45 North Real Estate LLC,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 19-002717

City of Traverse City,
Respondent.

Presiding Judge
Steven M. Bieda

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment (POJ) on January 26, 2021. The POJ states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

Neither party has filed exceptions to the POJ.

The Administrative Law Judge (ALJ) considered the testimony and evidence and made specific findings of fact and conclusions of law. The ALJ's determination is supported by the testimony and evidence and applicable statutory and case law.

Given the above, the Tribunal adopts the POJ as the Tribunal's final decision in this case.[1] The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the POJ in this Final Opinion and Judgment. As a result:

Parcel No. 28-51-898-649-00 shall be granted a partial exemption under MCL 211.181(2)(b), for the 2019 and 2020 tax years.

Parcel No. 28-51-898-036-10 shall be granted a partial exemption under MCL 211.181(2)(b), for the 2019 and 2020 tax years.

The property's taxable value (TV), as established by the Board of Review for the tax year at issue, is as follows:

[1] See MCL 205.726.

Parcel Number: 28-51-898-649-00

Year	TV
2019	$334,700
2020	$336,200

Parcel Number: 28-51-898-036-10

Year	TV
2019	$194,252
2020	$197,942

The property's taxable value (TV), for the tax year at issue, shall be as follows:

Parcel Number: 28-51-898-649-00

Year	TV
2019	$149,958
2020	$137,969

Parcel Number: 28-51-898-036-10

Year	TV
2019	$88,070
2020	$81,029

IT IS SO ORDERED.

IT IS ORDERED that the officer charged with maintaining the assessment rolls for the tax year(s) at issue shall correct or cause the assessment rolls to be corrected to reflect the property's exemption within 20 days of entry of this Final Opinion and Judgment, subject to the processes of equalization.[2] 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 within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and 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 this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, through June 30, 2012, at

[2] See MCL 205.755.

the rate of 1.09%, (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%, (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, (vi) after December 31, 2016, through June 30, 2017, at the rate of 4.50%, (vii) after June 30, 2017, through December 31, 2017, at the rate of 4.70%, (viii) after December 31, 2017, through June 30, 2018, at the rate of 5.15%, (ix) after June 30, 2018, through December 31, 2018, at the rate of 5.41%, (x) after December 31, 2018 through June 30, 2019, at the rate of 5.9%, (xi) after June 30, 2019 through December 31, 2019, at the rate of 6.39%, (xii) after December 31, 2019, through June 30, 2020, at the rate of 6.40%, (xiii) after June 30 2020, through December 31, 2020, at the rate of 5.63%, and (xiv) after December 31, 2020, through June 30, 2021, at the rate of 4.25%.

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

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A motion for reconsideration must be filed with the Tribunal with the required filing fee within 21 days from the date of entry of the final decision. Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee. You are required to serve a copy of the motion on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion. Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.

A claim of appeal must be filed with the Michigan Court of Appeals with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave." You are required to file a copy of the claim of appeal with filing fee with the Tribunal in order to certify the record on appeal. The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.

By _____

Entered: March 8, 2021
ssm

45 North Real Estate, LLC,
Petitioner,

MICHIGAN TAX TRIBUNAL

v

MOAHR Docket No. 19-002717

City of Traverse City,
Respondent.

Presiding Judge
Peter M Kopke

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

Petitioner filed this appeal disputing the property tax assessment levied by Respondent against Parcel Nos. 28-51-898-649-00 and 28-51-898-036-10 for the 2019 and 2020 tax years.[1] Rex O. Graff, Jr., Esq. represented Petitioner. Stephanie Simon Morita, Esq. represented Respondent.

[1] The Petition was filed on May 28, 2019 and indicated that Petitioner was appealing the assessments for Parcel Nos. 28-51-898-649-00, 28-51-898-036-10, and 28-51-900-112-02 for the 2017, 2018, 2019, and "subsequent" tax years. The Tribunal did not, however, have authority over the properties' assessments for the 2017 or 2018 tax years under MCL 211.735a(6), as the Petition was not timely filed for the 2017 or 2018 tax years. The Tribunal also had no authority over those assessments under MCL 211.53a or 211.53b. More specifically, no claim was made or facts provided that would indicate that the assessments were the result a clerical error (i.e., "an error of typographical, transpositional or mathematical nature") or mutual mistake of fact (i.e., "shared erroneous belief"). See also *International Place Apartments – IV v Ypsilanti Twp*, 216 Mich App 104, 109; 548 NW2d 668 (1996); and *Ford Motor Company v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006); and *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69, 84-5; 780 NW2d 753 (2010). Further, Petitioner did not protest the assessments to Respondent's July or December board of review and appeal action taken by those boards. As for "subsequent" tax year assessments, the Tribunal's authority is limited to established assessments timely appealed. As a result, the Tribunal issued an Order on June 24, 2020, dismissing Petitioner's assessment appeal for the 2017 and 2018 tax years and continuing the appeal for the 2019 tax year. In that regard, the Tribunal has no "equitable powers" that would allow it to waive statutory requirements or filing deadlines. See *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 547-548; 656 NW2d 215 (2002). Finally, the assessment for the 2020 tax year was established prior to the conducting of the hearing and that assessment was "added automatically," as provided by MCL 205.737(5)(a).

As for Parcel No. 28-51-900-112-02, Petitioner filed a Motion for Leave to File First Amended Property Tax Petition on July 11, 2019, that provided, in pertinent part:

> Petitioner seeks leave to allow the filing of the First Amended Petition, in part to remove the allegations pertaining to adjustments preceding 2019, consistent with this Court's Order of Partial Dismissal entered June 24, 2019, **and** in part, **to remove claims**

A hearing was commenced August 20, 2020. Petitioner's witness was Mike Terfehr and Respondent's witness was Polly Watson Cairns, Assessor.

Based on the evidence (i.e., testimony and admitted exhibits) and the case file,[2] the Tribunal finds that the properties were **partially** operated as a concession for both tax years at issue and, as such, the properties are each entitled to a **partial** exemption from ad valorem taxation under MCL 211.181(2)(b) for those tax years, as indicated herein. As a result, the properties' true cash value ("TCV"), state equalized value ("SEV"), and taxable value ("TV") for the tax years at issue are as follows:

Parcel Number	Year	TCV	AV	TV
28-51-898-649-00	2019	N/A	N/A	$149,958
28-51-898-649-00	2020	N/A	N/A	$137,969

Parcel Number	Year	TCV	AV	TV
28-51-898-036-10	2019	N/A	N/A	$88,070
28-51-898-036-10	2020	N/A	N/A	$81,029

FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence (i.e., testimony and admitted exhibits) and concern only the evidence and inferences found to be significantly relevant to the legal issues involved:[3]

1. Parcel No. 28-51-898-649-00 is located at 1190 Airport Access Road, Traverse City, MI in Grand Traverse County, is classified as commercial real, and has a principal residence exemption ("PRE") of 0%.
2. Parcel No. 28-51-898-036-10 is located at 1180 Airport Access Road, Traverse City, MI in Grand Traverse County, is classified as commercial real, and has a PRE of 0%.
3. The properties' TCV, assessed value ("AV"), and TV as established by Respondent's Board of Review are as follows:

---

pertaining to the Personal Property Tax Assessment (28-51-900-112-02) in acknowledgment that the Personal Property Tax Assessment was **not** appealed at the March Board of Review. [Emphasis added.]

Respondent did not file a response to the Motion or object to the withdrawal of Petitioner's assessment appeal relative to Parcel No. 28-51-900-112-02 and, as such, the Tribunal issued an Order granting the Motion on August 5, 2019. See TTR 231(3). In that regard, Petitioner was **not** required to protest the personal property assessment to the March Board of Review. See MCL 205.735a(4)(a) and (b).

[2] Petitioner's Exhibit Nos. 4 through 8, 10 through 12 and 19, and Respondent's Exhibit Nos. 1 through 7, 9 through 21, and 23 through 28 were admitted into evidence. See Transcript ("Tr.") at 9.

[3] The Tribunal has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to these findings.

Parcel Number	Year	TCV	AV	TV
28-51-898-649-00	2019	$669,400	$334,700	$334,700
28-51-898-649-00	2020	$672,400	$336,200	$336,200

Parcel Number	Year	TCV	AV	TV
28-51-898-036-10	2019	$398,000	$199,000	$194,252
28-51-898-036-10	2020	$411,000	$205,500	$197,942

4. Parcel Nos. 28-51-898-649-00 and 28-51-898-036-10 consist of hangars located at the Cherry Capital Airport ("Airport"), which is a public airport.
5. The hangar located on Parcel No. 28-51-898-649-00 consists of 17,265 square feet, while the hangar located on Parcel No. 28-51-898-036-10 consists of 8,000 square feet for a total square footage of 25,265.
6. The Airport is operated by the Northwestern Regional Airport Commission ("NRAC") on behalf of Grand Traverse County and Leelanau County, who are its sole members. The Airport land is also owned by the NRAC on behalf of those counties.
7. The Airport land underlying the hangars is leased to Petitioner by the NRAC.
8. Based on the terms of the Lease between Petitioner and the NRAC, the NRAC is the owner of the hangars and, as such, the hangars are also being leased to Petitioner by the NRAC.
9. Petitioner or, more specifically, its controlled sub-tenants and other sub-lessee used and use the hangars in connection with businesses conducted for profit.
10. 45 North Aviation was sub-tenant for both tax years. Evans Avionics was a sub-lessee for the 2019 tax year and a sub-tenant for the 2020 tax year, having been acquired by Petitioner's parent company in July of 2019.[4]
11. The mailing address for both 45 North Aviation and Evans Avionics is 1190 Airport Access Road, Traverse City, MI, which is also the address for Parcel No. 28-51-898-649-00.
12. 45 North Aviation provided non-discriminatory aircraft maintenance services to the general public and occupied 60% percent of the hanger space for both tax years.[5] Said hangar space does, however, include hangar space rental to FedEx of an "unfixed" space comprising 50 x 50 feet or 2,500 square feet as well as hangar space rental for other aircraft.[6]

[4] See Tr. 56, 59, and 87.
[5] See Tr. at 14,16, 21, 36-37 (i.e., "[t]here are two hangars that are both used for offices, maintenance and **all** the activities that we conduct, **all** the aviation-related activities" and "[w]e have another facility adjacent that we use as kind of our **overflow**, but we're also conducting maintenance, storage, avionics installation, aircraft sales," and "[e]verything goes on in **both** of these buildings), 44-46, 50-51, 90-95, and 105. [Emphasis added.]
[6] See Tr. 21, 63, 75, and 91-95.

13. Evans Avionics provided non-discriminatory aircraft radio maintenance services to the general public and occupied 10% of the hangar space for the 2019 tax year and 15% of the hangar space for the 2020 tax year.[7]
14. The services provided by 45 North Aviation and Evans Avionics are "customarily" and "needful" for the operation of an airport.
15. Based on the terms of the leases between Petitioner, 45 North Aviation, Evans Avionics, and the NRAC and the Minimum Standards applicable under those leases portions of both properties were utilized as a concession for each tax year.[8]

ISSUES AND CONCLUSIONS OF LAW

The issue in this matter is whether the properties at issue (Petitioner's hangars) qualify for property tax exemptions under MCL 211.7m or 211.181.[9] MCL 211.7m and 211.181 are tax exemption statutes and because tax exemptions upset the delicate balance achieved by equal taxation, the Tribunal is required to "strictly construe" those statutes "in favor of the taxing authority."[10] That does not, however, mean that the

[7] See Tr. at 18-19 and 91-95. As for the storage of the helicopters at night, said helicopters, which are under the control of Petitioner or, more specifically, its controlled subtenant, could be moved to accommodate emergency maintenance performed, as indicated by Mr. Terfehr's testimony.
[8] The Lease provides, in pertinent part:

> The aviation business as operated pursuant to this Lease **shall meet all requirements** contained in "Minimum Standards for Aeronautical Activities for the Cherry Capital Airport" as contained in Ordinance 12-1, and as amended ("Minimum Standards"). The Lessee agrees to restrict activities conducted on the leasehold to only those uses permitted under this Lease, **and in accordance** with the Minimum Standards. [Emphasis added.]

[9] A proceeding before the Tax Tribunal is original, independent, and de novo. See MCL 205.735a(2). The Tribunal's factual findings must be supported "by competent, material, and substantial evidence." See *Dow Chemical Co v Dep't of Treasury,* 185 Mich App 458, 462-463; 462 NW2d 765 (1990).
[10] See *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664–65; 378 NW2d 737 (1985). See also *TOMRA of North America, Inc v Dep't of Treasury*, ___ Mich ___; ___ NW2d ___ (June 16, 2020), which provides, in pertinent part:

> We take this opportunity to clarify that because the canon requiring strict construction of tax exemptions does **not** help reveal the semantic content of a statute, **it is a canon of last resort**. That is, courts should employ it only "when an act's language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity." In the present case, the canon is inapplicable because, as we explain below, the statutes are unambiguous: their ordinary meaning is discernible by reading the text in its immediate context and with the aid of appropriate canons of interpretation. [Emphasis added.]

Tribunal "should give a strained construction which is adverse to the Legislature's intent."[11] In that regard, MCL 211.7m provides:

> Property owned by, or being acquired pursuant to, an installment purchase agreement by a county, township, city, village, or school district used for public purposes **and property owned** or being acquired **by an** agency, **authority**, instrumentality, nonprofit corporation, commission, or other separate legal entity comprised solely of, or which is wholly owned by, or **whose members consist solely of** a political subdivision, **a combination of political subdivisions**, or a combination of political subdivisions and the state **and is used to carry out a public purpose** itself or on behalf of a political subdivision or a combination **is exempt** from taxation under this act . . . . [Emphasis added.]

MCL 211.181 also provides, in pertinent part:

> (1) Except as provided in this section, **if real property exempt for any reason** from ad valorem property taxation **is leased**, loaned, or otherwise made available to **and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessee or user of the real property is subject to taxation** in the same amount and to the same extent as though the lessee or user owned the real property.
>
> (2) Subsection (1) does **not** apply to all of the following . . .
>
> (b) Property that is **used as a concession at a public airport**, park, market, or similar property and that is available for use by the general public . . . . [Emphasis added.]

Finally, the requested exemptions are established classes of exemption and, as a result, Petitioner is required to establish its entitlement to those exemptions by a preponderance of the evidence.[12]

Here, Petitioner claims, in pertinent part, that:[13]

---

[11] See *Inter Co-op Council v Dep't of Treasury*, 257 Mich App 219, 223; 668 NW2d 181 (2003) citing *Cowen v Dep't of Treasury,* 204 Mich App 428, 431; 516 NW2d 511 (1994), which provides, in pertinent part, "[w]hile tax-exemption statutes are strictly construed in favor of the government, **they are to be interpreted according to ordinary rules of statutory construction**." [Emphasis added.]

[12] See *ProMed Healthcare v Kalamazoo*, 249 Mich App 490, 494-495; 644 NW2d 47 (2002).

[13] See the March 28, 2019 Petition. Petitioner also claimed in the Petition that "Stiner will testify that [the] business operations of 45 North are identical to those provided by K. Stiner Enterprises, LLC with the exception of expanded concessionaire services available to the general public, which are identified in attached Exhibit A." Notwithstanding said additional claim, Mr. Stiner did not testify.

> "Business qualifies as exempt under MCL 211.181 and MCL 211.7m, because the property is owned by the Airport and is being used to carry out a public purpose. The Petitioner/Tenant qualifies as a concession under MCL 211.181(2)(b). The use of the property is limited, any change in use is subject to Airport approval, the minimum standards must be met, improvements are subject to approval by Airport. Business is also exempt from LUTA, MCL 211.181 with concession related to Airport business. Use is limited to that within the scope of minimum standards for aeronautical activities at the Airport. **The business provides services directly associated with the use of the Airport by the general public and transient aircraft**." [Emphasis added.]

Petitioner also claims that:[14]

> "January 4, 2017, 45 North Real Estate acquired the business interests of K. Stiner Enterprises, LLC (formerly Cherry Capital Aviation, Inc.) **and the tenant's rights to the properties described in the two tax parcels at issue**. 45 North Real Estate is part of a collection of subsidiary companies, all under a single ownership, which provides concessionaire services without discrimination (other than compliance with various security and Airport regulations) to the general public.
>
> 45th North has continued providing the general public, without discrimination, [] the following services that were previously provided by the Stiner business operation:
>
> 1. Air Charter Services;
> 2. Air Rental Services;
> 3. Aircraft Maintenance;
> 4. Hangar Space Rental.
>
> In addition to those services, 45th North has added additional Airport related services to the general public, which consist of the following:
>
> 5. Float Plane Tours;
> 6. Aircraft Aviation Installation and Maintenance;
> 7. Power Line & Gas Line Patrol;
> 8. Helicopter Tours;
> 9. Aerial Photography and Video;
> 10. Aircraft Management;
> 11. Flight Instruction for Fixed Wing and Helicopters;
> 12. L-39 Albatros Fighter Jet Training;
> 13. Aerial Signs;

[14] See Petitioner's August 17, 2020 Opening Statement.

14. Merchandise for sale: T-Shirts, Hats, Patches, Mugs;
15. Aircraft Sales (Import and Export);
16. External Load (Transport of Building Material to Remote Areas);
17. Airshows.

All of the leasehold premises are open to the general public provided that the time and place of such general public access is coordinated with Airport security measures imposed by the Northwest Airport Commission and the FAA.

The Tenant, 45 North, is subject to a vast number of ordinances and restrictions imposed by the Airport Commission, Homeland Security, FAA, and General Aeronautic Requirements. There are occasions in which enforcement action has been taken by appropriate authorities. A couple times a day Airport Officials will observe the premises. Due to the very significant liability concerns for protecting the general public, and to comply with the various ordinances, regulations, leasehold restrictions, and Minimum Airport Standards, 45 North is extremely rigorous in attempting to comply with the myriad of regulations that are imposed, so as to not jeopardize, or lose, its business operations on this site. The degree and amount of sanctions imposed upon the tenant and its employees is primarily attributable to 45 North being a conscientious tenant. **The bundle of sticks held by the Airport/lessor is extensive**. **The services provided to the general public are consistent with those needed and essential to the operation of a regional airport facility** and will be detailed in the testimony of Michael Terfehr, part owner and facility manager." [Emphasis added.]

Petitioner further claims, in pertinent part, that:[15]

". . . **the bundle of sticks retained by the Lessor should be measured by all of the restrictions regardless of whether they have been enforced in the past or not**. For instance, Mike Terfehr testified that the landscaping and mowing of the grassy areas has always been completed in a fashion to keep the appearance neat and clean. The fact that no enforcement action has been taken with respect to that clause within the Lease is evidence that 'stick' within the Lease was receiving compliance. In a similar vein, the Lease provision that calls for notice and reasonable time inspections, instead has a far more rigorous application by the Lessor, without any objection from the Lessee, in terms of FAA inspections, Airport Personnel checking gate access a couple times a day, and annual audits.

[15] See Petitioner's September 21, 2020 Closing Statement.

In MTT File 15-007015, this Court reviewed the identical 2014 underlying Lease between the Airport and K. Stiner Enterprises, Inc., **which is the same Lease that is the subject matter of this dispute**. In the K. Stiner Enterprises file, this Court also reviewed the 31 page 'Minimum Standards of 1/1/13' (Exhibit P-10), which has subsequently changed.

As the Court did review the 38[-]page Minimum Standards of June 26, 2018 (Exhibit R-2 in the present litigation), it would be [an] inappropriate argument to suggest that the Airport has increased its bundle-of-sticks with respect to the present tenant. However, it is not [an] unfair argument to reflect that the Airport Commission has the authority, and has exercised the authority, to unilaterally change those voluminous Minimum Standards that are applicable to 45 North and its respective subordinate entities . . . .

The degree of control available to the Airport is reflected in the extensive Lease (Exhibit R-17) **provisions**. A summary of some of those provisions is set forth in Appendix A . . . .

The degree of control available to the Airport is also reflected in the 38 pages of Minimum Standards. A summary of those provisions [is] set forth in attached Appendix B . . . .

Respondent is correct that the Lease nowhere uses the term 'concession'[,] and the Lease does not mention the 'general public.' The Minimum Standards (Exhibit R-2) Page 8 indicates:

> Operator shall employ[] trained personnel in such numbers as are required to meet the applicable Minimum Standards set forth herein in an efficient manner for each aeronautical activity or service being performed. Operator's personnel shall be available to serve the public during the applicable operating hours . . . Roster of qualified personnel who are available after normal business hours to respond to emergency situations.

The fact that the Lease document **does not** mandate that 45 North perform as a concession **and does not** equivocally mandate service to the general public other than the reference within the Minimum Standards is **not** the criteria for determining tax exempt status. Instead[,] it is MCL 211.181(2)(b) that exempts from property taxes 'Property that is used as a concession at a public airport, park, market, or similar property and is available for use by the general public.' The extensive controls and restrictions set forth in the lengthy

Lease and Minimum Standards (Exhibits R-17 and R-2), put this business within the realm of the taxing authority [to] determine if 45 North's arrangement is that of a concession opened to the general public . . . .

Mike Terfehr testified (Page 21) that 45 North handles aircraft storage, maintenance, deicing and 'make sure the aircraft's in position' for FedEx. He also testified (Page 91) that FedEx occupied a space of approximately 50' x 50' which is **not** a fixed location within the hangar. 45 North's obligation is to provide hangar storage, but not a specific location within the hangar.

The City Assessor, Polly Cairns, testified (Page 115) that the 62,200 square feet was the size of the land that the Airport leased to 45 North. She further testified 'Rental rate of .22¢ per square foot is based upon the square feet of the land.' When questioned further 'So it's not related to - - in any way to the size of the buildings or the improvements that you have on the land; True?' She answered 'True.' That is the correct calculation based upon Exhibit R-17 Page 11 (Amended and Restated Airport Ground Lease of 3/18/14).

Thus, 45 North's Lease is based upon 62,200 square feet of which FedEx stores its airplane in 250[0] square feet for which services are provided by 45 North for storage, maintenance, and de-icing.

Is Simmons Airlines, Inc.['s] relationship to Bishop International Airport (205 Mich App 597 (1994) the same as FedEx's relationship to 45 North?

A portion of Skybolt's leasehold premises at Bishop Airport was subleased to Simmons Airlines, Inc. the *Skybolt* decision addresses Simmons' sublease in the following language:

> The part of Skybolt's leasehold at issue here consists of those portions of Skybolt's Hangar 1 and Hangar 2 that it subleases to Simmons Airlines, Inc. *Simmons uses this hangar space as its regional aircraft maintenance facility*. (Pages 600-601) (Emphasis in the original.)

This is a much different use. This exclusive situation does not exist with 45 North/FedEx.

> The portions of Hangar's 1 and 2 subleased to Simmons were used by that airline solely for the maintenance of its aircraft. Unlike the hangar space reserved for Skybolt's operation, the

> Simmons hangar area was not available for use by the public. (Page 603)

The distinguishing factor from Skybolt/Simmons is the fact that FedEx's use of a space approximately 50'x50' has the same 'public' component as other private airplanes on the 45 North premises in the respect that without discrimination 45 North was providing aircraft storage, maintenance, and de-icing for this, and other, hangar tenants. Just as FedEx is probably a 'for profit' business entity, **its presence on the premises is to facilitate the same sort of maintenance and de-icing services that 45 North's entities provide to American Airlines, Delta, and United**. 45 North's Lease provides:

> Further, lessee shall have the privilege of using for the term of his lease or any extension thereof, in common with others and the public, the Cherry Capital Airport, subject to the charges, rules, and regulations and State Aeronautical Agencies and by the local governing authority, it being expressly understood that this privilege covers the entire period of the lease and the extensions thereof as herewith set forth.

Mr. Terfehr indicated 'all we do is make sure the aircraft is in position' and FedEx loads and unloads on the ramp (Pages 21 and 75). Terfehr indicated 'Typically we keep FedEx aircraft in that building and the FedEx pilot accesses his aircraft through that building' (Page 46). In contrast from the Skybolt case, 'the portions of hangars 1 and 2 subleased to Simmons were used by that aircraft solely for the maintenance of its aircraft. Unlike the hangar space reserved for Skybolt's operator, the Simmons hangar area was not available for use by the public.' *(Skybolt Partnership v Flint,* 205 Mich App 597, 603 (1994). The distinction between 45 North and Skybolt is that Simmons had specific space reserved for its use (its maintenance operations) and that space was not available to the public. FedEx is using 45 North for 45 North service and has no particular restricted space (i.e.[,] 'typically we keep FedEx aircraft in that building') As such, 45 North meets the definition of a concession and the hangar at 1180 Airport Access 'is available for use by the general public.' Arguendo, 'the general public' includes private individuals, corporations, and associations. **45 North is providing services for FedEx just as it does for American, Delta, and United, albeit that those 'services' for FedEx also include overnight hangar space**. There was **no** testimony that indicated FedEx employees provided any services in the hangar.

Unlike the situation involving Simmons Airlines, there is no appearance of 'exclusivity.' Simmons used its space solely for maintenance of its aircraft. **FedEx is availing itself to 45 North services customarily afforded and necessary for proper regional airport operations, just as it does for other members of the general public**. *American Golf v Huntington Woods* 225 Mich App 226, 230 (1997) defined a concession as a 'privilege or space granted or leased for a particular use within specified premises' (citing *Detroit v Tvgard* 381 Mich 271, 275 (1968). Pursuant to approval by the Airport Commission, 45 North provides hangar storage, maintenance, and other services to FedEx as member of the general public and[,] of course, to the general public itself." [Emphasis added.]

As for Respondent, Respondent claims that:[16]

"This matter involves a dispute as to the tax-exempt status of vertical improvements to real property where the underlying land is owned by a tax-exempt governmental unit but where the vertical improvements are privately owned and operated in a for-profit manner, subleased to third[]parties, and otherwise not open to the general public. There are 2 specific issues, and 2 burdens of proof the Petitioner must meet. The Petitioner has the burden of proof to prove that the property is exempt under MCL 211.7m[] and must prove that the lessor of the property is political subdivision of the state which owns the vertical improvements. It is Respondent's contention that it is the Petitioner who is, in fact the owner of the vertical improvements. Only if the Petitioner can meet its burden of proof as to ownership under MCL 211.7m, will the Petitioner then have to prove that the property is being operated as a concession which is open to the general public as required by MCL 211.181 *et seq.* in order for the leased premises to be exempt from taxation. It is well settled that tax exemptions are disfavored and are strictly construed against the taxpayer. *Guardian Industries Corp v Dep't of Treasury,* 243 Mich App 244, 249 (2000). Accordingly, 'the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption.' *Id*.

It is the City's position that the Petitioner, 45 North Real Estate, LLC, and not the lessor, owns the vertical improvements, as evidenced by Petitioner's ability to purchase and mortgage the improvements. Essentially, while 45 North Real Estate, LLC claims the airport owns the property, any claim of ownership is a paper title only which does not entitle 45 North Real Estate, LLC to tax exempt status for the property. *See Simmer v Grand Ledge*, Final Opinion and Judgment, p[] 6, MTT Docket [N]os[.], 15-006902 and 16-000025 (issued June 25, 2017). Looking at the

[16] See Respondent's August 19, 2020 Opening Statement.

'bundle of sticks' used to determine ownership of the vertical improvements, the following provisions from the lease should be considered, and overall[,] the lease favors the City's position that 45 North Real Estate, LLC owns the property:

1. Premises: While the airport technically holds title to the underlying land, **45 North Real Estate, LLC is responsible for the operation, construction and maintenance of the vertical improvements and has in fact sublet the property to several entities without approval from the airport, including Fedex, CSA Air and others, and also has mortgaged the improvements**. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.
2. Term: The current lease is for a 20[-]year term with a 20[-]year option to extend. Under MCL 211.27a(6)(g), this **constitutes a transfer of ownership** favoring that the property is not tax exempt and that the vertical improvements are owned by 45 North Real Estate, LLC.
3. Rental: Rental for the underlying land is based upon the square footage of the land (62,200 sf) and not the square footage of the improvements, and the rental terms are not based upon the value of the vertical improvements where the improvements were mortgaged by 45 North Real Estate, LLC for $695,000, and the initial rent is $0.22 psf of land, only adjusted to reflect cost of living increases and is not based upon the value of the vertical improvements. *See* Amended and Restated Airport Ground Lease p.3, sec. 3. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.
4. Purpose: While the purpose indicates the premises may be used for carrying on aircraft maintenance business, sales, rental, flight instruction and other general aviation activities, **there is no indication that these activities if ceased would in any way impair the overall operation of the airport or that the activities are required to be offered to the general public**. While this indicates that the lease is also **not** a concession, the provision does not indicate ownership by either the lessor or lessee.
5. Leased Premises[:] The lessee pays for and improves the land with the vertical improvements, as approved by the airport, and carries required insurances. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.
6. Maintenance: 45 North Real Estate, LLC is entirely responsible for all maintenance. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.
7. Inspection: The airport can make inspections, but only with reasonable advance notice. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.

8. Compliance with Federal Aviation Act: The lessee agrees to charge fair prices, not discriminate in accordance with applicable Federal Standards. This favors that the premises are owned by the airport.
9. Conditions upon use of the premises: While there are several conditions, most are similar to general commercial leases, e.g.[,] compliance with the law, limits on signage, compliance with Fire Marshall requirements. This favors that the premises are owned by the airport.
10. Changes in Security and Safety Requirements: Increases in expenses for security will be based a rental increase, which is as previously explained, based upon the square footage of the land, and not the improvements. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.
11. Default, Termination, Cancellation, Forfeiture: In the event of a default, the airport can take over the premises. This favors that the premises are owned by the airport.
12. Insolvency, Bankruptcy or Receivership: If the events described occur, the airport can take over the premises. This favors that the premises are owned by the airport.
13. Fair Employment Practices: The lessee agrees to not discriminate in accordance with applicable Federal Standards. This does not favor ownership by the airport or the 45 North Real Estate, LLC.
14. Taxes: The lessee is responsible for the payment of all taxes and assessments, can contest the taxes and assessments. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.
15. Successors and assigns: The terms are binding on successors and assigns of both the lessor and the lessee. This does not favor ownership by the airport or the 45 North Real Estate, LLC.
16. Transfer of Interest: While 45 North Real Estate, LLC cannot transfer its interest in the lease to another party without consent of the airport, the consent cannot be unreasonably withheld, and 45 North Real Estate, LLC can sublease the property without consent. This favors that the property is not tax exempt and the vertical improvements are owned by 45 North Real Estate, LLC.
17. Utility Connection: The lessee is responsible for the connection to and payment for all utilities. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.
18. Waste Materials: Can only be stored in approved containers. The lease does not say who approves the containers. This does not favor ownership by either the airport or 45 North Real Estate, LLC.
19. Use of Airport Facilities: If 45 North Real Estate, LLC uses other facilities other than the leased premises it will be charged a fee. This does not favor ownership by either the airport or 45 North Real Estate, LLC of the leased premises.

20. Indemnification and Hold Harmless: 45 North Real Estate, LLC agrees to hold the airport harmless and indemnify the airport for its use of the property. This does not favor ownership by either the airport or 45 North Real Estate, LLC.
21. Notices: This does not favor ownership by either the airport or 45 North Real Estate, LLC.
22. Waiver of Breach: This does not favor ownership by either the airport or 45 North Real Estate, LLC.
23. Time of Essence: This does not favor ownership by either the airport or 45 North Real Estate, LLC.
24. Landing Area: This does not favor ownership by either the airport or 45 North Real Estate, LLC.
25. Rights to Purchase and Other Rights and Obligations Related to Expiration of the Lease:

    A. With 120 days[-]notice, the airport can terminate the lease and pay 45 North Real Estate, LLC a sum equal to the appraised value of the vertical improvements. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.
    B. Upon Expiration of the lease, 45 North Real Estate, LLC has the right to remove the vertical improvements, or leave the improvements behind as determined by 45 North Real Estate, LLC. This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.

26. Environmental Indemnification: This does not favor ownership by either the airport or 45 North Real Estate, LLC.
27. Agreement in its Entirety: The 'lease' constitutes the entirety of the agreement between the parties. While this does not favor ownership by either the airport or 45 North Real Estate, LLC, it should be recognized as important in terms of whether the 'lease' can be considered a concession agreement where none of the traditional concession operation requirements are contained within the lease.
28. Miscellaneous Provisions: This does not favor ownership by either the airport or 45 North Real Estate, LLC.
29. Mortgage Financing: 'Lessor consents to Lessee placing a mortgage upon any improvements constructed by Lessee.' This indicates that the vertical improvements are owned by 45 North Real Estate, LLC.

In sum, **of the 29 provisions in the lease**, **4 favor ownership by the airport** . . . **13 do not favor ownership by either party** . . . **and 12 favor ownership by 45 North Real Estate, LLC** . . . .

Further, and as can be seen from the lease, while the operation of the property may be subject to a slew of conditions and rules, the conditions and rules **do not** make the state political subdivision (the airport) the owner of the property. In a lot of ways this is **no** different than the ownership interest a multi-family residential condo owner has in his/her property where the condo owner can sell the his/her unit, but the operation of the unit is subject to oversight by the condo association rules which can dictate what activities are permitted not only outside the unit, but inside as well, and arguably the condo association owns the land underlying land the unit. Even so, the existence of the rules does **not** make the Petitioner's property here, or a condo unit owner's property, open to the general public. And the existence of the rules also does **not** make the airport or condo association the owner of the property, or otherwise prevent 45 North Real Estate, LLC from mortgaging or selling its interest in the property.

As it relates to a claim of the existence of a concession agreement, Respondent believes the MTT should be asking the following questions:

1. Does the lease agreement require a particular use of the premises such that the lease itself constitutes a concession agreement? *Detroit v Tygard*, 381 Mich 271, 275 (1968). Where here, 45 North Real Estate, LLC's uses are limited to the demised premises instead of extended to the whole airport facility for the benefit of the general public, then why would the lease be considered a concession? Both of these questions should be answered in the negative because there is no concession agreement.
2. Is there exclusivity of use granted to 45 North Real Estate, LLC? In other words, is there any restriction which would prevent other property at the airport from being leased to another tenant for the same use employed by 45 North Real Estate, LLC? Both of these questions should be answered in the negative because there is no concession agreement.
3. Does the lease require 45 North Real Estate, LLC, to maintain specific services at specified times as a condition of the lease, e.g.[,] specific services and minimum hours during which services are available to the public? *Tygard, supra. at 275-276.* This question should be answered in the negative because there is no concession agreement.
4. **Do the services offered bear a reasonable relationship to the purposes of a public airport** - **what percentage of 45 North Real Estate, LLC's actual business is related to the storage and service of transient aircraft necessary for the operation of a public airport**? *Tygard, supra at 276.* This question should be answered in the negative because there is **no** transient aircraft service requirement and there is no concession agreement.

5. Does the lease agreement meet the 2(b) requirement of being available for use by the general public to qualify for exemption as a public concession? *See Skybolt P'ship v City of Flint*, 205 Mich App 597, 603 (1994). In *Skybolt*, the Court determined that subleased space was not available for use by the general public and therefore was not exempt. This question should be answered in the negative because of the existence of subleases which preclude use by the general public of the premises.

The answers to all of these questions favor that 45 North Real Estate, LLC is **not** operating an airport concession.

The City will be presenting one witness, its assessor Polly Cairns. Ms. Cairns will testify that that the vertical improvements have their own parcel i.d. numbers, and that according to historical records and her research the current owner of the vertical improvements is not an airport manager fixed base operator required to provide services to the general public, ownership of the vertical improvements transferred to Petitioner in 2017 as a part of an IRC Section 1031 tax-deferred real estate exchange and sale, and the current owner has mortgaged the vertical improvements. Further, it is expected that Ms. Cairns will testify that even if the MTT were to consider the vertical improvements to be owned by the governmental unit, there is a ground-lease which effectuated a transfer of ownership because the lease which was signed (with its options for renewal) exceeds 35 years. And further, it is expected she will testify that none of the activities at the property, which is occupied by several entities, constitute an open to the public airport concession.

At the conclusion of the hearing, it should be clear that the two parcels at issue do not meet the requirements to be tax exempt because they are not owned by a tax-exempt entity and are instead privately-owned, and further do not qualify as a concession where the property is not open to the general public and is otherwise sub-leased. While the City appreciates the ingenuity employed by the owner of the parcel to avoid paying property transfer taxes and property taxes, the Tribunal should no longer permit the Petitioner to skirt the law with respect to its tax obligations while at the same time clearly enjoying the rights afforded to an owner of property, and as such should uphold the non-tax-exempt status of the parcels.

Further, the Petitioner has not paid any property taxes for 2018 (not under appeal in this matter), 2019 or 2020 (also not under appeal). Respondent requests that the MTT not render an opinion in this matter until Petitioner has paid its taxes." [Emphasis added.]

Respondent also claims that:[17]

> "Petitioner incorrectly claims that its two parcels of property, which consist of buildings and improvements on leased land, should be exempt from property taxation. Firstly, **as evidenced by the fact that the buildings and improvements that are assessed have been sold and purchased by private parties**, the buildings and improvements are **not** owned by a political subdivision of the state such that they should enjoy tax exempt status pursuant to MCL 211.7m. Secondly, **there is no concession agreement or indication that a concession is being operated such that the property at issue should not be taxed under MCL 211.181 *et seq.* even if it could be argued that the airport owns the buildings and improvements on the leased land**. It should be further understood that an exemption under MCL 211.181 *et seq.* would only apply to the land which is subject to the lease, and not to the buildings and improvements which are clearly separately owned by Petitioner, and not owned by a political subdivision of the state, and separately assessable as commercial real property under MCL 211.34c(2)(b)(iv). **To add an additional wrinkle**, Respondent argues that pursuant to MCL 211.27a(6)(g), ownership of the land **should be considered to have transferred** to Petitioner due to the length of the land lease. According to p. 10 of R-11, the initial term of the land lease was 20 years, with an additional 20 years[']' optional extension. Tr. 114, L 22 – Tr. 115, L 2. Essentially, there is no true public entity ownership of either the buildings and improvements, or the underlying land subject to the land lease, and tax-exempt status was properly denied.
>
> As to the first issue, tax exemption under MCL 211. 7m, the vertical improvements (which consist of two hangars and related office space built on two parcels of land leased from the airport authority), are not owned by the airport authority **and have been sold** by a prior lessee (K. Stiner) of the land to the new lessee of the land (Petitioner). Petitioner's only witness Mr. Terfehr (who is the manager of all of the entities operating out of the subject property except for the entities that are private sub-lessees, Tr. 101, L 9-13), admitted numerous times that the improvements were purchased and now owned by Petitioner (for example Tr. 89, L 14-16), to the extent that Petitioner was able to mortgage the property for $695,000 (Tr. 110, L 3-6). When asked, 'Did 45 North Real Estate or any other entity purchase real estate at Cherry Capital . . . Airport?' by counsel for Petitioner, Mr. Terfehr responded, 'Did we purchase the facility? Yes, . . . and the lease of the land. I mean that was assigned over. We purchased the structures.' Tr. 137, L 16-22. **And according to paragraph 25 of the lease**, 45 North Real Estate North LLC is the owner of the improvements on the 2 parcels. Tr 159, L 3-5.

[17] See September 22, 2020 Closing Statement.

Mr. Terfehr further testified that he was involved in the purchase of the real estate, which is the subject of this appeal, and that it was, in fact, a purchase of real estate. Tr. 107, L 5-9. R-11 (2017 Transfer of Lease from Stiner to Petitioner) was recorded with the Register of Deeds, and a Real Estate Transfer Valuation Affidavit was filed with it. Tr. 112, L 9-19. In fact, R-11 also provides that it was part of a Section 1031 tax-deferred exchange for the assignor, K Stiner Enterprises, LLC. Tr. 112, L 22-25. Terfehr also testified that since buying the real estate, which is the subject of the appeal, **he has mortgaged it**. Tr. 109, L 22-24 – P 110, L 2. Mr. Terfehr agreed that generally in order to mortgage property you have to have an interest in the property. Tr. 100, L 7-9.

Additionally, under the terms of the lease, Section 14, Petitioner is required to pay all property taxes and assessments on the leasehold premises, has the ability to appeal and/or protest the same, and presumes Petitioner will be paying property taxes. Tr. 117, L 22 – Tr. 118, L 7. Terfehr agreed that the requirement to pay property taxes on the vertical improvements is an indication that his entity which is the signatory to the lease is the owner of the improvements. Tr. 120, L 7-12. Interestingly, if the airport terminates the lease before the lease expiration the airport is required to pay 45 North Real Estate LLC a sum equal to the appraised value of the improvements (Section 25 of the lease). Tr 121, L 12 – Tr 122, L 11. At the expiration of the lease, 45 North Real Estate LLC has the ability to take the improvements and relocate them. Tr 122, L 12-18. Clearly, both the airport and Mr. Terfehr consider Petitioner to be the owner of the buildings and improvements encompassed within the two parcels under appeal in this case. under MCL 211.7m because the subject property is not owned by a political subdivision of the State.

As to the second issue, whether Petitioner's occupation of the property constitutes a concession such that the buildings and improvements should not be taxed to Petitioner, Mr. Terfehr admitted that there was **no** concession agreement between the Petitioner and the airport. Tr. 111, L 5-7. Importantly, Mr. Terfehr agreed the is **no** separate concession agreement apart from what is contained within the lease, and the lease is the only written agreement there is with the airport, **and** the lease does **not** pertain to anything else going on at the airport other than the two parcels that are under appeal. Tr 123, L 15 – TR 124, L 3. For sake of discussion only which presumes Petitioner is able to overcome the separate ownership of the vertical improvements and that tax exempt status under MCL 211.181 only applies if the property proposed to be taxed is otherwise tax exempt (**and there is nothing which indicates that the buildings and improvements on the leased land are publicly owned such that they should be tax exempt to begin with**), the Tribunal should keep the following in mind:

1. There is **no** public access to the premises, and members of the general public have to be escorted at all times. Tr. 34, L 5–8. While Petitioner's facility is **not** open to the general public and visitors must be escorted at all times by someone with a security badge, at the Cherry Capital Airport main terminal, the main terminal is generally open to the public once they get past security. Tr. 98, L20 – Tr. 99, L 11. Further, there is nothing in the lease agreement which requires the subject property to be open to the public. Tr. 144, L 17-21.
2. According to Petitioner's witness, **more than 100% percent of the property is privately leased to the extent that Petitioner has to rent additional hangar space to accommodate all of its tenants** (Tr. 95. L 4 – 12. Also Tr. 136, L 1-14). Some space is occupied by sister companies to Petitioner[18] (Traverse City Helicopter - 5% of space (Tr. 92, L 1-9), Cherry Capital Flight – 10-15% (Tr. 92, L 20), 45 North Aviation – 60% (Tr 92, L. 21 – Tr. 93, L. 1) and not Petitioner itself. However, there are unrelated businesses and parties occupying the space, such as FedEx – 2500 s.f. or 15% (Tr. 61, L 10, Tr. 91, L 6-10, Tr. 92, L 11-12.), Evans Avionics – 10-15% (Tr. 75, L 2-4, Tr. 90, L 19-20, Tr. 91, L 1-3) (not purchased by Petitioner's parent company until July 2019, Tr. 56, L 14-16, P 59, with the prior existing lease still in place, Tr. 100, L 12-18), Jim Lill's aircraft – 1800 s.f. which is more than 10% (Tr. 84, L 5-6, Tr. 94, L 1-11), and Bustamonte – 988 s.f. (about 6%). Further, the D2 Industries and Cold Creek aircraft take up 20% of the space at the facility. Tr. 106, L 2-L14.
3. 45 North Real Estate, LLC is not necessary for the operation of the airport. Tr. 90, L 3-6.
4. **In addition to the entities located at Petitioner's premises**, **there are other entities located at the airport that engage in light aircraft maintenance**. Tr. 51, L 14 -19.
5. Flights would still be able to come in and out of Cherry Capital Airport if 45 North Real Estate did not own the real estate. Tr. 90, L 20-23.
6. **Petitioner does not provide fueling services**. Tr. 95, L 18-19, Tr. 102, L 10-16.
7. Petitioner agreed that whether operating at Cherry Capital Airport or a privately owned airport, if Petitioner were engaged in the same type of operations, that Petitioner would be subject to the same

[18] Respondent also indicated that "Mr. Terfehr agreed that 45 North Aviation and 45 North Real Estate were separate legal entities, and further stated that separate entities were created to shield liability. Tr. 99, L 25 – Tr. 100, L 4."

types of audits as have previously occurred. Tr. 97, L 15-22. The requirements of sections 8, 9 and 10 of the Minimum Standards to comply with federal, state[,] and local laws would apply to Petitioner's type of business regardless of the location of the business. TR. 116, 18 – Tr 117 L 4. While Respondent argued in its opening statement that these requirements leaned in favor of the airport owning the vertical improvements for purposes of an MCL 211.7m determination, based upon Terfehr's testimony this was wrong. According to him, no matter where his business was located, he would have been subject to the same rules due to the nature of his business.

8. **Mr. Terfehr has the authority to set the hours of operation for the premises** (Tr. 101, L 14-15) **and has not gotten approval from the airport for the hours that he operates**. Tr. 101, L 21-25. While Petitioner may be required to keep regular hours under its agreement with the airport, this type of condition is no different from conditions found in many leases, and notably is less stringent than many retail leases which require stores in a mall or strip center to be open during specific certain hours of the day, and specific days of the year. Because of this, any requirement as to hours should also not be considered proof of the airport's ownership of the vertical improvements for MCL 211.7m purposes.
9. Avflight is the Cherry Capital Airport Fixed Base Operator. Avflight provides fueling services. Tr. 95, L 13-17. **The only fixed base operator** (FBO) **at the airport is Avflight**. Tr 166, L 8-9. **This is important, because it is the fixed base operator at an airport that is generally considered a concessionaire because of the requirement to provide services and other measures typical of a concession agreement in which the fixed base operator is required to engage and specifically fueling services.** A review of the FBO requirements in Aviation Fueling Definition, R-2, Part III, Sec. 10 of the Minimum Standards, indicates that an entity that does engage in fueling services, and is therefore an[] FBO, is subject to substantial oversight set out over 4 pages of the Minimum Standards, while other services have much less. As testified to by Mr. Terfehr, while the prior lessor of the land lease, K. Stiner engaged in fueling services, that portion of the business was sold prior to the Petitioner be[ing] assigned the lease and purchasing the vertical improvements.
10. Mr. Terfehr agreed that according to the definition of fixed base operator contained within the Minimum Standards for Aeronautical Activities at the Cherry Capital Airport, the entities he manages do not meet the definition of fixed base operator. Tr. 103, L 12-18. Further, at Tr 170, L 19 – Tr 171, L 1, Petitioner stipulated that it was not a fixed base operator. In other words, **there is no**

requirement in the agreement Petitioner has with the airport that Petitioner provide any services to anyone, at any time, under any circumstances. Petitioner is **not** a concessionaire. **This of course ignores the fact that a real estate holding company is the Petitioner, and the Petitioner itself does not engage in any airport related activities other than subleasing space**. That said, and even if the activities of the sister companies to Petitioner are taken into account, **there was no evidence presented of any type of concession agreement between any of the sister companies and the airport**. Even as to the sister companies.

11. While Terfehr previously testified **there was no evidence of a requirement to provide any services to anyone, at any time, under any circumstances** that all of his rates for the entities he managed were posted on his website, he then testified his prior testimony was incorrect and that not all of rates actually were posted on the website. Tr. 105, L 5-20. Meaning, even the rates he charges the public are not publicly available.
12. The specific agreement Petitioner has with the airport is a lease agreement. Tr. 106, L 1517. The lease agreement does **not** require that: 1) The property subject to the lease be open during specific hours; or 2) Petitioner provide services to the general public. Tr. 106, L18-24.
13. The Petitioner, 45 North Real Estate, LLC is a for-profit business which is not exempt from federal taxation. Tr. 106, L 25 – Tr. 107, 4.
14. Petitioner stipulated that the subleases at the property were entered into **without approval** from the airport **and approval** from the airport for a sublease **has never been obtained**. Tr. 114, L 11-21.
15. Section 3 of the lease provides for the lease of 62,200 square feet which is the size of the land, and not the buildings, and the rental rate of $.22 psf is based upon the square footage of the land[] and is not any way related to the size of the buildings or improvements on the land. Tr. 115, L 3-12. The lease with the airport was based upon the size of the land. Tr 155, L 21 – Tr 157, L 7.
16. **Terfehr agreed that the airport has let out other space at the airport to other operators similar to himself that provide service and maintenance for airplanes, and that he is not an exclusive purveyor of maintenance and operation of aircraft at the airport**. Tr. 124, L 4-12.
17. Ms. Cairns, the City's assessor, has been unable to locate a concession agreement between the Northwestern Regional Airport Commission and Petitioner, and to her knowledge, there is **no** agreement requiring Petitioner to provide specific services at specific times. Tr. 162, L 14-21.

18. **Even if Petitioner were considered to be a concessionaire, the portions of the property subleased to other entities should not be tax exempt because they are being used for a private use, not a public use**. TR. 164, L 18 -24.

In conclusion, based upon the legal framework and argument set forth in Respondent's Opening Statement, and the evidence admitted and the testimony heard at trial, it should be clear that the two parcels at issue do **not** meet the requirements to be tax exempt **because** they are **not** owned by a tax-exempt entity and **are instead** privately-owned, **and** further do **not** qualify as a concession **where there is no concession agreement, the property is not open to the general public and is otherwise sub-leased**. While the City appreciates the ingenuity employed by the owner of the parcel to avoid paying property transfer taxes and property taxes, the Tribunal should no longer permit the Petitioner to skirt the law with respect to its tax obligations while at the same time clearly enjoying the rights afforded to an owner of property, and as such should uphold the non-tax-exempt status of the parcels.

Further, the Petitioner has not paid any property taxes for 2019 or 2020. Tr. 159, L 6-9. Respondent requests that the MTT not render an opinion in this matter until Petitioner has paid its taxes." [Emphasis added.]

As a starting point, it is undisputed that the underlying land leased to Petitioner is owned by the NRAC whose members consist solely of Grand Traverse and Leelanau Counties, that the NRAC was formed by the Counties to have "jurisdiction and control" over the Cherry Capital Airport, and that the Airport serves a public purpose (i.e., public airport).[19] It is also undisputed that the leased land upon which the subject properties (i.e., hangars) are located could be subject to taxation under MCL 211.181(1), but not under MCL 211.7m given the NRAC's ownership of the land and the public purpose for which the land is utilized. In that regard, the construction and use of hangars on leased land has also been found to be "merely incidental to the main purpose" of an airport and "in keeping with the general purpose of the airport," as it "tends to increase the value to

[19] Although the parties' arguments relate to both the land and the hangars, the only property or, more appropriately, properties at issue are the hangars. In that regard, Respondent's purported "additional wrinkle" is **misleading and erroneous**, as MCL 211.27a(6)(g) relates to a transfer of ownership for uncapping purposes only.

the public of the facilities thereof."[20] As such, the only outstanding issues relate to who owns the hangars, Petitioner or the NRAC, and the commercial use of those hangars, if owned by the NRAC and leased to Petitioner for commercial use.

In that regard, MCL 211.8 provides, in pertinent part:

> For the purposes of taxation, personal property includes all of the following . . . .
>
> (d) For taxes levied before January 1, 2003, buildings and improvements located upon leased real property, except if the value of the real property is also assessed to the lessee or owner of those buildings and improvements. **For taxes levied after December 31, 2002, buildings and improvements located upon leased real property**, except buildings and improvements exempt under section 9f or improvements assessable under subdivision (h), **shall be assessed as real property** under section 2 **to the owner of the buildings or improvements** in the local tax collecting unit in which the buildings or improvements are located if the value of the buildings or improvements is not otherwise included in the assessment of the real property. For taxes levied after December 31, 2001, buildings and improvements exempt under section 9f or improvements assessable under subdivision (h) and located on leased real property shall be assessed as personal property . . . .[21]
>
> (h) During the tenancy of a lessee, leasehold improvements and structures installed and constructed on real property by the lessee, **provided and to the extent** the improvements or structures **add** to the true cash taxable value of the real property notwithstanding that the real property is encumbered by a lease agreement, **and the value added** by the improvements or structures is **not** otherwise included in the assessment of the real property or not otherwise assessable under subdivision (j). The cost of leasehold improvements and structures on real property shall not be the sole indicator of value. **Leasehold**

[20] See *Rockwell Spring and Axel Company v Romulus Township*, 365 Mich 632, 643; 114 NW2d 166 (1962). The Michigan Supreme Court also stated, in *Rockwell Spring* on p 643, "[t]he airport is a unit, and it would scarcely be feasible to separate the space therein contained for purposes of taxation." Although *Detroit Museum of Art*, 187 Mich 432; 153 NW 700 (1915) was cited in prior Small Claims cases in support of the contention that the use of buildings or hangars on a public airport does not support the public purpose required for the exemption, the public purpose discussion in *Detroit Museum* appears to be contained in the dissent and relates to the formation of a private corporation for the public exhibition of the corporation's collection of works of art. However, the *Rockwell Springs* case relates to hangars and is, given the circumstances of this case, better law. Further, the evidence provided indicates that Petitioner's use of the buildings or hangars for maintenance of aircraft provides a service to the airport.

[21] MCL 211.9(f) has no applicability to the instant case as that statute or subdivision thereof relates to the exemption of new personal property "owned or leased by an eligible business."

> **improvements and structures assessed under this subdivision shall be assessed to the lessee** . . . .
>
> (j) **To the extent not assessed as real property**, a leasehold estate of a lessee created by the difference between the income that would be received by the lessor from the lessee on the basis of the present economic income of the property as defined and allowed by section 27(5), minus the actual value to the lessor under the lease. This subdivision does not apply to property if subject to a lease entered into before January 1, 1984 for which the terms of the lease governing the rental rate or the tax liability have not been renegotiated after December 31, 1983. This subdivision does not apply to a nonprofit housing cooperative. As used in this subdivision, "nonprofit cooperative housing corporation" means a nonprofit cooperative housing corporation that is engaged in providing housing services to its stockholders and members and that does not pay dividends or interest upon stock or membership investment but that does distribute all earnings to its stockholders or members . . . . [Emphasis added.]

As such, the hangars are real property and assessable to the owner of the hangars.[22]

The issue of ownership in such situations has been addressed in a variety of tax cases and the courts have focused on who retained the majority of the "bundle of sticks" generally associated with property ownership based on the amount of control exerted over the "building or improvements" (i.e., hangars) under the lease (i.e., "ultimate" or "overall" control).[23] In that regard, the Wisconsin Supreme Court stated in *Mitchell Aero, Inc v City of Milwaukee*, a case cited and distinguished by the Michigan Court of Appeals in *Air Flite*:[24]

---

[22] Although not raised in this case, a preliminary issue in such cases has been whether such hangars are taxable as personal property and the courts have held that hangars are real property because under "[b]oth common law and by statute, buildings placed upon real property become part of the real property." See *Air Flite*, *supra* at p 77.

[23] In addition to the above-noted case (i.e., *Rockwell*), see *Skybolt*, *supra* at p 600 (i.e., "the city exerted ultimate control over the property and Skybolt's rights as lessee were strictly limited"), *Golf Concepts*, supra at p 33 (i.e., "*Skybolt* is distinguishable . . . because petitioner's rights as a lessee are not strictly limited"), *Air Flite*, *supra* at pp 77-78 (i.e., "the lessor was given the bulk of the rights of ownership"), *Service System Associates*, supra (i.e., "the tribunal determined that the clear terms of the agreement demonstrated that the City of Detroit owned the property, including the equipment, buildings and building improvements"), and *Brasseur v Rutland Charter Township*, MTT Docket No. 292326 (February 5, 2004). (i.e., "[t]he interpretation of MCL 211.7m and the applicable case law by the Michigan Courts make it clear that buildings built upon publicly owned property and leased to the builder are tax exempt").

[24] See *Mitchell Aero, Inc v Milwaukee*, 42 Wis 2d 656; 168 NW2d 183 (1969). In distinguishing *Mitchell Aero*, the Court of Appeals stated in *Air Flite*, *supra* at p 78:

> Ownership is often referred to in legal philosophy as a bundle of sticks or rights and one or more of the sticks may be separated from the bundle and the bundle will still be considered ownership. **What combination of rights less than the whole bundle will constitute ownership is a question which must be determined in each case in the context of the purpose of the determination**. [Emphasis added.]

Although distinguished, the decision in *Mitchell Aero* correctly indicates that the leases must be reviewed to determine what sticks are held by the lessor and the lessee under each lease.

In that regard, the instant lease was considered in MTT Docket Nos. 15-007015 and 15-007020 and found to support a determination that the NRAC was the "ultimate" owner of the properties issue and not Petitioner.[25] Nevertheless, Respondent once again claims that Petitioner "owns the vertical improvements [i.e., hangars], as evidenced by Petitioner's ability to purchase and mortgage the improvements." Said claim may, however, be the result of the Tribunal's failure to properly articulate the applicability of the doctrine of *collateral estoppel* in this case. More specifically, the Tribunal in its July 8, 2020 Order denying Petitioner's June 3, 2020 Motion for Summary Disposition indicated that the properties' exempt status "could not have been 'actually and necessarily determined' in the earlier adjudication or 'prior proceeding'" because said determination was dependent on facts that would not have existed at the time of the earlier adjudication or prior proceedings (i.e., whether the present commercial use of

---

> Though factually similar in some respects, **the lease terms** there in other respects **were totally different than those in the case before us**. No rent was charged for the space in the hangar which the lessee agreed to build, there was no provision for periodic increases in rent, and **the lease included an amortization formula which assured the lessee of recovery of its investment**. It is not surprising, therefore, that the majority opinion concluded that the arrangement was not a bona fide conveyance of buildings to the airport, but was "a hybrid arrangement, possibly to obtain both a tax exemption and the amortization of the cost of the buildings." 42 Wis2d 665; 168 NW2d 183. Also, the opinion was not unanimous. **A strong dissenting opinion found "only one stick" of the bundle of ownership sticks left with the lessee**. [Emphasis added.]

[25] See the Proposed Opinion and Judgment ("POJ") issued by the Tribunal in MTT Docket Nos. 15-007015 and 15-007020 on July 10, 2017. Further, the Tribunal issued a Final Opinion and Judgment ("FOJ") in those cases on August 14, 2017, adopting the POJ **and the FOJ constitutes a final decision**, as it was not appealed to the Michigan Court of Appeals. See MCL 205.752 and 205.753(1).

the hangars qualifies as a concession).[26] Said Order did, however, fail to address the resolution of the ownership issue, which was not dependent on new facts but, rather, "actually and necessarily determined" in the earlier adjudication or prior proceeding and Petitioner's privity with the petitioner in those cases (i.e., K Stiner Enterprises).[27] That failure does, unfortunately, justify a re-visiting of the lease and Respondent's claims regarding the lease to further demonstrate the NRAC's ownership of the hangars.

With respect to said re-visiting, the March 18, 2014 Amended and Restated Airport Ground Lease ("Lease") provides for the leasing of "certain premises at the Cherry Capital Airport . . . . for the following purposes only, and for no other purpose whatsoever, **unless agreed** to in writing **by the Lessor**: carrying on an aircraft

---

[26] See *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006), which provides, in pertinent part:

> Collateral estoppel bars relitigation of an issue in a new action arising **between the same parties or their privies** when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. See *People v Gates,* 434 Mich 146, 154; 452 NW2d 627 (1990); 1 Restatement Judgments, 2d, § 27, p 250. The doctrine bars relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action. *Arim v Gen Motors Corp,* 206 Mich App 178, 195; 520 NW2d 695 (1994). A decision is final when all appeals have been exhausted or when the time available for an appeal has passed. See *Cantwell v City of Southfield* (*After Remand*), 105 Mich App 425, 429-430; 306 NW2d 538 (1981). [Emphasis added.]

See also *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003) and *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971), which provides, in pertinent part:

> " . . . . **A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase**. See cases cited in 2 Black, Judgments, 2d Ed, sec 549; 35 Yale LJ 607, 608; 34 CJ 973, 1010, 1012; 15 RCL 1016. **The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him**. See cases cited in 2 Black, Judgments, 2d Ed, sec 534, 548; 1 Freeman, Judgments, 5th Ed, sec 428; 35 Yale LJ 607, 608; 34 CJ 988; 15 RCL 956." [Emphasis added.]

[27] There is no question that Respondent was a party to the earlier adjudication or prior proceeding and had "a full and fair opportunity to litigate" the ownership issue in that adjudication or proceeding. Rather, the only issue would be whether Petitioner is in privity with K Stiner Enterprises. In that regard, Petitioner purchased the property from K Stiner and is subject to the same lease, which was assigned from K Stiner Enterprises to Petitioner, as consented to by the NRAC. See R-11. See also R-17 relative to the assignment of the Lease to the Independent Bank as collateral for the promissory note or mortgage. Further, Petitioner would have been bound by a determination that K Stiner Enterprises was the owner of the hangars under the same lease.

maintenance business, including aircraft sales, aircraft charter, aircraft rental, flight instruction, and other general aviation activities **as may be approved** in writing **by the Lessor**, **all of which are subject to** certain rights, licenses, and privileges, together with any other purposes related to aviation **which is otherwise approved** in writing **by the Lessor**, to be located on the leasehold premises described herein."[28] [Emphasis added.] The Lease also provides, among other things:[29]

i. for a lease term of 20 years with an option to extend for an additional 20-year period **provided certain identified conditions have been met** by Lessee;
ii. for the payment of annual rent to be **adjusted** by cost-of-living increases every two years during the term of the lease **and revised** to cover the airport's required expenditure of additional funds for security, safety equipment, public safety, public health, etc.;[30]
iii. "[t]he aviation business as operated pursuant to this Lease **shall meet all requirements** contained in 'Minimum Standards for Aeronautical Activities for the Cherry Capital Airport' as contained in Ordinance Policy 12-1, and as amended ('Minimum Standards')";[31]

---

[28] See R-17. Further, the Lease also identifies the leasehold premises as Parcel 1 and 2 with diagrams of the parcels attached to the Lease as "Exhibit A 1 and 2." See R-17. the Lease also provides, in pertinent part:

> "Further, Lessee shall have the privilege of using for the term of this Lease, or any extension thereof, in common with others and the public, the Cherry Capital Airport, subject to the charges, rules, and regulations governing such airport issued by the Federal and State Aeronautical Agencies and by the local governing authority, it being expressly understood that this privilege covers the entire period of the Lease and extensions thereof as hereinafter set forth."

Finally, the leased premises could not, as a practical matter, be utilized for the identified purposes without the existence of the constructed hangars.

[29] The Lease dictates the form of any sublease and provides, in pertinent part:

> Any such sublease is an accommodation to Lessee's multiple lease agreements with the NRAC, the combination of which provide Lessee with control over sufficient contiguous premises at the Cherry Capital Airport **in which to conduct multiple aviation related businesses consistent with Minimum Standards** as herein defined. [Emphasis added.]

[30] Although the rental increases are automatic, the rental revisions are the result of required expenditures "in excess of available State and Federal funding" and the Lessee has a right to terminate the Lease "after the imposition" of any such revision. See also *Air Flite*, *supra* at p 77.

[31] In that regard, the Lease also provides, in pertinent part:

> "The Lessee **agrees to restrict** activities conducted on the leasehold to **only** those uses permitted under this Lease, **and** in accordance with the Minimum Standards. At the commencement of the term of this Lease, Lessee **shall provide** Lessor with written

iv. "[**n**]**o** portion of the leased premises **shall be used** in a manner or for a purpose **which, in the opinion of the Lessor**, **may interfere with** the proper use of the airport by others **or which violates** written rules, regulations, policies, and minimum standards of the Lessor or other competent authority or agency";
v. Lessee may, with prior written approval, "improve" the leasehold premises;[32]
vi. Lessee shall, "at its own expense . . . keep the said premises in a **neat and orderly appearance**";
vii. Lessor has "the right to **enter** upon" and **inspect** the leasehold premises "at all reasonable times **during business hours** . . . **or** for the purpose of making changes or alterations required by any existing or subsequent law";
viii. Lessee "agrees to comply with all required provisions of the Federal Aviation Act" and "sponsor assurances" (i.e., agreements between the NRAC and the Federal Aviation Administration relating to obligations undertaken by the NRAC resulting from the receipt of federal aid for the development of the airport);[33]

---

notice of all activities authorized as referenced herein which Lessee conducts upon the leasehold premises[] **and shall provide** Lessor with **verification of all necessary certification to conduct such uses**, including verification that such activities are properly insured as otherwise required under the terms of this [L]ease." [Emphasis added.]

[32] With respect to construction of improvements, the Lease also provides, among other things:

a. "Lessor agrees that at the expiration of this lease or any renewal thereof, Lessee **may**, within a reasonable time **remove** any and all buildings, structures, or other improvements placed or erected on said premises by the Lessee during the term thereof or any renewal thereof, **and all expenses connected with such removal shall be borne by Lessee**";
b. "any agreements between Lessee and contractor shall require that the contractor provide a lien free completion of construction";
c. "Lessee shall further cause a construction contract, financing arrangements, bonds and other documents to authorize Lessor the right to pursue the construction project to completion in the event of a default of Lessee, which construction completion performed by Lessor shall be at Lessee's sole expense";
d. "[i]f the Lessee makes any improvements without the Lessor's approval, then Lessor may, at its option, in addition to any other remedies which may be available to it, give written notice to Lessee to remove the same or, at the option of the Lessor, cause the same to be changed to the satisfaction of the Lessor"; and,
e. "[**n**]**o** temporary structures shall be erected or placed upon the leasehold premises **without** the express written approval of the Lessor" and any permitted temporary structure "**shall** meet the requirements of **all applicable** ordinances, regulations, and **standards of the** . . . **[NRAC]** and the City of Traverse City." [Emphasis added.]

[33] The Lease also provides that "Lessee further **agrees** that all federal, state and local laws **will be observed**, **including** the rules and regulations of the federal, state and local aeronautical authorities and **the policies, regulations, and minimum standards of the local governing airport commission**" (i.e., the NRAC). [Emphasis added.]

ix. limitations on the painting, posting, or display of signs and advertising without Lessor's prior consent;

x. "[t]he Lessor **shall have the right to complain** to the Lessee **as to the demeanor, conduct and appearance of the Lessee's employees, invitees and those doing business with it**, whereupon the Lessee **will take all steps necessary to remove the cause of the complaint**";

xi. "[t]he Lessor reserves the right to further develop and improve the landing are and/or facilities of the Cherry Capital Airport, including the premises herein demised, **regardless of the desires or views of the Lessee in this regard, without interference or hindrances and free from any liability to the Lessee**";

xii. Lessee is required to maintain and "furnish evidence" of insurance with the NRAC named as an additional insured and liability limits as determined by the NRAC;

xiii. a reservation of the "right of flight for the passage of aircraft in the airspace above the surface of the premises herein leased";

xiv. a **limitation** on the storage of "any and all flammable liquids or other hazardous materials" on the leasehold premises;

xv. Lessee agrees "that it will **not** make use of the leased premises in any manner which might interfere with the landing and taking off of aircraft from the airport or otherwise constitute a hazard" and that the NRAC has "the right to enter upon the premises" to abate said interference or hazard at the Lessee's expense;

xvi. a **prohibition** on the storing of equipment outside of any existing structure on the leasehold premises **without** the express written approval of the Lessee";

xvii. "if Lessee has control of an area accessing the air operations or an otherwise restricted area of the airport as designated in the Cherry Capital Security Plan, the Lessee shall be responsible for enforcement of all security measures imposed for said access point";

xviii. **the improvements become the property of the NRAC upon termination, cancellation, or forfeiture of the Lease due to Lessee's default, breach, insolvency, bankruptcy, or receivership**;[34]

xix. "[**n**]**o** rubbish, waste material, garbage or other trash shall be placed or stored on the premises **in other than approved containers**";

xx. Lessor **may terminate** the lease **at any time and acquire** the improvements **by paying** the Lessee the **market value** of the improvements determined under the lease **as adjusted "by an anticipated term of years equal to the then determined useful life of**

[34] A default under the Lease includes, but is not limited to, a failure to pay rent when due; **a failure to perform any of the terms and conditions under the Lease**, other than the payment of rent; and an attempted transfer of the Lease without receiving the NRAC's prior consent. [Emphasis added.] In that regard, the Lease also provides that "[a]ny transfer of corporate control or of fifty percent (50%) or more of the outstanding voting equity ownership of the Lessee **shall be construed** to be an assignment of this lease." [Emphasis added.]

> **the improvements, or a term of twenty (20) years, whichever is less**." [Emphasis added.]

Although, the Lease does provide Petitioner with the right to possess the hangars and dispose of them through both sale (i.e., re-assignment of the lease) and removal, said disposal is limited as the re-assignment must be approved by the Lessor or, more specifically, the NRAC and the removal of the hangars is, as indicated in MTT Docket Nos. 15-007015 and 15-007020, impractical and unlikely given the cost associated with such removal.[35] In that regard, the Lease also provides that the hangars become the NRAC's property upon termination of the Lease due to default, breach, and insolvency and that the NRAC can purchase the hangars upon the Lease's termination for any other reason or expiration.[36] The purchase price, as determined through an appraisal process dictated by the Lease, would, however, be discounted by the hangars' useful life or remaining lease term, whichever is less.[37] As such, Petitioner may, despite Respondent's claims, have "only one stick in the bundle of ownership sticks."[38]

With respect to the control issue, the items listed above do address control over the hangar by the NRAC. The majority of that control does, however, appear to relate more to airport operations than ownership of the hangars.[39] Nevertheless, those items have been found to constitute sticks within the bundle of sticks and must be treated as such. In that regard, the Tribunal in *Brasseur* stated, in pertinent part:

---

[35] Sub-leasing is also strictly controlled by the Lease and Minimum Standards.
[36] See also the Minimum Standards, Section 6 (Construction and Site Development Standards) on p 6.
[37] The purchase price on expiration of the Lease would be $0.00. As for other payments based on the remaining useful life or the remaining lease term, said payments would be "equitable" in nature to "assure that . . . [the NRAC} would not realize a windfall by the early termination of the lease." See *Air Flite*, *supra* at pp 77-8.
[38] See *Eastbrook Homes, Inc v Treasury Dep't*, 296 Mich App 336, 348; 820 NW2d 242 (2012) (i.e., "'[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property....'") and *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 57-59; 602 NW2d 215 (1999) (i.e., "which is usually understood to include '[t]he exclusive right of possessing, enjoying, and disposing of a thing'").
[39] The *Mitchell Aero* court provided at p 665:

> Under this lease arrangement, some of the rights usually associated with ownership are in Aero and others are in the county . . . . Such control the county keeps over these hangars is **not** indicative of true ownership **but concerns the operation of the airport**. [Emphasis added.]

To determine control of the hangars we must look to the terms of the lease. Respondent relies heavily on *Mitchell Aero* as persuasive case law in this dispute and cites several analogous factors in both Petitioner's lease and *Mitchell Aero's* lease. Respondent argues that **Petitioner does not pay rent** for the use of the hangar**, nor is he subject to rent increases**, **but he is responsible for upkeep and maintenance**. Additionally, Respondent argues that the **lessor does not control improvements** made to the hangars[] **or retain the right to increase insurance coverage**. Finally, Respondent argues that **Petitioner receives payment if the property was condemned**, and finally that **Petitioner has a full 30 years to recoup his investment for the two hangars**, which provides the ability to amortize and recover his investment in the property. Respondent reasons that these factors provide Petitioner with virtually unlimited control over the hangars, and as such, Petitioner should be taxed accordingly.

In contrast, Petitioner argues when the "bundle of sticks" analogy is applied, the ownership of the hangar is vested in the Airport Authority because **the lessor retained strict control over the plans and specifications for the hangars prior to them being built**. Further, **the lessees do have the full right and authority to sub-lease the hangars**; **they may not assign or transfer** their lease **without the written consent of the lessor**. The **rent** for the hangars **was paid** to the Airport **through the construction costs of the building**. Additionally, **the lease limits the use of the premises for the construction, maintenance, and operation of airplane hangars and the storage of airplanes**. Also, **the lessor airport can take any actions it considers necessary to protect aerial approaches of the Airport against obstruction[] and can prevent the hangar lessees from erecting or permitting to be erected any building or other structure on the Airport that would constitute a hazard to the aircraft**. Finally, **the lease requires the lessees to "yield and deliver up" the hangars at the expiration of the 30-year lease term**.

The Michigan Court of Appeals held in *Air-Flite* that an airplane hangar constructed by a lessee pursuant to a lease was real property owned by the lessor airport commission based on the lessor having **the overall right to control** the subject property. *Air-Flite*, 134 Mich App 73. Therefore, **in applying the *Air-Flite* rule to the instant case, the airplane hangar built by the lessee Petitioner pursuant to a lease agreement with the Airport Authority becomes real property with ownership ultimately vesting with the Airport Authority**. [Emphasis added.]

Although the instant case is, as indicated in the prior case, more similar to *Air-Flite* than *Brasseur,* the control exercised or potentially exercised by the NRAC is, as detailed above, sufficient to support a conclusion that the NRAC has the "bulk" of sticks or, more specifically, overall control over the hangar and is the "ultimate" owner of the property at issue and not Petitioner.[40] As a result, the hangars are, contrary to Respondent's contentions and Mr. Terfehr's mistaken testimony regarding Petitioner's purported ownership of the hangars, owned by the NRAC and the properties are exempt from taxation under MCL 211.7m, which is also consistent with the holding in the case cited by Respondent (i.e., MOAHR Docket Nos. 15-006902 and 16-000025), which provided, in pertinent part:

> In reviewing each provision above, **control of the building, its operation, and the operations allowed inside the building are clearly in the hands of the lessor**. As each right to control may be considered metaphorically a stick, **it is obvious that most of the sticks of ownership are clearly in the lessor's pile**. Accordingly, **lessor is the owner of the improvements**, which are exempt under MCL 211.7m, and the property is therefore exempt from ad valorem property tax.
>
> [Emphasis added.]

As also indicated in Respondent's cited case, "[o]ur inquiry . . . does not end with this holding," as the Tribunal is now required to determine whether the hangars or, more appropriately, the commercial use of the hangars qualifies as a concession. In that regard, Respondent contends that the hangars are not used as a concession, as the Lease is admittedly the only agreement between the parties and "the Lease does not

---

[40] Unlike the *Brasseur* case, Petitioner in this case pays rent that is subject to increases. Further, the lessor in this case controls improvements and retains the right to increase insurance coverage. As for the disposition of the hangars, Petitioner in this case is also required to "yield and deliver up" the hangars upon the expiration of the lease. Although the Lease in this case, unlike the *Brasseur* case, provides for the purchase of the hangars upon termination of the Lease, the purchase price upon expiration would be $0.00, as indicated herein, resulting in same "yielding" and "delivery" of the hangars.

With respect to Respondent's contentions relating to the mortgaging of the hangars and the payment of taxes, the mortgage or promissory note resulted in a re-assignment of the lease for collateral purposes and the payment of taxes under a long-term lease, with or without an option to buy, is generally responsibility of the lessee and not the lessor.

pertain to anything else going on at the airport other than the two parcels under appeal."[41] Respondent also contends, as supported by Mr. Terfehr's testimony, that "more than 100% percent of the property is privately leased to the extent that Petitioner has to rent additional hangar space to accommodate all of its tenants."[42] Respondent further contends, as also supported by Mr. Terfehr's testimony, that (i) Petitioner does not engage in fueling services, (ii) Petitioner is not an exclusive purveyor of aircraft maintenance, as there are other businesses similar to Petitioner that provide aircraft maintenance services, and (iii) Petitioner is not a fixed base operator for the airport.[43]

In addressing those contentions, the first level of review must relate to whether all of the services provided are "services customarily and needfully required at airports"[44] and said review was **not**, unfortunately, properly done by this Judge in the prior case. Nevertheless, aircraft maintenance, which is a service provided by 45 North Aviation (i.e., a controlled subtenant), and aircraft radio maintenance, which is a service provided by Evans Avionics (i.e., a prior sub-lessee and current controlled sub-tenant), are not only "customarily" provided by airports, but also essential to the operation of an airport. As for the other services provided by Petitioner, its controlled subtenants (i.e., aircraft charters, aircraft rental, aircraft tours, aerial power and gas line "patrol," aerial photography and video, aircraft management, flight instruction, aerial signs, aircraft "merchandise," aircraft load transport, and airshows),[45] such services are consistent with the "development of aeronautics" and provide "convenience and comfort of air travelers" and may, to some extent, be customary.[46] Said services are **not**, however, essential or, more appropriately, "needful" for the operation of an airport. Further, Petitioner also provides through its controlled sub-tenants hangar space rental and this Judge **failed once again** to properly consider such hangar space rental in the prior

[41] See Tr. 111.
[42] See Tr. 90-93.
[43] See Tr. at 51 and 102-103.
[44] See *Tygard*, *supra* at pp 276-7. In that regard, the former "exclusivity" requirement for such services was ultimately removed by amendment. See also *Aero Realty Corp v Clinton County*, 73 Mich App 102, 104-6; 250 NW2d 559 (1976) and *Avis Rent-A-Car Sys, Inc v City of Romulus*, 65 Mich App 119; 129-30; 237 NW2d 209 (1975), *aff'd sub nom Avis Rent-A-Car Sys, Inc v Romulus Community Schools*, 400 Mich 337; 254 NW2d 555 (1977).
[45] See Tr. at 29.
[46] See *Avis Rent-A-Car Sys, Inc*, *supra* at p 124.

case. In that regard, the Court of Appeal in *Skybolt*, *supra*, found at 603, as correctly indicated by Respondent, that:

> . . . the tribunal failed to give adequate consideration to the requirement that the facilities be available to the general public in order to qualify for the concession exemption. It is undisputed that the portions of hangars 1 and 2 subleased to Simmons were used by that airline solely for the maintenance of its aircraft. **Unlike the hangar space reserved for Skybolt's operation**, the Simmons hangar area was **not** available for use by the public. Under these circumstances, we must conclude that Skybolt failed to meet the second requirement of the concession exemption with regard to the Simmons hangar area. Accordingly, we reverse the decision of the Tax Tribunal to the extent that it held that the portions of hangars 1 and 2 subleased by Skybolt to Simmons were exempt from the lessee-user tax under MCL § 211.181(2)(b) . . . . [Emphasis added.]

Although Petitioner argues that the 2,500 square foot space sublet to FedEx was not a fixed location and, as such, is distinguishable from the above-noted reserved hangar space in *Skybolt*, said space, although unfixed, was still dedicated to the use of FedEx and ultimately unavailable to the general public, which is likely why Petitioner's sub-tenants were required to rent space from other hangars to store additional aircraft.[47]

As for the standards and oversight applicable to those services, the Lease requires Petitioner to "control" the premises and **reserves** to the NRAC the right to inspect and enforce compliance with the Lease and Minimum Standards. Petitioner, its controlled subtenants, and sub-lessee, albeit prior sub-lessee, are also required under their separate leases and the Minimum Standards to "employ trained personnel in such numbers as are required to meet the applicable Minimum Standards set forth herein in an efficient manner for each aeronautical activity or service being performed"; "provide a responsible person to supervise the operations in any leased area and on the Airport, with authorization to represent and act for and on behalf of the Operator during all business hours"; and "provide . . . [the NRAC] with a roster of qualified personnel who are available after normal business hours to respond to emergency situations involving . . . [the hangars'] activities." Petitioner, its controlled subtenants, and other sub-lessees

[47] See Tr. 81-83, 106, and 135.

are further required to "control the conduct, demeanor, and appearance of its employees"; "train its employees and ensure that they possess such technical qualifications and hold the required certificates, permits, licenses, and ratings to conduct . . . [the hangars'] business activities on the Airport"; and "maintain close supervision over its employees to assure a high standard of service to . . . [the hangars'] customers." In that regard, the leases require Petitioner, its controlled subtenants, and other sub-lessees to provide the NRAC "[a]t the commencement of the term of this Lease . . . with written notice of all activities authorized . . . which Lessee conducts upon the Leasehold premises, **and . . . with verification of all necessary certification to conduct such uses**" and reserve to the NRAC the "right to complain" to Petitioner, its controlled subtenants, and other sub-lessees "as to the demeanor, conduct and appearance of the Lessee's employees, invitees and those doing business with it, whereupon the Lessee **shall** take all steps **necessary to remove** the cause of the complaint." [Emphasis added.] The Minimum Standards also provide, among other things, that:

i. "[t]hese Standards shall establish the minimum requirements to be met as a condition for person conducting or proposing to conduct aeronautical activities on the Cherry Capital Airport";
ii. the NRAC's "goal in adopting these Standards is **to encourage the development of quality aeronautical services and** to **make the airport available for aeronautical activities on fair and reasonable terms without unjust discrimination** in accordance with FAA Grant Assurances";
iii. an aeronautical activity or service is "any activity which involves, makes possible, or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations";
iv. "[t]he such right or privilege, however, shall **not** be construed in any manner as affording the Operator any exclusive or continuing right of use of the premises or facilities of the Airport, other than those premises which may be leased exclusively to the Operator for the term of the lease, and then **only to the extent provided in the written agreement**";
v. the NRAC "reserves the right to lease an existing facility or any portion of an existing facility to a specialized aviation service operator in order to maximize facility use and business opportunities . . . at [the NRAC's] sole discretion . . .";

vi. the NRAC reserves the right to designate from time to time the specific areas where individual aeronautical services or a combination of aeronautical services may be conducted, **and to determine whether or not there is sufficient, appropriate, or adequate space at the proposed site to meet the minimum requirements established herein**";

vii. "[w]ith regard to an existing lease or concession agreement, all conditions **not** meeting these Minimum Standards shall be considered nonconforming";

viii. "[a]ll improvements constructed on the Airport, other than trade fixtures, **shall become part of the land and belong to** . . . [**the NRAC**] upon expiration, termination, or cancellation of the lease agreement between the Operator and . . . [the NRAC] covering such improvements, **except as otherwise specifically negotiated in lease agreements between Operator and** . . . [**the NRAC**]";

ix. "[c]ross-utilization of personnel between aeronautical services **may be permitted to the extent that** personnel qualifications and licensing requirements and the applicable operating hours of these Standards are met";

x. "Operator shall permit . . . [the NRAC] to enter upon its leased premises at any reasonable time **for any purpose necessary, incidental to, or connected with** the Operator's performance of its obligations **with respect to these Standards** or the terms of any operating agreement . . .";

xi. "[t]he rates or charges for any and all activities and services of Operator shall be determined by the Operator, and **subject to the further requirement** that all such rates or charges shall be **reasonable and be equally and fairly applied to all** users of the services";

xii. "Operator **shall adhere** to the highest ethical and aviation service community standards in the conduct of its activities."

xiii. "each Specialized Aviation Service Operator shall provide and maintain an office located upon the Airport **which shall be available to the public by appointment or during business hours posted** in a prominent place at the Operator's place of business";

xiv. "[t]he office **must include** a waiting area for the public with appropriate furnishings and rest rooms as required by the State Construction Code or the County Construction Code Office, unless adequate facilities currently exist, **as determined by** . . . [**the NRAC**]";

xv. "[o]ffices **shall contain** an adequate amount of interior floor space to appropriately conduct the business it is intended for **and shall be suitably provided with** heating and air conditioning, as appropriate";

xvi. "[t]he Operator shall conduct its business operations strictly within the areas assigned to it by the . . . [NRAC]";

xvii. "[t]he Operator **shall lease or construct hangar facilities** for aircraft storage/display space, public lounge, public restrooms, and the provision

of access to a telephone . . . . [**and**] **shall also lease sufficient land** from the Commission in order to locate paved private auto parking; a paved pedestrian walkway . . . .";

xviii. "Operator **shall provide** sufficient shop space, equipment, supplies, and inventory of aircraft parts . . . . [**and**] **shall provide** emergency aircraft recovery services and equipment necessary to promptly remove disabled general aviation aircraft of the largest type normally expected to use the Airport from the airfield':

xix. "Operator shall have its premises open and services available during regular, posted business hours . . . . [**and**] **shall make** provisions for someone to be in attendance in the office at all times during the posted operating hours";

xx. "Operators who do **not** post regular business hours **shall provide** for an adequate means of contacting the Operator to arrange an appointment (e.g., cellular phone, answering service, voice mail, pager, etc.) **and must agree** to contact the potential customer no more than 24 hours after the initial service inquiry";

xxi. "[i]f the Operator is an FAR Part 145 approved Repair Station, Operator **must possess all** of the tools and equipment **necessary to maintain** such certification **and shall provide** evidence of FAA certification to the . . . [NRAC]"; and,

xxii. "[t]he Operator shall employ, and have on duty during the appropriate business hours, trained personnel in such numbers as are required to meet these Standards in a **safe and efficient manner currently certified** by the FAA **with ratings appropriate to the work being performed** and holding an airframe and power plant (A&P) rating . . . . [and] the Operator **shall also have available or on-call** at least one person who holds an Aircraft Inspector (IA) rating.

As demonstrated herein, the NRAC has through its leases and the applicable Minimum Standards not only established minimum standards for the provision of aircraft maintenance and aircraft radio maintenance services (i.e., trained certified/licensed employees, employee supervision, demeanor/appearance of employees and customers, office construction, adequate office space, necessary equipment, reasonable fees, non-discriminatory treatment of customers, and safe, efficient services meeting the "highest ethical and aviation service community standards," but also provided for oversight of those services and enforcement, if necessary. With respect to the minimum hours of operation, Petitioner, its controlled subtenants, and other sub-lessee do, as also demonstrated herein, submit to the NRAC and post regular business

hours even though the NRAC does not require the posting of regular business hours.[48] Nevertheless, the NRAC requires Petitioner, its controlled subtenants, and other sub-lessees to be on call to respond to emergencies, as appropriate, and to other customers within 24 hours of that customer's initial inquiry and said "on-call" requirement is, particularly in light of Mr. Terfehr's testimony, sufficient to satisfy the minimum hours of operation otherwise necessary for the operation of a concession. As a result, Petitioner through 45 North Aviation and Evans Avionics provided and provides non-discriminatory aircraft maintenance and aircraft radio maintenance services to the general public under said lease and minimum standards that are customary and needful for the operation of the Cherry Capital Airport. Said services were, however, comingled with other non-concession services conducted in both hangars, which requires an apportioning of the properties' taxable values to reflect the degree or percentage of services provided in each hangar given the parties' joint failure to identify the specific percentage of services provided in each hangar (i.e., "both hangars," "overflow," etc.). Nevertheless, the combination of Petitioner's testimony relative to the above-noted concession activities and hangar space rental and Respondent's record cards relative to the total square footage of each hanger were sufficient for the Tribunal to apportion the properties' TV for both tax years to reflect the demonstrated percentage of concession services provided in both properties.

Based on the above, the Tribunal concludes that the properties' exempt status and TV for the tax years at issue are as listed in the Introduction Section of this Proposed Opinion and Judgment (POJ).

PROPOSED JUDGMENT

This is a proposed decision and not a final decision.[49] As such, no action should be taken based on this decision.

[48] The NRAC may not require the posting of regular business hours. It does, however, "encourage" said posting.
[49] See MCL 205.726.

After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, including the POJ and all exceptions and responses, if any, and:

1. Issue a Final Opinion and Judgment (FOJ) adopting the POJ as the final decision.
2. Issue an FOJ modifying the POJ and adopting the Modified POJ as the final decision.
3. Issue an Order vacating the POJ and ordering a rehearing or such other action as is necessary and appropriate.

EXCEPTIONS

This POJ was prepared by the Michigan Administrative Hearings System. The parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing, by mail or by electronic filing, if available,** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions).

Exceptions are **limited** to the evidence submitted prior to or at the hearing and any matter addressed in the POJ. There is no fee for filing exceptions and the opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.[50]

Exceptions and responses filed by *e-mail or facsimile* will **not** be considered in the rendering of the Final Opinion and Judgment.

A copy of a party's written exceptions or response **must** be sent to the opposing party **by mail or email, if** email service is agreed upon by the parties**,** and proof must be submitted to the Tribunal demonstrating that the exceptions or response were served on the opposing party.

Entered: January 26, 2021 By Peter M. Koglar

pmk

[50] See MCL 205.762(2) and TTR 289(1) and (2).