, and then to the Michigan Supreme Court for an affirmation of the Court of Appeals decision. On February 17, 2010, the Tribunal entered a scheduling order setting the case for hearing on this matter. After five days of testimony, the parties

reached an agreement on the true cash and state equalized values for tax years 2001 and 2002 and filed a stipulation for entry of partial consent judgment on August 3, 2010. On August 19, 2010, the Tribunal issued the partial consent judgment for both the true cash and state equalized values for the 353 residential lots and the 40-acre parcel that was subdivided in 2002 into 184 condominium units. Therefore, the sole remaining issue is whether the public service improvements should be removed from the taxable value for the tax years under appeal. Petitioners argue in the affirmative, stating that the Supreme Court's decision in *Toll* would remove $18,693,726 in public service improvements that in 2000 were spread on the parent parcel, and then to the children parcels which are the subdivision lots. Respondent argues in the alternative that the Supreme Court's ruling in *Toll* determined that, although MCL 211.34d(1)(b)(viii) was not constitutional, the decision should not be applied retroactively to tax years not under appeal with the Tribunal.

Further, Petitioners questioned the history of the parcels from the initial year they were placed on the roll, and subsequently have been combined and split. Specifically, Petitioners had concerns that the various splits and combinations resulted in additional taxable value. Noles testified that some of the parcel numbers were billed, but they did not receive a change of assessment notice from Respondent. During testimony of Ms. Adams, "dummy" parcels were explained. McLenaghan testified to the taxable value addition for the individual parcels for underground improvements.

The subject properties were purchased in 1998 and were placed on the tax roll for the first time as follows:

| 1999 | First Year on Tax Roll | | | |
|---|---|---|---|---|
| Parent | | | | 2000 TV |
| Parcel No. | Acres | SEV | TV | No Additions |
| 059-99-0001-702 | 157.65 | $3,941,250 | $3,941,250 | $4,016,134 |
| 059-99-0002-000 | 95.82 | $2,395,500 | $2,395,500 | $2,441,015 |
| 060-99-0001-701 | 57.46 | $1,401,250 | $1,401,250 | $1,427,874 |
| 061-99-0001-706 | 409.87 | $6,616,790 | $5,525,400 | $5,630,383 |
| 063-99-0002-700 | 80 | $1,422,000 | $1,422,000 | $1,449,018 |
| 064-99-0001-000 | 62.74 | $1,568,500 | $1,568,500 | $1,598,302 |
| | | | | |
| Total | 863.54 | $17,345,290 | $16,257,900 | $16,562,726 |

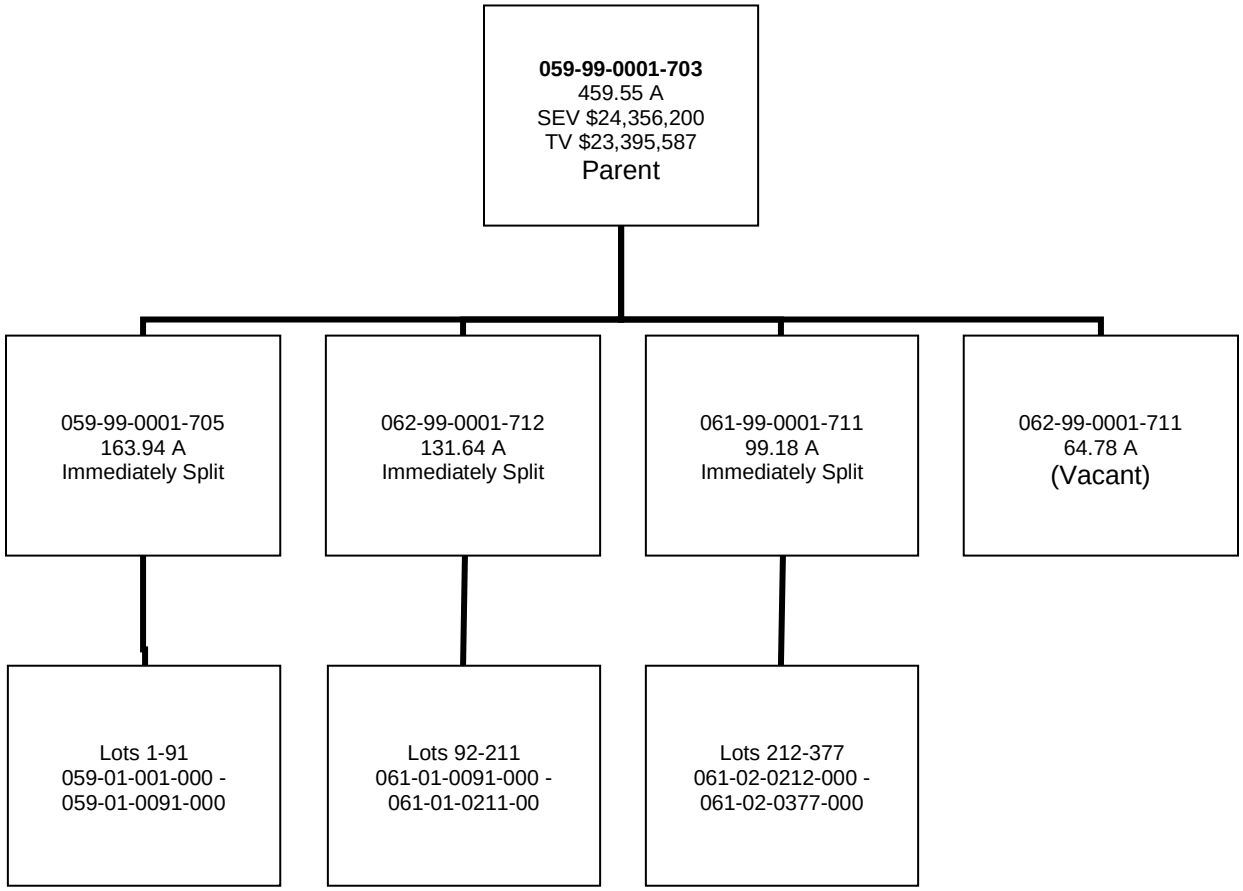
All six of the above original parent parcels were combined in 2000 and split into an additional fifteen parcels:

| Parcel No. | Acres | SEV | TV | Additions | TV No Add. | Description |
|---|---|---|---|---|---|---|
| 057-99-0004-708 | 4.42 | | | | | Exempt |
| **059-99-0001-703**[3] | 459.55 | $24,356,200 | $23,395,587 | $18,693,726 | $4,701,861 | |
| 059-99-0001-704 | 16.57 | | | | | Exempt |
| **059-99-0002-705**[4] | 40 | $1,978,600 | $1,978,600 | $1,485,727 | $492,873 | Spilt into Condos |
| 059-99-0002-706 | 13.5 | $321,600 | $284,147 | $149,059 | $138,088 | |
| 059-99-0002-707 | 0.46 | $11,000 | $9,849 | $5,113 | $4,736 | Part of Sheldon Rd |
| 060-99-0001-705 | 146.25 | $7,486,300 | $7,486,300 | $7,486,300 | $50 | E N'ville Sub |
| 060-99-0001-704 | 11.18 | $256,700 | $233,364 | $118,983 | $114,381 | E Condo |
| 061-99-0001-710 | 28.03 | | | | | Exempt |
| *062-99-0001-708* | *26* | | | | | *See ImmediateSplit* |
| Immediately combined and split to: | | | | | | |
| 062-99-0001-709 | 17.58 | $2,756,000 | $2,756,000 | | $2,756,000 | Robertson split condos |
| 062-99-0001-710 | 8.42 | $549,400 | $549,400 | $276,727 | $276,672 | Robertson split condos |
| 063-99-0002-709 | 80 | $1,452,400 | $1,344,686 | $673,134 | $671,552 | Technology Park |
| 163-99-0002-710 (13.89 A) & 163-99-0002-711 (14.00 ) | | | | | | |
| Immediately combined and split to: | | | | | | |
| 063-99-0002-713 | 10.69 | $236,790 | $236,790 | | $236,790 | ZF Group |
| 063-99-0002-714 | 17.19 | | | | | ARI-EL |

[3] Subject original parcel prior to subdivisions.
[4] 40-acres that was subdivided into the 184 Condominiums.

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | | Enterprises Exempt |
| 163-99-0002-712 | 7.4 | | | | | Park Commons |
| 064-99-0002-704 | 7.75 | $171,500 | $171,500 | $79,479 | $92,021 | Northville Tech Ctr. |

Parent parcel 059-99-0001-703 included $18,693,726 in 2000 “additions” to the taxable value for public service improvement. The parent parcel 059-99-0001-703 was split for tax year 2001 as follows:




The Tribunal will not go into detail or testimony that pertains to the true cash value portion of the hearing. The Tribunal will focus this opinion on the 2000 parent parcel 059-99-0001-703 (that later was divided into the subdivision) and the resulting residential subdivision known as Northville Hills Golf Club Subdivision**.**

Petitioners' Arguments

Petitioners believe that after this Tribunal's decision the appellate court will have an opportunity to clarify the applicability of the *Toll Northville* decision; therefore, a full and complete record is necessary. Petitioners have requested and have been denied the ability to include tax years 1999 and 2000. Petitioners state that mistakes and questions on the splits and combinations of subject properties by Respondent should allow Petitioners to capture the prior two tax years. Petitioners contend that on March 2, 2001, Respondent faxed to Petitioners corrections to the 2000 tax bills and removed the tax bill for subject parcel 059-99-0001-703 because it was incorrect.

Petitioners' Admitted Exhibits

P-1 Covenant Deed dated December 18, 1998, 459.55 acres.
P-2 Legal description.
P-3 PUD Agreement.
P-5 Color map of entire purchase.
P-6 Map of 40-acre parcel, total parent, parcel 059-99-0001-702, 57.96 acres and parcel 059-99-0002-000, 95.82 acres.
P-7 Survey of 40-acre parcel and description of history of parcel numbers.
P-8 Copy of 1999 summer and winter tax bills for parcel 059-99-0001-702, indicating 157.65 acres and TV of $3,941,250 sent to wrong address and containing 3.03 acres that are part of condominium parcel containing 40 acres.
P-9 Copy of 1999 assessments for parcel 059-99-0001-702, seven (7) parcels with affidavits of assessor dated April 28, 2000, restating the 1999 valuation to $75,750 for 3.03 acres of $25,000 per acre.
P-10 Map showing parcel of 3.03 acres.
P-11 Copy of 1999 tax bill for parcel 059-99-0002-000 showing 95.82 acres TV of $2,395,500 of which per acre value is $25,000. Contains 36.37 acres of condominium parcel.
P-13 Property record card for condominium parcel faxed by Respondent to Petitioners showing a 2000 TV of $41,976,600.
P-14 February 1, 2000, letter from Wayne County counsel addressing ownership of three tax bills received by Wayne County EDC.
P-15 December 7, 2000, letter from Respondent changing the 1999 value of parcel 059-99-0002-000 from 95.82 acres and a value of $3,395,500 to 82.32 acres and a value of $2,058,000.

P-16 Copy of fax from Respondent dated March 2, 2001, to Petitioners removing the tax bill for parcel 059-99-0001-702 regarding 2000 tax bills.
P-17 Memorandum from Kevin Kohls showing tax bill summary of Giffels-Webster breakdown of tax bills.
P-18 Copies of all surveys of subject property.
P-19 Respondent's February 22, 2000, phone log to Petitioners showing only parcels to be used for 2000.
P-21 Master Deed of Villas at Northville Hills.
P-22 1999 Summer and Winter tax bills for 061-99-0001-706 for 430.67 acres.
P-23 Survey of parcel on 1999 tax bill for parcel 061-99-0001-706, 329.67 acres.
P-26 Giffels-Webster breakdown of 430.67-acre parcel.
P-27 April 19, 2000, Memorandum from Wayne County to Township of Northville showing errors in tax bills and assessments.
P-28 April 28, 2000, statement of assessing office for 1999.
P-33 Vertical costs.
P-34 Cap value summary of 40-acre parcel 059-99-0002-705.
P-43 Petitioners' valuation disclosure for 2000 and 2001, Volume 1 by Bur.
P-44 Petitioners' valuation disclosure, Volume 2 by Bur.
P-52 December 20, 2000, fax from Ted Stanek.
P-55 2002 residential factor.
P-58 Parent-Child parcels from Adams.
P-77 Respondent's response in compliance with January 9, 2003, Tribunal Order.
P-78 Aerial map book.
P-79 1999 summer tax bill for parcel 060-99-0001-701.
P-89 2000 summer tax bill for parcel 059-99-0001-705.
P-90 2000 summer tax bill for parcel 062-0001-723.
P-91 2000 summer tax bill for parcel 062-99-0001-724.
P-92 2000 winter tax bill for parcel 059-99-0001-703.

## Petitioners' Appraisal

Petitioners' first witness was David D. Bur, MAI. Bur prepared and testified to an appraisal containing his methodology, analysis and value conclusions for 353 residential lots that were not sold, 40-acre planned condominiums, and a 64.78 acre parcel located in the northwest section. Bur concluded to an average market value per residential lot of $168,853. The Tribunal notes that the amenity of each individual lot was considered by Bur. Using a discounted cash flow for the risk of holding the lots by the investor, Bur determined that the percentage of market value to the allocated value of the discounted cash flow reduced the value to an average of $85,506 per lot.

Petitioners' fact witness, Michael T. Noles, is Land Development Vice President for Toll Brothers Midwest region. Noles is in charge of the land work and checking that property taxes fit within the budget.

Noles testified that he received property tax bills for property that Petitioners did not own. The tax bills were paid and then he was required to collect from the third parties that were responsible. There were meetings between Brian Pietenpol, the Controller of Biltmore, and various members of the taxing jurisdiction to determine the ownership of some of the parcels and the responsible parties for tax bills. Noles believed that Petitioners were charged twice for the same property.

Noles was questioned on when infrastructure was added. Phase 1, Phase 2, and Phase 3 had some infrastructure constructed during 2000. He testified:

> The infrastructure for the subdivision itself, for sub four that you asked about, was installed during the calendar year 2002. However, sub four is adjacent to Six Mile Road and the Six Mile Road berm was installed in the year that you asked about, the year 2000. Tr Vol 3, p 142.

Noles contends that the road right-of-ways have never been removed from the acreage for assessment purposes. He presented parcel 059-99-0001-703, which contains 45.8 acres shared by Toll Brothers Inc. and Biltmore Wineman, LLC, for road right-of-way. Noles testified that the 45.8-acre road right-of-way was never deducted from the assessments. (P-17).

Jeremiah Fink, Professional Land Surveyor, testified that using information from transfer affidavits, tax bills, parent parcel information, assessing officer letter, memos and prior

surveys and sketches, he created a visual exhibit that was admitted. Fink's objective was to create a map with an overlay for each parcel split that was provided to him. Respondent objected as the maps were not accurate and contained parcel identification numbers that were never on the assessment roll.

Holly A. Adams, CMAE 3, was called as Petitioners' adverse witness. She testified that the March 2, 2001, fax to Brian Pietenpol was to correct the tax bill for subject parent parcel 05-99-0001-705 and delete it. Parcel 059-99-0001-703 was split into four parcels (059-99-0001-705, 062-99-0001-712, 061-99-0001-711, 062-99-0001-711) and the parent parcel was deleted. However, the four children splits may not have received a tax bill because they were further split into the 40-acre condominiums, or the subdivision, in the same year. A new bill was sent that contains 320.87 acres. (Adams did not testify as to the correct parcel number for the 320.87 acres.)

Adams testified that the assessor's office would receive sheets from Wayne County assigning new parcel numbers for properties that were split. It is possible throughout the year to have multiple parcel splits (parcel numbers) before the assessment roll is finalized. The numbers that are assigned but never placed on the assessment roll are considered place holders or "dummy" parcels for the subdivisions that are created from the original parcel number. A parcel number may be assigned by Wayne County and then, if that parcel is split, additional new parcel number(s) may be assigned, especially in the instance of subdivision creation.

Adams testified that she received a call from Brian Pietenpol asking about parcel 706 having incorrect acreage. Pietenpol indicated that they did not own all of the acreage. Adams explained that without him making the request to the Township and requesting

an official split the parcel could not be split. When asked about further contact she stated:

> Yes. Actually, what happened was that conversation generated a meeting that we had in April of 2000 that involved all the interested parties. And at that meeting, that would have the been EDC, Biltmore, myself, Mr. McLenaghan, the assessor. We also asked if the Wayne County Equalization Department and Engineering, that Mr. Joseph Goluban attend, who was the engineer for that department, and he also brought with him Mr. Ted Stanek. Tr Vol 4, pp 201, 202.
>
> There were a couple attorneys there. I believe one from the EDC. I think there was another attorney from possibly the Biltmore that was there. And then from that meeting, based on what I explained to Brian, they realized that this was going to be an issue with all these acreage parcels that the EDC was selling to various parties, and that because they didn't come in and request splits on these parcels as they were selling them off, they understood that they'd have to be placed on the assessment roll as acreage parcels. Tr Vol 4, p 202.
>
> So... and then that was confirmed at the meeting with Mr. Joseph Goluban from the equalization department to confirm the process that would have had to take place. At that meeting, then, the parties discussed how to handle it, because they weren't seeing the need to request these formal divisions based on how they're selling it, because it was going to be developed into a larger development with the lots, I believe coming the next year. Tr Vol 4, pp 202, 203.

As of result of the April 2000 meeting, the Equalization Department requested ownership information prior to a "courtesy" split. Petitioners provided legal descriptions and ownership in order for the interested parties to have tax bills for the proper entity. The parcel numbers were created solely to generate tax bills, but were not ever on the assessment roll. Adams stated that this process is known as a division of assessments. This does not "split" the property, but is for the convenience of the property owners' identification.

Adams continued ongoing discussions with Mr. Pietenpol and discovered that parcel 061-99-0001-706 contained some exempt acreage for which they were being billed. She did not take this error to the December 2000 Board of Review. Adams received a fax from the EDC indicating that they sold the 13.5 acres to Biltmore-Wineman, LLC; thus there was no need for a protest to the December 2000 Board of Review.

Petitioners' Arguments Regarding Application of Infrastructure Taxable Value Issue

Petitioners argue that the public service improvements added to then parent parcel 059-99-0001-703 should be removed from the 2001 taxable values of the resulting subdivision parcels. The amount of $18,693,726, all of which was for public service improvements per McLenaghan's testimony, was added to the taxable value of the parent parcel.[5]

Petitioners state that the Tribunal has the authority to make the decision based on the decisions of the Court of Appeals and the Supreme Court. It would be disingenuous to hold that *Toll* does not apply to this instant matter. Petitioners' state:

> Alternatively, the Tribunal can recalculate the taxable value under MCL 211.27a that requires losses to be subtracted from the taxable value when physically and legally removed from the parcel or when property is exempted. Loss is defined by MCL 211.34d(1)(h)(1) as removed or destroyed and under (h)(2), as exempted. Tr Vol 6, p 121.

Respondent's Argument

Respondent did not present valuation evidence because the parties agreed to compromise on the true cash value of the residential lots as well as the true cash, state

[5] Petitioners' exhibit P-77, Respondent's exhibit R-56 and R-58.

equalized and taxable values of parcel 059-99-0002-705 for 2001 and the individual 184 condominium lots for 2002.

Respondent argues that the taxable value of the subject properties was properly calculated pursuant to the applicable statutes at the time of the assessment. Respondent further states that the public service improvements were added to the parent parcel a year prior to the subdivision. Therefore, the Tribunal is without jurisdiction to recalculate the taxable value in a year which is not before the Tribunal. There is no mutual mistake or clerical error that allows the Tribunal to reach back and recalculate the taxable value of subject properties.

Respondent's Admitted Exhibits

R-2 2000 and 2001 Property record cards for acreage parcels.
R-6 2002 assessment roll for 353 residential parcels.
R-7 2002 assessment roll for 184 condominium parcels.
R-8 2000 and 2001 assessment roll for acreage parcels.
R-9 Parent parcel (353 residential parcels) record card for parcel 059-99-0001-703.
R-10 2001 L-4021 for 353 residential parcels.
R-11 2002 L-4021 for 184 condominium parcels.
R-12 Property transfer affidavit for acreage parcel.
R-14 Summary of individual residential parcels parent/child split and taxable values for 2000 and 2001.
R-16 Summary of individual residential parcels tax years 2001 and 2002 taxable values.
R-24 Property transfer affidavit for 1999 parent parcels 061-99-0001-706, 064-99-0001-000, 059-99-0002-000 including property record cards.
R-27 Parent parcel 1999 061-99-0001-706.
R-48 Land Contract memorandum which was the basis for Respondent not revising the assessment on parcel 059-0002-000 per December 7, 2000, letter to Mr. Pietenpol. This indicates that 13.50 acres was transferred from EDC to Biltmore in 1998 and, therefore, was not exempt for the 1999 tax roll.
R-55 Map for each tax year indicating parcel identification numbers and acreage.
R-56 1999 to 2000 summary of combination/split and taxable value.
R-57 1999 assessment roll pages for 1999 parent parcels.
R-58 2000 assessment roll pages for 2000 child parcels and L-4021 for Links of Northville.
R-59 2001 assessment roll page for parcel 062-99-0001-711.

Adams' testimony reflected that parcel numbers were created to allow Petitioners to do a "courtesy" split based on legal descriptions and ownership. Adams termed the result of "courtesy" splits as "dummy" parcels. These "dummy" parcel numbers were not part of the assessment roll because before December 31st the parcels were again split into individual parcel numbers reflecting the residential lots or the condominium parcels. The Treasurer did send out bills to the various property owners based on Petitioners' request.

John McLenaghan, CMAE 3, was the assessor of record at the time of the purchase and was aware of the various split and combinations of the subject properties. He was able to explain the formula for spreading the $18,693,726 from the parent parcel to the individual residential lots. When asked if he determined a percentage to allocate among the residential lots, he testified:

> Yes, . . . there was [$18,693,726] of additions, divided by the total taxable value of [$23,395,587]; you get a decimal of .79903. So of what was allocated, 79.903 percent was additions - - - was, I'm sorry, was public utilities. Tr Vol 6, p 110.

McLenaghan, using parcel 77-059-01-0001-000 as an example, further testified that multiplying the 2000 taxable value by the .79903 for public service improvements will result in the amount allocated for taxable value. The remaining taxable value is without public service improvements. He stated that this formula is correct for lots that are not part of the golf course.

## Tribunal's Findings of Fact

## Conclusions of Law

The Tribunal finds that the subject properties for the tax years at issue have public service improvements improperly added to the taxable values. In this instance, this specific case was the impetus for the Supreme Court's decision that public service improvements should not be included as an "addition" to taxable value. The subject properties' taxable values were calculated pursuant to the statute in place at the time. However, the addition of public service improvements to taxable value was ruled unconstitutional in *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006) and affirmed by the Supreme Court in *Toll Northville, Ltd v Northville Twp*, 480 Mich 6; 743 NW2d 902 (2008).

The Supreme Court in *Toll Northville, supra,* ruled that MCL 211.34d(1)(b)(vii) is unconstitutional because it is inconsistent with the meaning of "additions" as used in Const 1963, art 9, sec 3, and that public service improvements consisting of public infrastructure located on utility easements or land that ultimately becomes public do not constitute "additions" to property within the meaning of that constitutional provision.

When Proposal A was adopted the General Property Tax Act defined "additions" to mean:

> All increases in value caused by new construction or a physical addition of equipment or furnishings, and the value of property that was exempt from taxes or not included on the assessment unit's immediately preceding year's assessment role. MCL 211.34d(1)(a).

After Proposal A was adopted the Legislature enacted several amendments of MCL 211.34d:

1) As used in this section or section 27a, or section 3 or 31 of article IX of the state constitution of 1963:

(a) For taxes levied before 1995, "additions" means all increases in value caused by new construction or a physical addition of equipment or furnishings, and the value of

property that was exempt from taxes or not included on the assessment unit's immediately preceding year's assessment roll.

(b) For taxes levied after 1994, "additions" means, except as provided in subdivision (c), all of the following:

* * *

(*viii*) Public services. As used in this subparagraph, "public services" means water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks, or street lighting. For purposes of determining the taxable value of real property under section 27a, the value of public services is the amount of increase in true cash value of the property attributable to the available public services multiplied by 0.50 and shall be added in the calendar year following the calendar year when those public services are initially available.

The Michigan Supreme Court determined that the portion of the statute describing public service improvements as additions is unconstitutional. As such, public service improvements are no longer considered taxable value "additions" within the meaning of this statute. MCLA Const. Art. 9, § 3; MCLA § 211.34d(1)(b)(viii).

Public service improvements on public property or on utility easements are not taxable "additions" as that term was understood when the public adopted the state constitutional amendment capping property tax increases of each parcel of property adjusted for additions and losses. M.C.L.A. Const. Art. 9, § 3.

Respondent argued in the Court of Appeals that the Tax Tribunal has no jurisdiction or authority in this case because the underlying tax appeal covers tax years 2001 and 2002, but the alleged "additions" to the taxable value were made in 2000. The Court stated that "We acknowledge that *Springhill* and *Leahy* limit the Tax Tribunal's authority to decide the accuracy and methodology of assessments to the tax years timely

appealed, we do not agree that those decisions limit our ability to resolve the constitutional issue at hand."[6]

## Conclusions of Law

### Retroactive Application of Taxable Value Issue

Petitioners request that the Tribunal take jurisdiction over the 2000 tax year. As such, Petitioners are attempting to invoke the jurisdiction of the Tribunal under MCL 211.53a. Specifically, Petitioners are alleging a mutual mistake of fact occurred when the subject property's 2000 taxable values were increased as a result of public improvement additions to the property, pursuant to MCL 211.34d(1)(b)(viii). The Michigan Supreme Court, affirming the Michigan Court of Appeals' decision, held the aforementioned statute unconstitutional because it is inconsistent with the meaning of "additions" as used in Const. 1963, art.9, §3 and therefore public service improvements are not taxable additions to property. See *Toll Northville, Ltd Partnership, et al v Township of Northville*, 480 Mich 6, 8-9; 743 NW2d 902 (2008). As such, Petitioners argue that the parties mutually relied upon a statute that was declared unconstitutional and that the Tribunal has jurisdiction to refund the taxes wrongfully paid as a result of said "mutual mistake of fact."

The Tribunal further finds that the Supreme Court in *Ford Motor Company v Woodhaven,* 475 Mich 425; 716 NW2d 247 (2006), held that "mutual mistake of fact"

[6] *Springhill Assoc v Shelby Twp*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2003 (Docket No. 247100). *Leahy v Orion Twp*, 269 Mich App 527; 711 NW2d 438 (2006).

means an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction. *Id.* at 442. The test the Court used required the parties to "share a mistaken belief about a material fact that went to the very nature of the transaction." *Id.* at 443. A mutual mistake of fact is required for recovery under MCL 211.53a and the pleading of a mutual mistake of law is not sufficient. *Noll Equipment Co v City of Detroit*, 49 Mich App 37, 41-43; 211 NW2d 257 (1973).

This holding is supported by the Supreme Court holding in *Briggs v Detroit Public Schools, et al*, 485 Mich 69; 780 NW2d 753 (2010). In *Briggs*, the Detroit Public School Board (DPS) reinstituted an expired millage rate without obtaining voter approval. Briggs brought suit against DPS for this action, and one of his contentions was that a mutual mistake of fact occurred regarding the tax dollars collected under the reinstituted millage rate. The Court overturned the Court of Appeals' decision that the respondent's wrongful collection of property taxes from the petitioner constitutes a mutual mistake of fact within the meaning of MCL 211.53a. The Court determined that although a mistake was made in this case, the mistake was not a mutual mistake of fact. The Court specified that the mistake made between the parties was not mutual; it was not shared and relied on by the assessing officer and the taxpayer. The Court also concluded that the mistake that occurred in this case was not a mistake of fact because "collection of an unauthorized tax constitutes a mistake of law, not a mistake of fact."

The Tribunal further finds that the Supreme Court did not hold its decision in *Toll-Northville* to be retroactive. Generally, a judicial decision is to be given complete retroactive effect. *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 292; 590 NW2d 612 (1998). However, the Court has also recognized that a more flexible approach may be appropriate in circumstances where injustice may result from full retroactivity. In these instances, a court's holding may be given limited retroactivity or given prospective effect only. *Lindsey v Harper Hospital*, 455 Mich 56, 68; 564 NW2d 861 (1997) (citing *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984)).

In *Bolt v City of Lansing***,** 238 Mich App 37; 604 NW2d 745 (1999), the Supreme Court held that a storm water service charge the City of Lansing imposed on certain property owners was a tax and the Ordinance was unconstitutional under the Headlee Amendment. The *Bolt* Court, citing *Lindsey, supra*, stated that particular circumstances may warrant only prospective application. The court stated:

> A key consideration under *Lindsey* in deciding if a decision should be given prospective or retrospective application is: Did the judicial decision announce a new and unexpected rule of law, or did it merely clarify, extend, or interpret existing law? A decision should be applied prospectively if the decision overrules settled precedent or decides an issue of first impression. . . . Of course, a decision regarding an issue of first impression does not necessarily require prospective application. If the decision merely provides a clarified legal interpretation without announcing a new rule of law or a change in existing law, the decision should be retroactively applied. *Id*. at 750 (citing *Lindsey*, *supra* at 68-69).

The Court concluded that retroactive application would burden defendant more than it would benefit plaintiff. Further, the *Bolt* Court stated that if a refund was required it would be a symbolic benefit to plaintiff or any other Lansing taxpayer afforded a refund.

The Tribunal finds that, in applying the *Bolt* decision to the above-captioned case, it is evident that the Supreme Court's decision rendering MCL 211.34d(1)(b)(viii) unconstitutional should be applied prospectively only. Here, the Court's decision announced a new and unexpected rule of law. Specifically, MCL 211.34d(1)(b)(viii), which permitted municipalities to increase the taxable value of property based upon infrastructure improvements, was held unconstitutional and municipalities were *no longer permitted* to add these improvements to the taxable value of a property. This is undoubtedly a new rule of law and, pursuant to *Bolt*, must only be applied prospectively since the Court's decision in *Toll* overruled well-settled precedent.

Notwithstanding the above, the Tribunal finds that even if *Bolt* is inapplicable, *Fonger v Department of Treasury*, 193 Mich App 71; 483 NW2d 920 (1992), is controlling case law. The petitioner in *Fonger* brought the appeal in response to the United States Supreme Court's decision in *Davis v Michigan Department of Treasury,* 489 US 803; 109 S Ct 1500 (1989). The Supreme Court in *Davis* found MCL 206.30(1)(f), of the Michigan Income Tax Act, unconstitutional and invalidated the section as discriminating in favor of state retirees and against federal retirees in taxing retirement benefits. The petitioner in *Fonger* paid income taxes on his federal pension benefits pursuant to the now invalid MCL 206.30(1)(f). The petitioner appealed to this Tribunal the denial of an amended income tax return to obtain a refund for taxes paid under the invalidated lawl. The Tribunal concluded that the respondent, Department of Treasury, must refund the petitioner's state taxes paid on federal benefits for the tax years in question. The Court of Appeals held that the *Davis* decision would be given retroactive effect and *the fact*

*that the Michigan Tax Act section was found unconstitutional and invalid did not preclude the State from imposing a limitation period on the refund remedy*, so long as the period passes constitutional muster. *Fonger, supra* at 78. (Emphasis added)

In applying *Fonger* to the facts of the above-captioned appeal, the Tribunal concludes that the limitation period for issuing a refund of Petitioners' taxes paid has run. Specifically, as discussed herein, the Tribunal lacks authority to consider the subject matter of this appeal under MCL 211.53a. The Tribunal distinguished this case from *Briggs* and, as such, Petitioners may not argue that the tax at issue was the result of a mutual mistake of fact. At the time Respondent applied MCL 211.34d(1)(b)(viii) in determining Petitioners' taxable value the statute was good law. In fact, because the invalidation of MCL 211.34d(1)(b)(viii) is not retroactive, the additions to the subject property's taxable value was also not a mistake of law since the additions were pursuant to valid law at the time the taxable value was increased. As such, even if Petitioners argue that the application of the statute was a mistake of law, the Tribunal finds that Respondent possessed actual statutory authority to increase Petitioners' taxable value based on public improvement additions. Unlike the facts of this case, the respondent in *Briggs* merely possessed apparent authority to tax the petitioner.

The Tribunal finds that Petitioners also try to invoke the Tribunal's subject matter jurisdiction according to MCL 205.735a. The statute provides:

> (6) The jurisdiction of the tribunal in an assessment dispute as to property classified under section 34c of the general property tax act, 1893 PA 206, MCL 211.34c, as commercial real property, industrial real property, developmental real property, commercial personal property, industrial

> personal property, or utility personal property is invoked by a party in interest, as petitioner, filing a written petition on or before May 31 *of the tax year involved*. The jurisdiction of the tribunal in an assessment dispute as to property classified under section 34c of the general property tax act, 1893 PA 206, MCL 211.34c, as agricultural real property, residential real property, timber-cutover real property, or agricultural personal property is invoked by a party in interest, as petitioner, filing a written petition on or before July 31 *of the tax year involved*. In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, or determination. (Emphasis added).

The Tribunal concludes that retroactive application of the Supreme Court's invalidation of MCL 211.34d(1)(b)(viii), in *Toll,* is inappropriate and adverse to established case law in this State. The invalidation of MCL 211.34d(1)(b)(viii) established new precedent and pursuant to *Bolt* must be applied prospectively only. Further, the Tribunal lacks jurisdiction over the above-captioned case as Petitioners failed to timely file their appeal in the year the public service additions were added to the subject property's taxable value. The Tribunal further finds that a mutual mistake of fact did not occur and the statute of limitations was not tolled and the Tribunal cannot take jurisdiction over previous tax years. As such, the Tribunal concludes that dismissal of the retroactive application is denied.

The Tribunal finds no evidence that the "courtesy splits" requested by Petitioners to split the taxes among the various owners did not constitute a double charge for the property taxes. Requests for splitting a parcel midyear may or may not become the final property split or combination for a parcel for the year. This may have resulted in Petitioners' confusion that the parcels were double billed for property taxes. The question of

incorrect acreage appearing on tax bills does not appear to be attributable to any value conclusion and is an error in the property description.

The Tribunal does find some slight evidence that the road right-of-way was approximately 45.8 acres pursuant to Petitioners' records. However, there was no testimony as to the value of the acreage and whether it was included in the value of subject properties. Therefore, the Tribunal denies Petitioners' contention on this matter.

## Valuation Issues

The true cash value issue for all properties at issue has been resolved by the parties resulting in a Consent Judgment entered August 19, 2010.

## Conclusions of Law

Pursuant to Section 3 of Article IX of the State Constitution, the assessment of real property in Michigan must not exceed 50% of its true cash value. The Michigan Legislature has defined true cash value to mean the usual selling price at the place where the property to which the term is applied is at the time of the assessment, being the price which could be obtained for the property at private sale, and not forced or auction sale. See MCL 211.27(1). The Michigan Supreme Court in *CAF Investment Co v State Tax Commission*, 392 Mich 442, 450 (1974), has also held that true cash value is synonymous with fair market value.

The Tribunal finds that the taxable value of the properties as assessed includes an amount for public service improvements. The Tribunal finds that this was found to be unconstitutional and, therefore, prospectively amends the taxable value of the

properties at issue to conform to the Supreme Court's decision in *Toll Northville*, and to also make the taxable value "just and proper," compliant with MCL 211.27a, and also compliant with MCL 211.29 and 211.30. The taxable value conclusions are attached in the Addendum.

Judgment

IT IS ORDERED that the property's assessed and taxable values for the tax years at issue shall be as set forth in the *Addendum* section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 90 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

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 28 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. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. 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 the Tribunal's order. As provided in 1994 PA 254, 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 rate of the 94-day discount treasury bill rate for the first Monday in each month plus 1%. As provided in 1995 PA 232, being MCL 205.737, as amended, interest shall accrue for periods after January 1, 1996 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 the rate of 6.55% for calendar year 1996, (ii) after December 31, 1996 at the rate of 6.11% for calendar year 1997, (iii) after December 31, 1997 at the rate of 6.04% for calendar year 1998, (iv) after December 31, 1998 at the rate of 6.01% for calendar year 1999, (v) after December 31, 1999 at the rate of 5.49% for calendar year 2000, (vi) after December 31, 2000 at the rate of 6.56% for calendar year 2001, (vii) after December 31, 2001 at the rate of 5.56% for calendar year 2002, (viii) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (ix) after December 31, 2003 at the rate of 2.16% for calendar year 2004, (x) after December 31, 2004 at the rate of 2.07% for calendar year 2005, (xi) after December 31, 2005 at the rate of 3.66% for calendar year 2006, (xii) after December 31, 2006 at the rate of 5.42% for calendar year 2007, and (xiii) after December 31, 2007 at the rate of 5.81% for calendar year 2008, (xiv) after December

31, 2008, at the rate of 3.31% for calendar year 2009, and (xv) after December 31, 2009, at the rate of 1.23% for calendar year 2010.

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

MICHIGAN TAX TRIBUNAL

Entered: October 19, 2010 By: Victoria L. Enyart