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

Toll Northville, LLC and Biltmore-Wineman, LLC,
Petitioners,

v

MTT Docket No. 284952

Township of Northville,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER DENYING PETITIONERS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(9)

ORDER DENYING PETITIONERS' FIRST MOTION FOR IMMEDIATE CONSIDERATION

ORDER DENYING PETITIONERS' REQUEST FOR ORAL ARGUMENT

ORDER DENYING RESPONDENT'S MOTION FOR SANCTIONS PURSUANT TO MCR 2.114

ORDER DENYING PETITIONERS' MOTION FOR LEAVE TO FILE REPLY BRIEF

ORDER DENYING PETITIONERS' SECOND MOTION FOR IMMEDIATE CONSIDERATION

ORDER GRANTING PARTIAL SUMMARY DISPOSITION IN FAVOR OF PETITIONERS PURSUANT TO MCR 2.116(C)(10)

ORDER GRANTING PARTIAL SUMMARY DISPOSITION IN FAVOR OF RESPONDENT PURSUANT TO MCR 2.116(I)(2)

Petitioners filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(9). The issue under consideration in Petitioners' Motion is whether the value of public service improvements, as defined in MCL 211.34d(1)(b)(viii), added to a property's taxable value pursuant to MCL 211.27a(2)(a) in a tax year not under appeal and over which the Tribunal does not have jurisdiction, can be subtracted from the property's taxable value in the following tax year, which is under appeal and over which the Tribunal has jurisdiction, now that this type of

addition to taxable value was held unconstitutional in *Toll Northville, Ltd and Biltmore Wineman, LLC v Township of North*ville, 480 Mich 6; 743 NW2d 902 (2008). For the reasons set forth herein, the Tribunal finds that Petitioners' motion must be denied.

Petitioners, Toll Northville, LLC and Biltmore-Wineman, LLC, filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(9) and a Brief in support thereof. In their Motion, Petitioners contend that the Answer filed by Respondent, Township of Northville, failed to state a valid defense against Petitioners' claim that the portion of the subject property's taxable value attributable to the public service improvements added pursuant to MCL 211.34d(1)(b)(viii) must be removed. Petitioners requested that Oral Argument be held on this Motion and that the Motion for Summary Disposition be given immediate consideration.

Respondent filed an Answer in Opposition to Petitioners' Motion for Immediate Consideration. Respondent also filed a Motion for Sanctions Pursuant to MCR 2.144, alleging that Petitioners' Motion for Immediate Consideration was not warranted and was filed to harass and increase Respondent's litigation costs. Thereafter, Respondent filed an Answer in Opposition to Petitioners' Motion for Summary Disposition Under MCR 2.116(C)(9) and a Brief in support thereof.

Petitioners filed a Response to Respondent's Motion for Sanctions. Petitioners also filed a Motion for Leave to File Reply Brief and Immediate Consideration, contending that Respondent had misrepresented the holdings of key cases and that immediate consideration of its Motion for Leave was warranted so that a decision by the Tribunal on the above Motions would not render the Motion for Leave moot. Respondent filed an answer in opposition to Petitioners' Motion. Finally, Petitioners filed a document titled "Supplemental Authority."

PETITIONERS' MOTIONS FOR SUMMARY DISPOSITION AND IMMEDIATE CONSIDERATION

According to Petitioners, public service improvements as defined in MCL 211.34d(1)(b)(viii) were installed on Parcel No. 059-99-0001-703 ("Parcel 703") in 1999. For the 2000 tax year, half the value of the improvements, being $18,693,726, was added to Parcel 703's taxable value. Thereafter, in 2000, Parcel 703 was split into 377[1] lots. These 377 lots were assessed individually for the first time in 2001. In 2001, Petitioners appealed the true cash and taxable values of 363[2] of the 377 lots (the "subject property"). (Petitioners' Brief in Support of Motion for Summary Disposition under MCR 2.116(C)(9)[3], p3) In their Brief, Petitioners state that they appealed the 2002 true cash and taxable values of 277[4] of the parcels. In their Petition, Petitioners describe the subject property as "contiguous vacant residential lots and a commercial golf course." (Petition, p1)

In their Motion for Summary Disposition, Petitioners contend that "Respondent has no valid defense to Petitioners' claim that taxable value for each subject parcel must be reduced by the amount of taxable value increase attributable to Public Service Improvements under MCL 211.34d(1)(b)(viii), which has been found to be unconstitutional" in *Toll Northville, supra*. (Petitioners' Brief, p4) For this reason, Petitioners argue that their Motion for Summary Disposition under MCR 2.116(C)(9) must be granted.

In their Brief, Petitioners state that "Respondent will raise the defense that the Michigan Tax Tribunal has no jurisdiction for tax year 2001 to correct unconstitutional increases to taxable

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[1] In Petitioners' Exhibit B, Petitioners contend that there were a total of 383 residential lots.
[2] However, in the Stipulation filed in Wayne County Circuit Court Docket No. 03-326658-CZ, the parties contend that there are "353 single family residential parcels" under appeal in this case. (Petitioners' Exhibit A, p2)
[3] Hereinafter referred to as "Petitioners' Brief."
[4] However, in the Stipulation filed in Docket No. 03-326658-CZ, the parties contend that 229 parcels were appealed in 2002. (Petitioners' Exhibit A, p2)

value placed on the mother parcel in tax year 2000." (Petitioners' Brief, p4) Petitioners believe that Respondent will base its position on the Michigan Court of Appeals decision in *Leahy v Orion Township*, 269 Mich App 527; 711 NW2d 438 (2006). Specifically, Petitioners believe that "Respondent will argue…that because the Township's unconstitutional calculation concerning taxable value occurred in 2000 rather than 2001, the Tribunal is completely impotent, and powerless to correct this $18 million dollar [sic] error in calculating taxable value for 2001, as well as every year thereafter." (Petitioners' Brief, pp 4-5) Petitioners argue that any reliance on *Leahy* is misplaced because, in reaching its decision, the court "relied upon the principal of collateral estoppel, rather than lack of jurisdiction." (Petitioners' Brief, p6) Petitioners argue that collateral estoppel is not applicable in the instant case because the subject properties' 2000 taxable value, "the first year that reflects the addition of public service improvements," was never litigated. (Petitioners' Brief, p7)

Petitioners also believe that:

> Respondent may still argue that *Leahy* stands for the proposition that once a prior year's taxable value is established (in this case, by non-appeal), it cannot be challenged for purposes of challenging the taxable value of the following year properly before the Tribunal. As a court can only rule upon the facts before it, any further discussion by the Court in *Leahy* is *obiter dictum*, and not *stare decisis*. The facts before the court in *Leahy* concerned a year which had already been litigated. Those facts are of key importance, and render the court's decision in *Leahy* inapposite to the present case, where the prior year was never litigated. Because there is no binding authority, the question of whether or not the Tribunal can revisit an earlier year for the purpose of calculating a year properly before it is an open question. (Petitioners' Brief, p8)

Petitioners next argue that the "Tribunal has jurisdiction to consider an improper calculation in a prior year to recalculate the present year." (Petitioners' Brief, p10) According to Petitioners:

> Nothing in case law, the General Property Tax Act, or the Tax Tribunal Act requires the Tribunal to ignore a Respondent's constitutionally invalid action in

> the prior year to calculate the assessment for the current year. Any such proposed restriction on the Tribunal's power to inquire is baseless. Nothing in Michigan law requires the Michigan Tax Tribunal to allow a constitutional violation to be perpetuated year after year until the last parcel sells. Any such restriction allows violations of the state's highest law to be flaunted. Such an artificial self-imposed limitation will render a Supreme Court decision a nullity and therefore conflicts with the Tribunal's mission of inspiring trust in Michigan's tax system. The Tribunal was not set up to be impotent and powerless to act in the face of constitutional violations in its area of expertise. (Petitioners' Brief, p12)

Petitioners further argue that "the public service improvements for the subdivision were legally and physically removed from each resulting child parcel for the first time in 2001, and said removal constitutes a loss under MCL 211.34d(1)(h), the loss of said must be subtracted when calculating taxable value for each subdivision parcel in 2001." (Petitioners' Brief, p12) In support of this argument, Petitioners state that the "the starting point for determining the taxable value under MCL 211.27a(2)(a) is the taxable value for the prior year. In the present case, there was no prior year for each of Toll-Northville's parcels" as they are the result of the split of the parent parcel in 2000. (Petitioners' Brief, p13)

> As the Court of Appeals recited and held, title to public service improvements, once dedicated are no longer within the parcels, and/or are exempt from taxation...As both [the Michigan Court of Appeals and the Michigan Supreme Court] have noted in reaching their decisions [in *Toll-Northville*], once the property is split, the public service improvements are no longer part of the subject parcels.
>
> As removed and exempted property are defined by MCL 211.34d(1)(h) as a loss, one half of the true cash value of this property must be subtracted from the taxable value from the immediately preceding year, (2000) and then multiplied by the lesser of 1.05 or the inflation rate, per MCL 211.27a(2)(a). Since there is no need to recalculate the taxable value for the prior year, a restrictive inquiry into the prior year's taxable value is not necessary in this case to remove public service improvements from 2001's taxable value. (Petitioners' Brief, pp13-15)

Petitioners anticipate that Respondent will argue that "removal of infrastructure from the parcel is not included as a loss" under MCL 211.34d(1)(c)(i). (Petitioners' Brief, p16) MCL 211.34d(1)(c)(i) states, in pertinent part: "(c) For taxes levied after 1994, additions do not

include increased value attributable to any of the following: (i) Platting, splits, or combinations of property." According to Petitioners:

> In the case of residential subdivisions, the physical removal and/or exemption of public service improvements will often coincide with platting or splitting the mother parcel. However, platting, and splitting *do not necessarily* involve the removal of public service improvements. As Respondent noted on p. 2 of its appellate brief, four unimproved acreage parcels were split into 15 acreage parcels in 1999, which were later split again into the parcels subject to this appeal. As that first split did not result in the dedication of the roads and other infrastructure, there was no loss under MCL 211.34d(1)(h) to be subtracted in 2000. (Petitioners' Brief, p16)

Petitioners' final argument is that "[a]s Respondent actively sought a declaratory action concerning the constitutionality of public service improvements as additions to taxable value and voluntarily submitted to the jurisdiction of the Wayne County Circuit Court, it is bound by that court's holding under the 'Law of the Case' Doctrine." (Petitioners' Brief, pp17-18) Petitioners argue that:

> In the present case, Respondent's admission as to jurisdiction and of the necessity of resolving the constitutional issue concerning [MCL 211.34d(1)(b)(viii)]…was binding on the Michigan Tax Tribunal. The Respondent admitted in its answer that there was an actual case and controversy here in the Tribunal and a decision on the constitutionality of public service type additions was necessary in order for the Tribunal to render a decision. (Petitioners' Brief, p19)

In support of their Motion for Immediate Consideration, Petitioners state:

> As the Petitioners have been awaiting for a resolution of this case since this matter was initiated in 2001, and because similar issues in other appeals pending before the Tribunal may be resolved by a decision, the Tribunal's immediate consideration will help to clear a number of old appeals from its docket, and determine the rights of the present parties, who have been in limbo for a lengthy period of time. (Petitioners' Motion, p5)

RESPONDENT'S ANSWER TO PETITIONERS' MOTIONS FOR SUMMARY DISPOSITION AND FOR IMMEDIATE CONSIDERATION

In its Answer to Petitioners' Motion for Summary Disposition, Respondent asserts that:

> Having little support for its challenge to 2001 assessment, Petitioner is now attempting to use the 2008 Supreme Court decision in *Toll Northville* . . . to reach back eight years to a tax year that not only is not under appeal but was previously dismissed by the Tax Tribunal for lack of jurisdiction. The Court decision does not and cannot revive prior tax years that are not under appeal nor grant the Tax Tribunal jurisdiction where none exists. (Respondent's Brief in Support of Answer in Opposition to Petitioners' Motion for Summary Disposition Under MCR 2.116(C)(9)[5], p1)

Respondent provided the following chain of events in support of its assertion:

> Petitioner acquired several parcels of real property in Northville Township for development. Parcel No. 77-059-99-0001-703 was conveyed in a deed dated April 14, 1999. In 1999, Petitioner installed roads and utility infrastructure on the parcel. Respondent increased the 2000 assessed and taxable values due **in part** to the public service installations as required by MCL 211.34d(1)(b)(viii). Petitioner sought to appeal the 2000 assessment of Parcel No. 77-059-99-0001-703 in Docket No. 278299. Petitioner filed the appeal untimely and it was dismissed for lack of jurisdiction.
>
> In 2001, Petitioner filed the present appeal to challenge the 2001 assessment of 363 residential lots and a commercial golf course. Most, **but not all**, of the parcels under appeal were split out of Parcel No. 77-059-99-0001-703...(the "parent parcel"). This appeal also included Parcel No. 77-059-99-0002-705, 40 acres of vacant land that was later split into 184 condominium parcels. This appeal never included the parent parcel, Parcel No. 77-059-99-0001-703, as that parcel ceased to exist after tax year 2000 when it was subdivided. The appeal only challenged the child parcels created after the parent parcel was split.
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> During this appeal, the Michigan Supreme Court decided *WPW Acquisitions v City of Troy*, 466 Mich 117[; 643 NW2d 564] (2002), holding that "additions" attributable to increased occupancy under MCL 211.34d(1)(b)(vii) are unconstitutional. After the Supreme Court's decision in *WPW*, Petitioner, for the first time, argued in this appeal that MCL 211.34d(1)(b)(vii) was likewise unconstitutional. However, Petitioner did not amend its Petition to include such an allegation. In 2003, Petitioner filed a Complaint for Declaratory Judgment in Wayne County Circuit Court (Case No. 03-326658 CZ) claiming that MCL 211. 34d(1)(b)(viii) was unconstitutional . . . .
>
> Neither the trial court, the Court of Appeals, nor the Supreme Court made any ruling that its decision had any application to the valuation appeal at issue in this appeal. In fact, a discussion by the Court of Appeals clarified that its review was limited to the constitutional challenge to MCL 211.34d(b)(1)(viii), and the

[5] Hereinafter referred to as "Respondent's Brief."

> determination of whether the Tax Tribunal has jurisdiction to hear Petitioner's challenge to the 2000 assessment is left to the Tribunal's province...Petitioner's attempt to hamstring the Supreme Court's holding into this appeal is not supported by law. (Emphasis added.) (Respondent's Brief, pp1-3)

Respondent argues that Petitioners' Motion for Summary Disposition pursuant to MCR 2.116(C)(9) should not be granted because "[s]ummary disposition for failure to state a valid defense is a rare occurrence; one that can be defeated merely be denying an allegation or asserting affirmative defenses." (Respondent's Brief, p3) Respondent cites *Hanon v Barber*, 99 Mich App 851; 298 NW2d 866 (1980), and *Northern Ohio Bank v Ket Assoc Inc*, 74 Mich App 286; 253 NW2d 734 (1977), in support of its position. Respondent argues that the denials and affirmative defenses in its Answer "provide a valid defense to the petition and are sufficient to defeat Petitioners' Motion for Summary Disposition." (Respondent's Brief, p5)

Respondent further argues that:

> Rather than address the pleadings as required by MCR 2.116(C)(9), the Motion is based on Petitioner's new argument that the increase to the taxable value of the parent parcel No. 059-99-0001-703 in tax year 2000 due to the installation of public service improvements was unconstitutional and, pursuant to the decision in *Toll Northville*, must now be deducted from the taxable value of the child parcels under appeal. This allegation is not part of Petitioner's pleadings and therefore is not considered when reviewing the Motion for Summary Disposition under MCR 2.116(C)(9). (Respondent's Brief, pp4-5)

Respondent next contends that Petitioners' argument that the Tribunal has jurisdiction over the 2000 tax year is without support and should be rejected. According to Respondent, the *Toll Northville* decision "is prospective in application and has limited impact on the valuation determination in this appeal, which is limited to a challenge to the assessments for 2001-2007 and does not include a challenge to the 2000 tax assessment." (Respondent's Brief, p6)

Respondent cites *Leahy*[6], *supra*, and *Springhill Assoc v Shelby Twp*, unpublished per curiam decision of the Court of Appeals, decided December 11, 2003, (Docket No. 247100), in support of its position "that while the taxable value of property can no longer be increased based on the installation of public service improvements dedicated to the public, an owner whose property was revalued due to these improvements may not challenge the assessment or try to recover any taxes previously paid in a tax year not under appeal." (Respondent's Brief, p6)

Respondent further argues that this theory also applies in situations where assessments were later found to have been invalid. Respondent cites *Booker v Detroit*, 469 Mich 892; 668 NW2d 623 (2003), *Noll Equipment Co v Detroit*, 49 Mich App 37; 211 NW2d 257 (1973), and *Wolverine Steel Co v Detroit*, 45 Mich App 671; 207 NW2d 194 (1973), in support of this argument.

Referring to Petitioners' "loss" argument as "novel," Respondent contends that "separating public service improvements" from the parent parcel "does not constitute a loss to the parcels under appeal," as the improvements were never part of the parcels resulting from the split, the "child parcels." (Respondent's Brief, pp10-11) Instead, the improvements were installed on Parcel No. 77-059-99-0001-703, the "parent parcel," before the child parcels were in existence.

> When the parent parcel was split creating the residential and condominium parcels, the roads, utilities, and utility easements under the roads were simultaneously split from the parent parcel and identified for public dedication. The improvements were not split off as part of the child parcels and then removed from those parcels in a second action. Because the public service improvements were not removed or exempted from the child parcels, the improvements did not

[6] Respondent argues that Petitioners' attempt to distinguish *Leahy* on the basis of collateral estoppel must fail. Respondent admits that the *Leahy* court discussed collateral estoppel, but asserts that the court ultimately determined that the Tribunal lacked jurisdiction to hear the appeal because it was not timely filed.

> constitute a loss for the purposes of calculating the taxable value for the child parcels. (Respondent's Brief, p11)

Respondent acknowledges that the *Toll Northville* Court did not specify whether its decision should be applied retroactively or prospectively. However, "[a]s a general rule, an unconstitutional statute is void *ab nitio* and judicial decisions are given retroactive effect." (Respondent's Brief, p12) On the other hand, "courts have recognized that a more flexible approach is warranted where injustice might result from full retroactivity" and, as such, the *Toll Northville* decision should not be applied retroactively. (Respondent's Brief, p12) In support of this argument, Respondent cites *Lindsay v Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997), *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), and *Johnson v White*, 261 Mich App 332; 682 NW2d 505 (2004).

Additionally, Respondent cites *Riley v Northland Geriatric Center*, 431 Mich 632; 433 NW2d 787 (1988), wherein the Court established a three-part test to determine whether a decision that sets forth a new principle of law should be applied retroactively or prospectively. If this test is utilized, Respondent believes that the outcome of the instant case will be the same as that in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). In *Pohutski*, the Court overruled a long accepted legal tenet. Having done so, the Court applied the three-part test and held that "because we are mindful of the effect our holding will have on the administration of justice, we conclude that limiting our holding to prospective application is appropriate." *Id*., p679.

In assessing the effect that the decision in *Toll Northville* will have on the administration of justice, Respondent argues that:

> Taxing jurisdictions not only relied on the statutory directive to increase assessments for the addition of public service improvements, they were legally compelled to make the adjustment. To retroactively apply the decision would

> arguably have a profound effect on the administration of justice and more importantly have a crippling effect on numerous governmental units.
>
> There was never any allegation that Respondent improperly applied the statute in 2000, and Respondent was bound by law to follow it at that time. The Supreme Court's decision was an issue of first impression. No one had challenged [the constitutionality of] MCL 211.34d(1)(b)(viii) before. Under these facts, it would be wrong to conclude that *Toll Northville* should be given anything other than prospective effect. All taxing jurisdictions did exactly what Respondent did with respect to application of MCL 211.34d(1)(b)(viii). No community can pick and choose which statute to follow based on its own opinion of the constitutionality of a statute. (Respondent's Brief, p14)

Respondent cites *Singh Management Co v City of Northville*, unpublished opinion per curiam of the Court of Appeals, decided January 12, 2006, (Docket No. 256258), as a case in which the issue of whether the petitioner could "obtain relief with respect to the property's value for the 2003 tax year on the basis of an increase in the taxable value in 2000 that was premised on a statutory provision that was later deemed unconstitutional." *Id*. In *Singh*, the property's 2000 taxable value was increased due to an "addition" to the property in 1999 under MCL 211.34d(1)(b)(vii). Thereafter, in 2002, the Michigan Supreme Court issued its decision in *WPW Acquisition Co v City of Troy*, 466 Mich 117; 643 NW2d 564 (2002), holding MCL 211.34d(1)(b)(vii) unconstitutional. The petitioner appealed the property's 2003 taxable value, arguing "that an unconstitutional statute is void *ab initio* and, therefore, the ruling in *WPW Acquisition, supra,* 'must be applied to negate Respondent Appellant's action in uncapping the 2000 & subsequent years' Taxable Values." *Singh, supra*. The Michigan Court of Appeals held that "[a]lthough petitioner cites authority for the proposition that unconstitutional statutes are void *ab initio*, petitioner does not cite any authority for the proposition that a determination of unconstitutionality of a statute nullifies the limitations on the tribunal's authority to examine the taxable values of property for prior years." *Singh, supra*.

Finally, Respondent cites *City of Kalamazoo v Dept of Corrections*, 229 Mich App 132; 580 NW2d 475 (1998), for an explanation of the "law of the case doctrine." In that case, the Michigan Court of Appeals stated that "[i]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Id.*, p135. Respondent argues that:

> The Court of Appeals did not rule that *Leahy* would apply to the Tax Tribunal's valuation in this property tax appeal. It merely found that the case did not preclude the Court from ruling on the constitutionality of MCL 211.34d(1)(b)(viii). The law of the case therefore dictates that the Tax Tribunal may not take any action in the property tax appeal that is inconsistent with the ruling that MCL 211.34d(1)(b)(viii) is unconstitutional and, to the extent Respondent relied on the provision to increase the assessment of the parcels solely on the basis of the public service improvements, it violated the cap on annual increases of the taxable value imposed by Article 9, §3 of the Michigan Constitution. (Respondent's Brief, p16)

In support of its Response in Opposition to Petitioners' Motion for Immediate Consideration, Respondent contends that Petitioners have not presented "one viable reason for the request for immediate consideration." (Respondent's Brief in Opposition to Petitioners' Motion for Immediate Consideration, p2) According to Respondent, "[t]here is no imminent deadline or any extenuating circumstances to justify the request or immediate consideration . . . Whether this appeal or others have been pending for a number of years is not sufficient reason to request immediate consideration, especially for such an important question as summary disposition based on a constitutional argument." *Id.*, p3. Respondent concludes by arguing that immediate consideration "prejudices Respondent" and "should be denied immediately to provide clarity on the response time." *Id.*, p5.

PETITIONERS' MOTIONS FOR LEAVE TO FILE REPLY BRIEF AND FOR IMMEDIATE CONSIDERATION

In response to Respondent's Brief, Petitioners filed a Motion requesting permission to file a reply brief. Petitioners also requested that this Motion be given immediate consideration. In its Motion, Petitioners recognize that TTR 230(2) limits a party to a Motion and brief in support thereof. However, Petitioners argue "that the issue before the Tribunal is weighty, the amount of tax years and tax dollars is large, this ruling is likely to be precedential, and that the law represented to the Tribunal is in fact different from what has been presented, consideration of a reply brief is warranted in this case." (Petitioners' Motion, p2) Instead of a Brief in support of their Motion, Petitioners filed their reply brief.

RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO FILE REPLY BRIEF

Respondent filed an Answer in Opposition to Petitioners' Motion for Leave to File Reply Brief and a Brief in support thereof. In its Answer, Respondent states that pursuant to TTR 230 "[p]leadings on motions shall be limited to the motion and a brief in support of the motion and a single response to the motion and a supporting brief." Given this, Respondent argues that Petitioners must file a separate Motion seeking to file a reply brief. Instead, in this case, Petitioners filed their Motion and instead of filing a brief in support of their Motion, they filed a brief replying to Respondent's reply brief. Finally, Respondent cites *RPP Limited Housing v* [*City of Detroit*], (Docket No. 173222, February 10, 1998), in which the Tribunal stated that "the parties are limited to a single brief and that the Tribunal will determine whether Respondent's brief contains any misstatements of law . . . ." (*RPP, supra*)

RESPONDENT'S MOTION FOR SANCTIONS

In support of its Motion for Sanctions Pursuant to MCR 2.114, Respondent states: "Petitioner knowingly filed the Motion for Immediate Consideration without grounds to do so. The clear purpose behind the Motion is to harass Respondent and prejudice its ability to respond to Petitioner's Motion for Summary Disposition." *Id*., p5. Respondent argues that Petitioners' Motion for Immediate Consideration is sanctionable because "[t]here is no question here that Petitioner's Motion for Immediate Consideration is not warranted and interposed to harass and increase Respondent's litigation costs." *Id.,* p5.

PETITIONERS' ANSWER TO RESPONDENT'S MOTION FOR SANCTIONS

In support of their Motions for Leave to File Reply Brief and Immediate Consideration, Petitioners contend that Respondent's Brief in Opposition to Petitioners' Motion for Summary Disposition "misstates the holdings of several cases." (Petitioners' Motion for Leave to File Reply Brief, p2) Petitioners argue that consideration of a reply brief is warranted by the circumstances presented by this case, as "the issue before the Tribunal is weighty, the amount of tax years and tax dollars is large, this ruling is likely to be precedential, and that the law represented to the Tribunal is in fact different from what has been presented." *Id.,* p 2. Petitioners renewed their request for immediate consideration so that Petitioners' Motion for Summary Disposition "will not be rendered moot." *Id.,* p2.

In response to Respondent's Motion for Sanctions, Petitioners argue that sanctions are not warranted by existing law.

PETITIONERS' SUPPLEMENTAL AUTHORITY

After the briefs were submitted, the Michigan Court of Appeals issued two decisions that Petitioners believe are applicable in this case. The first is *Briggs Tax Service LLC v Detroit*

Public Schools, 282 Mich App 29; 761 NW2d 816 (2008), the second being *Superior Hotels LLC v Township of Mackinaw*, 282 Mich App 621; 765 NW2d 31, (2009). To bring these cases to the Tribunal's attention, Petitioners filed a document titled "Supplemental Authority." Petitioners filed this document pursuant to MCR 7.212(F).

According to Petitioners, *Briggs* "appears to expand the definition of 'mutual mistake' under MCL [211.53a] to include assumptions that were relied upon by both parties, but were not correct. In *Briggs*, the assumption was that a levy was valid. In *Toll-Northville*, the assumption was that MCL 211.34d(1)(b)(viii) was valid. (Petitioners' Supplemental Authority, p1) Regarding *Superior Hotels*, Petitioners argue that the decision in that case

> . . . is in contradiction to the interpretation set forth by the Respondent of *Leahy v Orion Twp*, that taxable value may only be calculated based upon the prior year's assessment. While the case is somewhat distinguishable since it was put forth under MCL 211.154, rather than MCL 211.53a, a consistent reading of the law does away with the notion that taxable value may only be revised based upon the previous year's value. (Petitioners' Supplemental Authority, p1)

Respondent filed a response objecting to Petitioners' filing of Supplemental Authority because Petitioners merely filed the document without filing a Motion, in violation of Tax Tribunal Rule 230(1). Respondent further argues Petitioners' reliance on MCR 7.212(F) is "grossly misplaced" as that rule "governs the submission of supplemental authority to an appellate court after appellate briefs have been filed." (Respondent's Response in Opposition to Petitioners' Supplemental Authority, p3)

As to the substance of the cases cited in Petitioners' Supplemental Authority, Respondent argues that *Briggs* is inapposite to the instant case because in the instant case "there was no mistake made by either Petitioners or Respondent." (Respondent's Response in Opposition to Petitioners' Supplemental Authority, p4) According to Respondent, Petitioners' statement that "'[i]n *Toll-Northville*, the assumption was that MCL 211.34d(1)(b(viii) was valid' . . . does not

recognize that in fact, at the time of the assessment, the *Briggs* levy was **not** valid, yet at the time of Respondent's assessment, MCL 211.34d(1)(b(viii) was valid." (Respondent's Response in Opposition to Petitioners' Supplemental Authority, p5)

Finally, Respondent argues that *Superior Hotels* is distinguishable from the instant case for the simple reason that *Superior Hotels* did not have anything to do with MCL 211.53a. Instead, that case was decided upon an entirely different section of the property tax act, that being MCL 211.154.

FINDINGS OF FACT

In 1999, Petitioners acquired Parcel 703, located in Northville Township. That same year, public service improvements were installed on Parcel 703. In 2000, Respondent increased Parcel 703's assessed and taxable values by 50% of the true cash value of the improvements, or $18,693,726. This action was taken pursuant to MCL 211.27a and MCL 211.34d(1)(b)(viii).

Some time during calendar year 2000, Petitioners split Parcel 703 into approximately 383 parcels of property.[7] At the time of the split, title to the public improvements included on Parcel 703 was dedicated to the municipality and the applicable utility companies. On July 31, 2000, Petitioners appealed Parcel 703's 2000 tax year assessment to the Tribunal and the appeal was assigned Docket No. 278799. On March 15, 2006, MTT Docket No. 278799 was dismissed as untimely as to the 2000 tax year[8]. On December 21, 2006, Petitioners and Respondent stipulated to dismiss with prejudice the remaining tax years included in MTT Docket No. 278799 and the case was closed.

[7] As previously stated, it is unclear as to the exact number of parcels created from the split.
[8] At that time, appeals were required to be filed by June 30. Since then, the statute has been amended to provide that appeals of residential property must be filed by July 31.

On July 2, 2001, Petitioners filed this appeal with the Tribunal challenging the 2001 assessed and taxable values of 363 parcels of property. It appears that all but one parcel included in the appeal, that being Parcel No. 77-062-99-0001-711, were parcels obtained from the split of Parcel 703 in 2000. Included in the 363 parcels were 254 residential parcels and 9 golf course parcels.

On October 29, 2002, the Tribunal entered a Consent Judgment in which the assessed and taxable values of the golf course parcels were resolved. Pursuant to the Consent Judgment, the amount added to these properties' 2000 taxable value pursuant to MCL 211.27a and MCL 211.34d(1)(b)(viii) was removed because Respondent determined that:

> . . . it was an error to add Taxable Value to the golf course parcels due to the value of the improvements, because the aforementioned improvements did not increase the True Cash Value of the golf course parcels. Rather, the value of the improvements should have been distributed only among the single family residential lots. (Respondent's Response in Compliance with Tribunal Order of January 9, 2003, p5)

Given this, Respondent now seeks to offset this reduction in taxable value by increasing the taxable values for the remaining residential properties. (Respondent's Response in Compliance with Tribunal Order of January 9, 2003, p5)

Also included in the 2001 appeal was Parcel No. 77-059-99-0002-705 (hereinafter "Parcel 705"). Sometime during 2001, Petitioners split Parcel 705 into 184 residential condominium lots. These lots first appeared on Respondent's 2002 assessment roll. At that time, "the taxable value of each of the 184 lots was increased $21,100 for the installation of underground improvements." (Respondent's List of Parcels by Tax Parcel Number for Tax Years 2000 through 2002 for all Properties Under Appeal, dated July 16, 2003, p2)

MOTIONS FOR SUMMARY DISPOSITION

There is no specific Tribunal Rule governing motions for summary disposition. As such, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such a motion. (See TTR 111(4)). Pursuant to MCR 2.116, a party may move for dismissal of or judgment on all or part of a claim in accordance with MCR 2.116. (MCR 2.116(B)(1)). In this case, Petitioners moved for summary disposition pursuant to MCR 2.116(C)(9), which provides that a party may move for summary disposition on the grounds that "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her." Only the parties' pleadings may be considered on a motion file pursuant to MCR 2.116(C)(9). MCR 2.116(G)(5). In *Owczarek v State of Michigan*, 276 Mich App 602, 609; 742 NW2d 380 (2007), the Michigan Court of Appeals reiterated the standard of review for a (C)(9) motion.

> Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim . . . A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true...If the defenses must be "so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery," then summary disposition under this subrule is appropriate . . . MCR 2.116(I)(2) permits a court to enter judgment for the party opposing a motion for summary disposition "[i]f it appears to the court that the opposing party rather than the moving party, is entitled to judgment." *Id*., p609.

Finally, MCR 2.116(I)(5) states, "[i]f the grounds asserted are based on subrule (C)(8) or (9) . . . , the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified."

CONCLUSIONS OF LAW

After reviewing the Petition filed in this matter and Respondent's Answer, the Tribunal finds that that Respondent pled a valid defense to each of the claims made in the Petition. The

Tribunal further finds that the Petition does not contain a claim that the taxable value for each parcel of property must be reduced by the amount the property's taxable value was increased due to the installation of public improvements pursuant to MCL 211.34d(1)(b)(viii). Moreover, Petitioners have not filed a motion to amend their pleadings to include this claim. Finally, the most recent Motion to Amend filed by Petitioners, that being a motion to add the 2006 tax year, does not include this claim. Because Respondent's defenses to the claims made in the Petition were valid, Petitioners' Motion for Summary Disposition Under MCR 2.116(C)(9) must be denied.

"However, where a party brings a summary disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled." *Blair v Checker Cab Company*, 219 Mich App 667, 671; 558 NW2d 439 (1996). In this case, the Tribunal finds that neither party was misled and that, for the reasons set forth herein, Petitioners are entitled to partial judgment pursuant to MCR 2.116(C)(10).

MCR 2.116(C)(10) provides the following ground upon which a summary disposition motion may be based: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), the Michigan Supreme Court provided the following explanation of MCR 2.116(C)(10).

> MCR 2.116 is modeled in part on Rule 56(e) of the Federal Rules of Civil Procedure . . . [T]he initial burden of production is on the moving party, and the moving party may satisfy the burden in one of two ways.
>
> First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. (Citations omitted.) *Id*. pp361-363.

In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

As discussed herein, in *Toll Northville Ltd and Biltmore Wineman LLC v Township of Northville*, 480 Mich 6; 743 NE 2d 902 (2008), the Michigan Supreme Court held MCL 211.34d(1)(b)(viii) unconstitutional. By Respondent's own admission, the 2002 taxable value of each of the 184 condominium units[9] included an addition of $21,100.00 pursuant to MCL 211.34d(1)(b)(viii). (Respondent's List of Parcels by Tax Parcel Number for Tax Years 2000 through 2002 for all Properties Under Appeal, dated July 16, 2003, p2) Because the Tribunal has jurisdiction over the 2002 taxable values and because the taxable values for these 184 properties were increased in 2002 pursuant to MCL 211.34d(1)(b)(viii), the Tribunal finds that there is no genuine issue as to any material fact and that Petitioners are entitled to partial judgment as a

[9] These parcels were the result of the split of Parcel No. 77-059-99-0002-705 in 2001.

matter of law as to those 184 parcels of property. The Tribunal further finds that the 2002 taxable values for each of the 184 parcels of property must be reduced by $21,100.00 and that Petitioners are entitled to a refund.

Having made this determination, the question remains as to whether the public improvements installed on Parcel 703 in 1999 may be subtracted from the 2001 taxable values of the 363 parcels under appeal in this case. For the reasons set forth below and in the Tribunal's September 15, 2009 Order, the Tribunal finds that they may not.

The requirements that must be met in order for the Tribunal to acquire jurisdiction in an appeal are set forth in Section 35 of the Tax Tribunal Act. In relevant part, Section 35 provides:

> The jurisdiction of the tribunal in an assessment dispute is invoked by a party in interest, as petitioner, filing a written petition on or before June 30 of the tax year involved . . . All petitions required to be filed or served by a day during which the offices of the tribunal are not open for business shall be filed by the next business day. (MCL 205.735(3))

In this case, the Petition was filed on July 2, 2001. As June 30, 2001, was a Saturday, the Petition was timely filed. Therefore, in this case the first tax year in which the Tribunal has jurisdiction is the 2001 tax year.

The requirements for assessing property and the formula for calculating taxable value are found in Article IX, §3, of the Constitution of the State of Michigan. In relevant part, §3 provides:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. **For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this**

> **article, or 5 percent, whichever is less until ownership of the parcel of property is transferred.** When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. (Emphasis added.)

The general property tax act ("GPTA"), being MCL 211.1 *et seq*, implements the legislative determination required by Article IX, §3. Specifically, MCL 211.27a provides, in relevant part:

> 1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.
>
> (2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
>
> (a) The property's taxable value in the immediately preceding year **minus any losses**, multiplied by the lesser of 1.05 or the inflation rate, **plus all additions**. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.
>
> (b) The property's current state equalized valuation.
>
> (3) Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer. (Emphasis added.)

Thus, the starting point of a property's taxable value in any given year is the property's taxable value in the previous year.

In this case, to arrive at the subject properties' 2001 taxable value, the subject properties' 2000 taxable value was multiplied by the rate of inflation, 1.032%. There were no additions or losses to the subject properties in 2000. As such, this is the end of the taxable value calculation required under MCL 211.27a for the 2001 tax year.

Sometime during calendar year 2001, Parcel No. 703 was split into approximately 383 parcels of property, of which 363 are under appeal in this case. Therefore, to arrive at a taxable

value for each of these separate parcels of property for the 2002 tax year, "the Taxable Value that had been added to the parent parcels in tax year 2000 for the improvements was divided among the single family residential lots and the golf course parcels based on the size of the various lots, rather than their use." (Respondent's Response in Compliance with Tribunal Order of January 9, 2003, pp4-5)

While it is clear that under the Michigan Supreme Court's decision in *Toll Northville* additions made to taxable value for installation of public service improvements under MCL 211.34d(1)(b)(viii) are unconstitutional, no such additions were made in the first tax year under appeal in this case, that being the 2001 tax year. The Tribunal simply has no statutory or constitutional authority under these circumstances to examine previous tax years and require that changes be made to the taxable values in those years.

However, Petitioners disagree. According to Petitioners, it does not matter when the additions to a property's taxable value were made as long as in some tax year after the addition is made the Tribunal acquires jurisdiction over the property's taxable value. In their Motion for Summary Disposition, Petitioners argue that "[o]nce the Tribunal's jurisdiction is invoked under §35 or §35a of the Tax Tribunal Act, there are no other statutes that limit its scope of inquiry into the determination of taxes for the tax year properly before it." (Petitioners' Brief, p12) Therein lays the flaw in Petitioners' argument. Petitioners would have one believe that once the Tribunal acquires jurisdiction over a given tax year, it is free to ignore other statutory and constitutional requirements. This is simply not true.

There are numerous Michigan court decisions in which the Tribunal's decision not to address a property's prior taxable value for lack of jurisdiction has been upheld. For example, in *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006), the Michigan Court of

Appeals dealt with a case remarkably similar to the case at hand. In an earlier case filed by the same petitioner, the petitioner challenged the 2002 assessment of his property by suing the respondent in circuit court instead of by filing a petition at the Tribunal. See *Leahy v Orion Twp*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004 (Docket No. 250406). The circuit court dismissed the case for lack of jurisdiction. The Court of Appeals affirmed the circuit court's decision. In the following year, the petitioner filed a petition at the Tribunal challenging his property's 2003 taxable value. The Tribunal agreed with the petitioner that its 2003 taxable value was incorrectly calculated, but declined to address previous year's taxable values as the petitioner requested.

> The tribunal found that it lacked jurisdiction to revisit the 2000 through 2002 assessments because petitioner had
>
> > failed to appeal his assessment in said years [2000 through 2002]; therefore, those years are not currently before the Tribunal. As a general rule, the Tribunal lacks jurisdiction to revise a property's taxable value with respect to tax years not properly before it. An exception to this rule is set forth in MCL 211.53a...In the instant case, however, the mistake, if any, in Respondent's determination of the subject property's taxable value for 2000-2002 was not the result of a clerical error or mutual mistake of fact; thus the Tribunal does not have jurisdiction over those tax years, and no revisions may be made to the taxable values set forth by Respondent. *Leahy*, p529.

In his appeal to the Court of Appeals,

> . . . petitioner argued that the tax code requires property taxes to be based on the prior year's assessed value, so the prior year's value *must* be the correct value. Petitioner suggests on appeal that because the tribunal found that respondent had erred in the 2003 assessment, respondent must recognize its errors for the years 2000 through 2002, correct those assessments, and then recompute the 2003 taxable value. *Leahy*, p529.

The court rejected the petitioner's argument, holding that:

> Petitioner cannot be aggrieved by the tribunal's finding that respondent erroneously computed the 2003 assessment. Rather, petitioner challenges the 2003 assessment to the extent that it remains premised on an incorrect starting

> point. Thus, petitioner argues that the 2003 assessment remains erroneous because it was computed on the basis of the 2002 taxable value of $137,910. However, this challenge presents a collateral attack on a matter that is no longer subject to litigation.
>
> 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. The doctrine bars relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action. A decision is final when all appeals have been exhausted or when the time available for an appeal has passed.
>
> Petitioner's attempts to challenge the 2002 assessment culminated in this Court's affirmance of the circuit court's dismissal of petitioner's complaint. The record shows that, in that appeal, petitioner failed to take advantage of appellate opportunities to disturb the challenged assessment while he had time to do so. This Court affirmed both the circuit court's dismissal for lack of jurisdiction and its award of sanctions, rejecting petitioner's attempt to characterize his claim as a constitutional one. *Leahy, supra,* slip op at 1-2. Because the time available for appeals has run out, that assessment now stands as final. Therefore, petitioner is precluded from attacking the 2002 taxable value assessment. We agree with the Tax Tribunal that the starting point for the 2003 assessment was the final figure resulting from the initial 2002 assessment and petitioner's failed attempts to appeal it: $137,910. (Citations omitted.) *Leahy,* p530.

In this case, Petitioners make the same argument as the petitioner in *Leahy*. Petitioners request that the Tribunal take into consideration the fact that the subject property's 2000 taxable value was increased due to an addition that was found to be unconstitutional in 2008 and remove the value of this addition from the property's 2001 and 2002 taxable values. For the reasons set forth in *Leahy*, Petitioners' request must be denied.

It is Petitioners' position that the *Leahy* court "relied upon the principle of collateral estoppel, rather than lack of jurisdiction." (Petitioners' Brief, p6) The Tribunal disagrees. The *Leahy* court relied upon both principles. In addition to its holding relating to collateral estoppel, the court held that:

> Because the time available for appeals has run out, that assessment now stands as final. Therefore, petitioner is precluded from attacking the 2002 taxable value

> assessment. We agree with the Tax Tribunal that the starting point for the 2003 assessment was the final figure resulting from the initial 2002 assessment and petitioner's failed attempts to appeal it . . . . *Leahy*, p531.

Clearly, this holding was based upon lack of jurisdiction.

Petitioners argue that *Leahy* is distinguishable from the instant case because the prior year's taxable value had been litigated in *Leahy*, hence the court's reliance on collateral estoppel in its decision. Petitioners argue that the issue of the prior year's taxable value has not been litigated in the instant case.

> Toll-Northville *never* litigated the taxable value for 2000, the first tax year that reflects the addition of public service improvements. Therefore, the key element of "earlier proceeding" is missing. As that year was never litigated, Petitioner is not asking the Tribunal to *re*-litigate that year. As the collateral estoppel doctrine does not apply, the *Leahy* decision does not render the Tribunal impotent in addressing the constitutionally correct method of determining the taxable value of Toll-Northville's subject parcels by recalculating the correct value in 2000 for purposes of reducing the value in 2001. (Petitioners' Brief, p7)

> The Respondent may still argue that *Leahy* stands for the proposition that once a prior year's taxable value is established (in this case, by non-appeal), it cannot be challenged for purposes of challenging the taxable value of the following year properly before the Tribunal. As a court can only rule upon the facts before it, any further discussion by the court in *Leahy* is *obiter dictum*, and not *stare decisis*. The facts before the court in *Leahy* concerned a year which had already been litigated. Because there is no binding authority, the question of whether or not the Tribunal can revisit an earlier year for the purpose of calculating a year properly before it is an open question. (Petitioners' Brief, p8)

The Tribunal is concerned as to Petitioners' lack of candor in making this argument. As discussed at length in the Tribunal's September 15, 2009 Order, while Petitioner Toll-Northville may not have litigated the property's 2000 taxable value, Petitioner Biltmore-Wineman did**.** The appeal of the subject property's 2000 taxable value was dealt with in MTT Docket No. 278799.

The Tribunal finds, contrary to Petitioners' argument, that the facts in this case are indistinguishable from those in *Leahy* since in both cases the "petitioner failed to take advantage of appellate opportunities to disturb the challenged assessment while he had time to do so."

Leahy, p530. In this case, Petitioners failed to take advantage of appellate opportunities because they filed the appeal of the subject property's 2000 taxable value on July 31, 2000, more than a month after the Tribunal's filing deadline expired. Therefore, the subject property's prior year's taxable value (the 2000 taxable value) was established in the same manner as the property's taxable value in *Leahy* and not by a "non-appeal," as Petitioners would have one believe. In both instances an appeal was filed but the cases were dismissed for lack of jurisdiction.

Moreover, as in *Leahy*, because the time available for appealing the 2000 taxable value has run out, that assessment now stands as final. Given this, the Tribunal finds that *Leahy* is binding authority and that the question of whether or not the Tribunal can revisit an earlier year for the purpose of calculating a year properly before it is **not** an open question. Petitioners are precluded from attacking the 2000 taxable value.

Another case dealing with an attempt to deal with "the legality of the precipitate increase" in a property's taxable value was *Springhill Associates, et al v Township of Shelby*, unpublished opinion per curiam of the Court of Appeals, decided December 11, 2003, (Docket Nos. 247100, 247101, 247102, 247103, 247104, 247105). In that case, Petitioners argued that:

> [T]he Tax Tribunal erred in granting respondent's motions for summary disposition with regard to the 2002 taxable values of petitioners' property. The Tax Tribunal found that it lacked subject matter jurisdiction to consider the legality of the precipitate increase in the taxable values of petitioners' property from the year 2000 to 2001, because petitioners failed to timely file petitions protesting the 2001 taxable values of their property. The tribunal further found that because it could not alter the excessive 2001 taxable values, and because the 2002 taxable values were correctly calculated by the simple application of a statutory inflation factor to the 2001 taxable values, respondent was entitled to summary disposition. Petitioners contend that while they cannot request a refund for the 2001 taxes assessed on their property because of their failure to timely file a petition protesting the 2001 tax assessments, they are entitled to protest the 2002 assessments and to call for an examination of the taxable values of their property, even if this means examining the excessive increase in their 2001 taxable values. *Id.*

Before rendering its decision, the court reiterated applicable language from previous decisions.

> The Tax Tribunal has exclusive and original jurisdiction to review final decisions relating to assessments or valuations under the property tax laws. MCL 205.731(a). To invoke the tribunal's jurisdiction, a party in interest must file a written petition "on or before June 30 of the tax year involved." MCL 205.735(2). This statute "is not a notice statute, but a jurisdictional statute that governs when and how a petitioner invokes the Tax Tribunal's jurisdiction." *EDS v Flint Twp,* 253 Mich App 538, 542-543; 656 NW2d 215 (2002). Failure to correct assessments and evaluations in the manner and time provided by statute precludes later attack upon the assessment. *Auditor General v Smith,* 351 Mich 162, 168; 88 NW2d 429 (1958). The Tax Tribunal properly grants summary disposition to a respondent on the basis of the lack of subject matter jurisdiction when the petitioner fails to timely file the petition. *Kelser v Dep't of Treasury,* 167 Mich App 18, 20-21; 421 NW2d 558 (1988).

The court held that:

> The tribunal correctly determined that petitioners' failure to challenge the 2001 taxable values within the statutory period prevented the tribunal from hearing and deciding it. So the only question before the tribunal was whether the assessor properly applied the statutory inflationary factor to the 2001 taxable values of the petitioners' property when it determined the 2002 taxable values. Because there was no genuine issue of material fact that the assessor correctly made this simple calculation, the tribunal properly granted respondent's summary disposition motion . . . Petitioners argue that because they are challenging the 2002 taxable values and have properly invoked the tribunal's subject matter jurisdiction on this issue, they are entitled to have the tribunal reexamine the excessive increase in 2001 taxable values of their property. This is sophistry. A timely filed petition with regard to the 2002 taxable values restricts petitioners' proofs and the tax tribunal's inquiry to whether the 2002 taxable values were correctly calculated based on the 2001 taxable value. *Auditor General, supra.* It does not enable petitioners to circumvent the jurisdictional requirements of the Tax Tribunal. *Id.*
>
> Petitioners argue that *Springhill* is not a binding decision because it was unpublished.

However, Petitioners recognize that non-binding decisions can be persuasive. In the case of *Springhill*, Petitioners argue that this decision is not only not binding, it is not persuasive because "there is no in-depth discussion of this issue, and the cases cited and relied upon by the Court of Appeals in *Springhill* had nothing to do with determinations of taxable value." (Petitioners'

Brief, pp8-9) "In fact, the Michigan Court of Appeals in *Toll-Northville* refused to consider *Springhill*, and whether or not the Tribunal had jurisdiction to revise the 2001 taxable value . . . ." (Petitioners' Brief, p9) The Tribunal disagrees with Petitioners' legal analysis.

While it is true that the Court of Appeals refused to consider *Springhill* in *Toll Northville*, it was not due to the court's holding in *Springhill*; instead, it was due to the fact that the issue presented to it was the constitutionality of MCL 211.34d(1)(b)(viii) and not the Tribunal's jurisdiction. The court specifically stated that "[w]hile we acknowledge that *Springhill* and *Leahy* limit the Tax Tribunal's authority to decide the accuracy and methodology of assessments to the tax years timely appealed, we do not agree that those decisions limit our ability to resolve the constitutional issue at hand." *Toll Northville v Township of Northville*, 272 Mich App 352, 360; 726 NW2d 57 (2007). The court went on to state that:

> Failure to correct assessments and evaluations in the manner and time provided by statute precludes later attack on the assessment. The Tax Tribunal properly grants summary disposition to a respondent on the basis of the lack of subject-matter jurisdiction when the petitioner fails to timely file the petition. *Id*., p360.

The Tribunal understands that, as an unpublished decision, *Springhill* is not binding. However, the Tribunal concurs with the court's analysis and finds the decision persuasive.

In *Singh v City of Northville*, unpublished opinion per curiam of the Court of Appeals, decided January 12, 2006, (Docket No. 256258), the court again dealt with a case in which the petitioner appealed a property's taxable value, but the appeal "was premised on an alleged erroneous increase in taxable value for [a previous] tax year." *Id*. Of particular importance is the fact that the alleged erroneous increase in the 2000 taxable value was due to an addition that was held unconstitutional two years later, in 2002.

In *Singh*, the addition to taxable value in question was that of an increase attributable to the property's occupancy rate under MCL 211.34d(1)(b)(vii). The addition was held

unconstitutional in *WPW Acquisition Company v City of Troy*, 466 Mich 117; 643 NW2d 564 (2002). In *Singh*, the court stated:

> There is no dispute that respondent relied on the unconstitutional provision as a basis for uncapping the taxable value for the 2000 tax year with respect to the subject property. But the issue here is whether petitioner may obtain relief with respect to the property's value for the 2003 tax year on the basis of an increase in the taxable value in 2000 that was premised on a statutory provision that was later deemed unconstitutional. *Id*.

In *Singh*, as in MTT Docket No. 278799, the petitioner filed an appeal in the tax year in which the unconstitutional addition was added to the property's taxable value. In both cases, that appeal was dismissed. In *Singh*, the appeal was dismissed for procedural reasons; in MTT Docket No. 278799, the appeal was dismissed because it was not timely filed. In *Singh*, the court held that:

> . . . regardless of whether petitioner previously timely filed a petition challenging the taxable value for the 2000 tax year, the tribunal correctly granted summary disposition in favor of respondent in this case, which involves a challenge to the taxable value for the 2003 tax year. Even if petitioner properly invoked the tribunal's jurisdiction with respect to the 2000 tax year in *Singh Dev Corp v. City of Northville*, Tax Tribunal Docket No. 277482, the tribunal dismissed that action on procedural grounds. As a result, petitioner failed to obtain relief with respect to the 2000 taxable value. "Failure to correct assessments and evaluations in the manner and time provided by statute precludes later attack upon the assessment." *Auditor Gen v Smith*, 351 Mich 162, 168; 88 NW2d 429 (1958). **The fact that petitioner's prior failure was the result of its failure to comply with the tribunal's orders as opposed to its failure to file a timely petition is a distinction without a difference.**
>
> ***
>
> Petitioner maintains that an unconstitutional statute is void ab initio and, therefore, the ruling in *WPW Acquisitions, supra*, "must be applied to negate Respondent Appellant's action is uncapping the 2000 & subsequent years' Taxable Values." Although petitioner cites authority for the proposition that unconstitutional statutes are void ab initio, petitioner does not cite any authority for the proposition that a determination of unconstitutionality of a statute nullifies the limitations on the tribunal's authority to examine the taxable values of property for prior years. Petitioner has failed to adequately address this point. (Emphasis added.) *Id*.

While *Singh* is an unpublished decision, and therefore not binding on the Tribunal, the Tribunal finds the analysis presented in *Singh* persuasive. Given this, and for the reasons discussed herein, the Tribunal finds that Petitioners, "[h]aving failed to properly pursue relief in its direct challenge to the 2000 taxable value, petitioner is precluded from now collaterally attacking that taxable value in the context of this challenge to the 2003 taxable value." *Singh, supra*.

Having made this determination, two issues remain. First, whether the Court's holding in *Toll Northville Ltd and Biltmore Wineman, LLC v Township of Northville*, 480 Mich 6; 743 NW2d 902 (2008), should be applied retroactively; and second, whether the addition to the subject property's 2000 taxable value should be considered a mutual mistake of fact or clerical error pursuant to MCL 211.53a.

The question of whether its decision should be applied retroactively was not addressed by the Court in *Toll Northville*. "Sometimes a court which announces a change of law will refrain from going the next step to indicate how its new rule is to be applied. In such a situation, the prospective-retrospective issue is left for decision in a later case." *Riley et al v Detroit Board of Education*, 431 Mich 632, 643; 433 NW2d 787 (1988). In both *Toll Northville* and *WPW*, the Court refrained from going the next step. As such, it appears as though this is the "later case" in which this issue must be decided.

"Courts have acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley*, p644. In *Pohutski, et al v City of Allen Park, et al*, 465 Mich 675; 641 NW2d 219 (2002), the Court stated that "[a]lthough the general rule is that judicial decisions are given full retroactive effect, a more

flexible approach is warranted where injustice might result from full retroactivity." (Citations omitted.) *Id*. pp695-696.

> This court has overruled prior precedent many times in the past. In each such instance the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change...While fairness is a goal, certain rules or principles have evolved which provide guidance in resolving the retroactive-prospective dilemma. *Riley*, p645, quoting *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979).

The resulting test to be applied in situations such as this was adopted from *Linkletter v Walker*, 381 US 618; 85 S CT 1731; 14 Led 2d 601 (1965), and set forth in *People v Hampton*, 384 Mich 669, 674; 187 NE2d 404 (1971). This test requires a court to weigh: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice," or, in a civil case, whether "the decision clearly [establishes] a new principle of law." *Riley*, pp645-646.

In *Bolt v City of Lansing***,** 238 Mich App 37; 604 NW2d 745 (1999), the Court of Appeals dealt with the question of whether the Supreme Court's decision in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1999), should be given retrospective or prospective application.

> [A]s our Supreme Court recognized in *Lindsey v Harper Hospital*, 455 Mich 56, 58; 564 NW2d 861 (1997), particular circumstances may warrant only prospective application:
>
> > [W]here injustice might result from full retroactivity, this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect. This flexibility is intended to accomplish the "maximum of justice" under varied circumstances.
>
> A key consideration under *Lindsey* in deciding if a decision should be given prospective or retrospective application is: Did the judicial decision announce a new and unexpected rule of law, or did it merely clarify, extend, or interpret existing law? A decision should be applied prospectively if the decision overrules settled precedent or decides an issue of first impression "whose resolution was not clearly foreshadowed" . . . Of course, a decision regarding an issue of first impression does not necessarily require prospective application. If the decision merely provides a clarified legal interpretation without announcing a new rule of

> law or a change in existing law, the decision should be retroactively applied. (Citations omitted.) *Id*., p750.

Having considered these things and the three-part test set forth in *People v Hampton*, the *Bolt* court concluded that the "decision announced a new and unanticipated rule of law concerning a significant public issue of first impression" and should be applied prospectively. *Id*., p45.

Applying the three-part test to the instant case, the Tribunal finds that the purpose to be served by the "new rule" set forth in *Toll Northville* was to declare MCL 211.34d(1)(b)(viii) unconstitutional. As to the second part of the test, the Tribunal finds that reliance on MCL 211.34d(1)(b)(viii) was extensive as it was relied upon for fourteen years, beginning in 1994 with the adoption of Proposal A. This reliance was not misplaced as "[s]tatutes are presumed constitutional unless the unconstitutionality is clearly apparent." *Toll Northville*, citing *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999), p11. "If tax legislation is at issue, then the presumption is especially strong. Until a taxing statute has been shown to 'clearly and palpably violate[] the fundamental law,' it will not be declared unconstitutional." (Citations omitted.) *Dana Corporation v Department of Treasury*, 267 Mich App 690, 694; 706 NW2d 204 (2005). In *Toll Northville*, the unconstitutionality of MCL 211.34d(1)(b)(viii) was not clearly apparent. At best, the constitutionality of MCL 211.34d(1)(b)(viii) could not have been called into question until after the Michigan Supreme Court's decision in *WPW* in 2002, which was after the addition for public improvements was made to the subject properties' taxable value.

Finally, the third part of the test requires a court to determine whether the decision clearly establishes a new principle of law. The Tribunal finds that, as in *Bolt*, the Court's decision in *Toll Northville* announced a new and unanticipated rule of law concerning a significant public issue of first impression. Thus, under this test the decision in *Toll Northville* should be applied prospectively.

The *Bolt* Court also discussed the Michigan Supreme Court's decision in *Michigan Educational Employees Mutual Insurance Company v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999), wherein the Court set forth two other things to take into consideration when deciding the question of retrospective or prospective application. Specifically, the Court stated:

> [I]t has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.". . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity. (Citations omitted.) *Bolt*, p48.

Having weighed the merits and demerits, the Tribunal finds that a decision requiring retroactive application of the *Toll Northville* decision would produce substantial inequitable results. Since 1994, every assessing unit in Michigan in which "public improvements" have been installed, having no authority to otherwise ignore a statute, has increased the property's taxable value pursuant to MCL 211.34d(1)(b)(viii). Retroactive application of the *Toll Northville* decision would require each of these hundreds of units of government to review fourteen years of assessment rolls to determine which properties' taxable values were increased pursuant to MCL 211.34d(1)(b)(viii). Having done so, every unit of government that levied a millage against that taxable value would have to issue a refund of excess taxes paid. The result would be an extreme hardship that can only be avoided by prospective application.

Having found that the decision in *Toll Northville* should be given prospective application, the Tribunal must now determine whether a clerical error or mutual mistake of fact occurred that would permit Petitioners to include the 2000 tax year in this case. A decision as to this issue was made in the Tribunal's September 15, 2009 Order. However, the discussion bears repeating.

Pursuant to MCL 211.53a:

> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, **if suit is commenced within 3 years from the date of payment**, notwithstanding that the payment was not made under protest. (Emphasis added.)

In this case, the Tribunal finds that the addition to the subject properties' taxable value pursuant to MCL 211.34d(1)(b)(viii) was not a clerical error. Clearly, this addition was made intentionally and was based upon the state equalized value of the improvements as required pursuant to MCL 211.27a.

Petitioners assert that there was a "mutual mistake of fact as to the addition of public service improvements to taxable value . . . ." (Petitioners' Brief, p21) The Tribunal disagrees and finds that the additions made pursuant to MCL 211.34d(1)(b)(viii) were not the result of a mutual mistake of fact.

In *Ford Motor Company v City of Woodhaven, et al*, 475 Mich 425; 716 NW2d 247 (2006), the Michigan Supreme Court interpreted the phrase "mutual mistake of fact" in MCL 211.53a to mean "an erroneous belief, which is shared and relied upon by both parties, about a material fact that affects the substance of the transaction." *Id*., p443. As Respondent so aptly stated in the instant case,

> . . . there is no mistake made by either Petitioners or Respondent. Respondent properly assessed Petitioners' property pursuant to MCL 211.34d(1)(b)(viii) and Petitioners properly paid the corresponding taxes. At the time that the assessments were levied, MCL 211.34d(1)(b)(viii) was valid, and therefore, there was no mistake made. (Respondent's Response in Opposition to Petitioners' Supplemental Authority filed in response to Petitioners' Motion to Amend to Add 2000 Tax Year Brief, pp4-5)

Respondent's argument is supported by the Court of Appeals' decision in *Wolverine Steel Company v City of Detroit*, 45 Mich App 671; 207 NW2d 194 (1973). In that case the City of Detroit levied a tax in violation of the United States Constitution. *Id*., p675. The Wolverine

Steel Company asserted that there had been a mutual mistake of fact between the assessing officer and the taxpayer and requested a refund of the tax it paid under MCL 211.53a. The court held:

> On the facts as presented, contrary to the trial court's ruling, we believe that a "mutual mistake" was made. However appellant is still not entitled to recovery under MCLA §211.53a; MSA §7.97(1). An error made in determining the application of the United States Constitution to the tax laws of Michigan is not the type of mistake of fact required by this statute…When the words 'mutual mistake of fact made by the assessing officer and the taxpayer' are construed in the light of the other type of mistakes covered by this section, i.e., a 'clerical error', it seems clear that the statute was not intended to apply to mistakes in determining the application of the United States Constitution to the tax laws of Michigan. This would not generally be assumed to be within the province of a taxpayer and the tax assessor . . . .
>
> Case law in Michigan also indicates that the appellant may not recover, because if any mistake did occur it was not a mistake of "fact." *Upper Peninsula Generating Company v City of Marquette*, 18 Mich App 516, 517; 171 NW2d 572 (1969), the plaintiff had paid ad valorem taxes for the years 1965 and 1966. Sometime in 1967 the plaintiff became convinced that the taxes had been illegally assessed because the millage had been in excess of the 15-mill limitation imposed by article 9, section 6 of the Michigan Constitution of 1963, and had not received the approval of the electorate. The plaintiff sought recovery under MCLA 211.53a as does the appellant here. This Court denied recovery holding that an error of the type made could not be characterized as a 'mistake of fact'.
>
> The error made in the *Upper Peninsula* case was the same type of error that was made in the present case. In the *Upper Peninsula* case the City of Marquette levied taxes in violation of the Michigan Constitution. In the present case the appellees levied taxes in violation of the United States Constitution. In both cases the plaintiff and the defendants thought that the taxes were valid at the time they were paid. In the *Upper Peninsula* case this was held not to be an error of fact within the meaning of the statute. The same result must, therefore, be reached in the present case . . . . *Id*., pp673-677.

In this case, Respondent levied taxes based on a statute that was ultimately determined to be in violation of Article 9, §3 the Constitution of the State of Michigan. As in *Wolverine Steel*, the parties in this case thought the taxes were valid at the time they were paid. Thus, the result reached in *Wolverine Steel* must be reached in the present case.

However, even if it were determined that there was a mutual mistake of fact in the present case, to decide this issue the Tribunal must first have acquired jurisdiction over the 2000 tax year. This could have occurred one of two ways. First, Petitioners could have invoked the Tribunal's jurisdiction by timely filing an appeal of the 2000 tax year. As discussed at length above, Petitioners filed an appeal as to the 2000 tax year in MTT Docket No. 278799, but they did not do so timely and the appeal was dismissed with prejudice. Second, the Tribunal could have acquired jurisdiction if Petitioners had commenced suit as to the 2000 tax year within three years from the date of payment of the tax. Petitioners did not do so. According to Respondent, "the tax for tax year 2000 was paid on September 14, 2000 and on February 28, 2001." (Respondent's Answer to Petitioners' Motion to Amend to Add Tax Year 2000, p2) Because Petitioners' Motion to Amend to add the 2000 tax year was filed on April 28, 2008, the suit was commenced more than seven years, not within three years, from the date of payment of the tax as the statute requires.

Finally, the Tribunal finds Petitioners' argument that the public service improvements should be treated as a "loss" to the taxable value under MCL 211.34d(1)(h)(i) to be without merit. In Pursuant to MCL 211.34d(1)(h)(i), losses includes "[p]roperty that has been destroyed or removed." In *Hunt v Green Lake Township*, unpublished opinion per curiam of the Court of Appeals, decided May 21, 2009, (Docket No. 283524), the Court of Appeals was asked, inter alia, to determine whether MCL 211.34d(1)(h)(i) was unconstitutional. The Court compared the current language to that which existed prior to the adoption of Proposal A. Prior to Proposal A, "losses" was defined as "a decrease in value caused by the **removal or destruction** of real or personal property." (Emphasis added.) *Id*. The Court found that the current statutory language ". . . employs essentially the same meaning of the term 'losses' that was in force before the

adoption of Proposal A." *Id*. In this case, it is clear that the public service improvements were neither removed nor destroyed. Therefore, there is no loss under MCL 211.34(d)(1)(h)(i).

It appears to the Tribunal that Petitioners' argument really is that, now that the subject property has been platted and split, and the public improvements are now located on public land or public easements, the value that had been added to the subject property under MCL 211.34d(1)(b)(viii) must be subtracted from the parcels created by the split. However, just as additions do not include increased value attributable to platting, splits or combinations under MCL 211.34(d)(1)(c)(i), these actions do not result in a loss. See MCL 211.34(d)(1)(i)(i).

In MCL 211.34(d)(1)(b)(iii), the Legislature provided for an addition to taxable value due to new construction. Pursuant to MCL 211.34(d)(1)(b)(iii), new construction is defined as "property not in existence on the immediately preceding tax day and not replacement construction. New construction includes the physical addition of equipment or furnishings, subject to the provisions set forth in section 27(2)(a) to (o)." There can be no disagreement that public service improvements are a physical addition to property. Given this, public improvements would have been included in the definition of new construction. However, it is clear that by enacting a completely different subsection to deal with public improvements, the Legislature determined that these improvements should not be included in new construction.

As the Court of Appeals so aptly explained, "because title to these improvements ultimately resides with the municipality or a utility company, these improvements should not be included in the taxable value of the property." *Toll Northville*, p376. Therefore, if an appeal was timely filed and the Tribunal had jurisdiction to decide the issue, as it does with the aforementioned 184 condominium units, the value added as a result of these improvements would be removed from a property's taxable value.

Even if Petitioners were to prevail on their legal arguments, there is one important statutory provision that neither party discussed, specifically MCL 211.27a(3). To determine how to calculate a property's taxable value in any given year, the first decision that must be made is whether MCL 211.27a(2) or MCL 211.27a(3) applies. MCL 211.27a(2) states, in pertinent part: "(2) Except as otherwise provided in subsection (3) . . . ." Given this language, it is clear that one or the other subsection should be utilized each year, but not both. In this case, the Tribunal finds that MCL 211.27a(3) must be utilized in calculating the subject property's 2000 taxable value.

MCL 211.27a(3) states: "**Upon a transfer of ownership** of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the properties' state equalized valuation for the calendar year following the transfer." (Emphasis added.) In this case, ownership of the subject property was transferred to Petitioners in 1999. Pursuant to MCL 211.27a(3), to calculate the subject property's 2000 taxable value, the subject property's 2000 state equalized value became the subject property's taxable value. Therefore, the issue of whether the value of the public service improvements should have been added to the taxable value under MCL 211.27a(2) is, in reality, a non-issue. In *Toll Northville*, the Court of Appeals stated:

> We further note that to the extent that the public service improvements increase the true cash value of the land, the tax revenue for that increased value will be realized when the lots are transferred to the private owners. As required by Const. 1963 art. 9, § 3, "[w]hen ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value." Stated differently, the increased value for public service improvements should be realized just as any other community improvements are realized. For example, public service improvements are analogous to better community resources, like a better school system, which increase home values across the community that are realized when the homes are sold for higher prices, at which time the true cash value assessments can be adjusted accordingly. As stated in *WPW Acquisition Co.*, "The amendment generally was to not allow the

> taxable value to increase above the 'cap' regardless of any larger increase in true market value until the property was transferred." *Id.*, pp375, 376.

Thus, the Court of Appeals recognized that when ownership is transferred, the property is assessed at 50% of true cash value. In this case, ownership was transferred and public service improvements were installed in the same year. If Petitioners had made the public service improvements in a year other than the year in which ownership transferred, MCL 211.27a(2) would have applied.

In summary, the Tribunal finds that there is no basis to grant Petitioners summary disposition for the 2001 tax year. However, Petitioners are entitled to partial summary disposition pursuant to MCR 2.116(C)(10) for the 2002 tax year. Specifically, the 2002 taxable value of the 184 condominium units must be reduced by $21,100 for the public service additions made to that property in 2001. The Tribunal further finds that oral argument is not required as the Tribunal has enough information to make a determination as to Petitioners' motion. Therefore, Petitioners' request for oral argument is denied. This matter must now be set for hearing to resolve the remaining issues, namely the subject property's assessed and taxable values for each of the tax years at issue. This will be accomplished in a separate order.

Additionally, the Tribunal finds that Petitioners' Motion for Leave to File Reply Brief and Immediate Consideration thereof must be denied. In their Motion, Petitioners state that "[t]he Respondent's Brief in Opposition misstates the holdings of several cases." (Petitioners' Motion, p2) The Tribunal finds that Respondent has not misstated the holdings of several cases and that, in fact, the majority of Petitioners' Brief contains rebuttal arguments to Respondent's Brief. Even if Respondent's legal analysis were incorrect, the Tribunal is fully capable of determining the holdings, relevance and applicability of the cases cited by Respondent.

As for Respondent's Motion for Sanctions Pursuant to MCR 2.114, the Tribunal finds that it must deny Respondent's motion. MCR 2.114(D) provides, in relevant part:

> The signature of an attorney or party . . . constitutes a certification that . . .
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 2.114(E) provides for appropriate sanctions when a document is signed in violation of MCR 2.114. Those sanctions may include an order to pay the other party the amount of the reasonable expenses incurred due to the filing of the document that violated MCR 2.114, including reasonable attorney fees.

In its motion, Respondent claims that Petitioners' Motion for Immediate Consideration was not warranted and was interposed to harass and increase Respondent's litigations costs. The Tribunal finds that this claim is unsupported. Respondent provided no evidence to show an inappropriate purpose and provided no law to show that Petitioners' Motion for Immediate Consideration violated MCR 2.114. While Petitioners' grounds for its Motion for Immediate Consideration failed to show a need for immediate consideration, Petitioners' grounds do not reveal an improper purpose.

As for Petitioners' submission of "Supplemental Authority," the Tribunal finds that there is absolutely no support for this under MCR 7.212(F) and that this attempt to submit additional arguments was clearly not warranted by existing law. Moreover, Petitioners' attorney is well aware that, pursuant to TTR 230(1), "[a]ll requests to the tribunal shall be made by written

motion . . . ." For these reasons the Tribunal will not entertain Petitioners' discussion as to its "Supplemental Authority."

Finally, as to Respondent's request to offset the reduction in taxable value made pursuant to the Consent Judgment entered on October 29, 2002, by increasing the taxable values for the remaining residential properties, the Tribunal finds that Respondent did not file a motion or pay a motion fee for this request and, as such, the request is not properly before the Tribunal. However, even if Respondent were to properly bring this motion, it would be denied. The Tribunal has no more authority to consider the subject properties' 2000 taxable value in order to add value as it has to return to the 2000 taxable value in order to subtract value.

JUDGMENT

IT IS ORDERED that Petitioners' Motion for Summary Disposition Under MCR 2.116(C)(9) is DENIED.

IT IS FURTHER ORDERED that Petitioners' first Request for Immediate Consideration is DENIED.

IT IS FURTHER ORDERED that Petitioners' second Request for Immediate Consideration is DENIED.

IT IS FURTHER ORDERED that Respondent's Motion for Sanctions Pursuant to MCR 2.114 is DENIED.

IT IS FURTHER ORDERED that Petitioners' Motion for Leave to File Reply Brief is DENIED.

IT IS FURTHER ORDERED that Petitioners' request for oral argument is DENIED.

IT IS FURTHER ORDERED that Petitioners are GRANTED Partial Summary Disposition pursuant to MCR 2.116(C)(10).

IT IS FURTHER ORDERED that Respondent is GRANTED Partial Summary Disposition pursuant to MCR 2.116(I)(2).

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reduce the 2002 taxable values of each of the 184 parcels of property known as Parcel Nos. 77-059-02-0001-000 through 77-059-02-0184-000 by $21,100.00 each within 20 days of entry of this Order,

subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with refunding the affected taxes of each of the 184 parcels of property known as Parcel Nos. 77-059-02-0001-000 through 77-059-02-0184-000 shall issue a refund as required by this Order within 90 days of the date of this order. Any refund shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2001, at the rate of 5.56% for calendar year 2002; (ii) after December 31, 2002, at the rate of 2.78% for calendar year 2003; (iii) after December 31, 2003, at the rate of 2.16% for calendar year 2004; (iv) after December 31, 2004, at a rate of 2.07% for the calendar year 2005; (v) after December 31, 2005, at a rate of 3.66% for the calendar year 2006; (vi) after December 31, 2006, at the rate of 5.42% for calendar year 2007; (vii) after December 31, 2007, at the rate of 5.81% for calendar year 2008; (viii) after December 31, 2008, at the rate of 3.31% for calendar year 2009; and (ix) after December 31, 2009, at the rate of 1.23% for calendar year 2010.

MICHIGAN TAX TRIBUNAL

By: Patricia L. Halm

Entered: January 28, 2010