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

Richmond Street, LLC,
Petitioner,

v

MTT Docket No. 337980

City of Walker,
Respondent.

Tribunal Judge Presiding
Stuart Trager

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING RESPONDENT'S COUNTER MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

Petitioner, Richmond Street, LLC ("Richmond"), is appealing the assessment of the general common elements of the condominium project, as a separate unit of the subject property, for the 2007 tax year.

Petitioner is represented by David Charron, Attorney. Respondent is represented by Greg Longworth and Ingrid A. Jensen, Attorneys.

II. BACKGROUND

In early March, 2007, Respondent sent Richmond a Notice of Assessment, assessing the subject parcel at $501,600.00, with a tentative taxable value of $478,810.00. On March 14, 2007, Richmond filed a Petition to the Board of Review protesting the assessment asserting that general common elements are not subject to taxation, pursuant to Section 131 of the Michigan Condominium Act, MCL 559.231. Thereafter, Respondent sent Richmond its Notice from the 2007 Board of Review, denying Richmond's appeal. On May 30, 2007, Richmond filed its Petition for Property Tax Appeal with the Tax Tribunal. On November 13, 2007, Respondent filed its response. On December 13, 2007, Richmond filed this Motion for Summary Disposition under MCR 2.116(C)(10). Respondent submitted a Response and Counter Motion in opposition to Petitioner's Motion on December 26, 2007. Oral argument was held on February 25, 2008.

III. PETITIONER'S CONTENTIONS

In support of its Motion and at the February 25, 2008 oral argument, Richmond contended that:

(i) Section 131 of the Michigan Condominium Act states:

"[P]roperty taxes shall be assessed against the individual condominium units identified as units of the condominium subdivision plan **and not on the total property of the project or any other part of the project**, except for the year in which the condominium project was established subsequent to the tax day." MCLA 559.231(1). (Emphasis in the motion.)

(ii) "The property in question, PPN 41-13-18-124-001, consists solely of general common element area of the Project, and has since the recording of the Master Deed. As of tax day, December 31, 2006, and currently, the Master Deed has not created any condominium units within the Property."

(iii) Because the Property is a general common element, and not a condominium unit, pursuant to the Michigan Condominium Act it is not subject to taxation and the City is in violation of the Michigan Condominium Act.

(iv) "Respondent can only assess and tax the condominium units created by the Master Deed, [and] not [the] general common element areas. The City's action in issuing assessed values and tentative taxable values for the general common element Property ignores the fact that general common elements are not subject to tax and that the individual condominium units within the Project are or should be proportionately taxed for their share of the general common elements."

(v) "[U]nder section 61, units are inseparable from common elements. There would be no place for a tax lien to attach if it only attached to a general common element. Only condominiums are deedable; only condominium units are supposed to be taxed."

(vi) These elected reservation rights "are typical provisions that appear in the Condominium Act and almost every condominium project that we draft. The developer has a six-year window to exercise reserve rights."

(vii) "No separate tax bill is supposed to issue on the common elements, because they're inseparable from the units. That's double taxation."

IV. RESPONDENT'S CONTENTIONS

In support of its Motion in Opposition and Counter Motion, and at oral argument, Respondent contended that:

(i) "Contrary to Richmond's assertion, the Property does not 'consist solely of general common element area of the Project.' Instead, among other rights, Richmond has retained unilateral, fully discretionary rights related to the Property." Quoting the Master Deed: "The Developer reserves the right to elect, on or before the expiration of six years after the initial recording of [the] Master Deed for the Project, to contract the Project by withdrawal of all or any portion of the lands… [and] to convert any General Common Element(s) appurtenant to one or more Units, by an amendment or series of amendments to [the] Master Deed without the consent of any Co-owner, mortgagee, or other person.

(ii) "Thus, while the owners of the seventeen units in Cambridge Grove (the 'Co-owners') may use the Property during this six-year period, they essentially have only a license, which Richmond may revoke at any time."

(iii) Section 3 of the General Property Tax Act authorizes the City to assess the Property to Richmond because the "Master Deed includes several provisions in which the condominium unit Co-owners have designated Richmond as their agent."

(iv) Because the "Property is not controlled exclusively by the Cambridge Grove's Co-owners," the Property is not truly a common element, and the City has properly separately assessed it to Richmond.

(v) "Because of Richmond's rights in the Property, the Property is a separate 'condominium unit' so the City has properly separately assessed it to Richmond." Respondent is asking the Tribunal to look beyond the term "common element" as entitled in the Master Deed, like it did in *Bay Harbor Yacht Club v Petoskey*, MTT Docket No. 298777 (2006). Respondent is asking the tribunal to look at the reality of what, in fact, is really happening; "…a tax evasion scheme, a way to remove a large segment of the property for valuation purposes, and to remove that from taxation for six years."

(vi) "It's the right of development that we are taxing to the developer…. [a]nd as long as that bundle of sticks includes development rights, those development rights need to be taxed to the person to whom those rights pertain, and in this case, that's the developer."

(vii) "The second and third arguments that we've made are addressing the fact that this so-called common element can, in fact, be construed and interpreted as a condominium unit and can be properly taxed as such. It's within the definition of a condominium unit under the Condominium Act, because it's designed and intended for separate ownership and use. At least as long as the developer retains those rights."

V. FINDINGS OF FACT

On March 16, 2006, Richmond, as the Developer, recorded a Master Deed establishing Cambridge Grove as a residential site condominium project. Cambridge Grove is a multi-phase condominium project that, by the exercise of reserved rights of the developer, may include no more than 145 units. As of the oral argument date, February 25, 2008, Richmond owned all the units. The Project currently consists of 17 condominium units and a large parcel attached referred to as the general common elements in the Master Deed. This parcel, PPN 41-31-18-124-001 ("Property"), consists of wetlands and brush, and may be turned into "something."

Article VII of the Master Deed reserves the right for the developer to elect, on or before the expiration of six years after the initial recording of the Master Deed for the Project, to contract and withdraw, expand, or convert any General Common Element by amendment, or a series of amendments, to the Master Deed, without the consent of any co-owner, mortgagee, or other person.

In March, 2007, Respondent sent Petitioner a Notice of Assessment. Respondent assessed the Property at $501,600.00, with a tentative taxable value of $478,810.00, separately from the condominium units.

VI. APPLICABLE LAW

Under MCR 2.116(C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-55; 597 NW2d 28 (1999). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745, March 4, 2004, the Tribunal stated the standards governing motions for summary dispositions as follows:

> Motions for summary disposition are governed by MCR 2.116. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). *JW Hobbs Corp v Mich Dep't of Treasury*, Court of Claims Docket No. 02-166-MT (January 14, 2004). This particular motion has had a longstanding history in the Tribunal. *Kern v Pontiac Twp, supra*; *Beerbower v Dep't of Treasury*, MTT Docket No. 73736 (November 1, 1985); *Lichnovsky v Mich Dep't of Treasury, supra; Charfoos v Mich Dep't of Treasury*, MTT Docket No. 120510 (May 3, 1989); *Kivela v Mich Dep't of Treasury*, MTT Docket No. 131823.

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. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992). In the event, however, it is determined 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). However, if it appears that the party opposing the motion is entitled to judgment, the tribunal may render judgment in favor of the opposing party. MCR 2.116(I)(2); TTR 205.1111.

The issues in this case are governed by the general property tax act, MCL 211.1, et seq., and the Michigan Condominium Act (MCA), MCL 559.101 et seq.

Section 72 of the Michigan Condominium Act states:

> A condominium project for any property shall be established upon the recording of a master deed that complies with this act. MCL 559.172.

Section 61 of the Michigan Condominium Act states:

> Upon the establishment of a condominium project each condominium unit, together with and inseparable from its appurtenant share of the common elements, shall be a sole property subject to ownership, mortgaging, taxation, possession, sale, and all types of juridical acts, inter vivos or causa mortis independent of the other condominium units. MCL 559.161.

Section 131(1) of the Michigan Condominium Act states:

> [P]roperty taxes shall be assessed against the individual condominium units identified as units of the condominium subdivision plan and not on the total property of the project or any other part of the project…. MCL 559.231(1).

Section 131(2) of the Michigan Condominium Act states:

> [P]roperty taxes in any year in which the property existed as an established condominium project on the tax day shall be assessed against the individual condominium unit, notwithstanding any subsequent vacation of the condominium project. MCL 559.231(2).

VII. CONCLUSIONS OF LAW

Richmond's reliance on MCL 559.231(1) leaves open the question whether the subject parcel Petitioner designated as a common element, given Richmond's reservation of the development rights, is a true common element.

The Master Deed, in Article VII CONTRACTION, EXPANSION, WITHDRAWAL, AND CONVERSION OF PROJECT, under section 7.1 **Contraction** provides:

> The Developer reserves the right to elect, on or before the expiration of 6 years after the initial recording of this Master Deed for the Project, to contract the Project by withdrawal of all or any portion of the lands described from time to time in Section 2.1 or series of amendments to the Master Deed, each withdrawing land from the Project as then constituted, without consent of any Co-owner... provided that no unit which has been sold or which is the subject of a binding purchase agreement may be withdrawn without the consent of the Co-owner, purchaser and/or mortgagee of such Unit.

Section 7.3 of the Master Deed provides:

> **Conversion.** The Developer reserves the right, to elect, on or before the expiration of six (6) years after recording of this Master Deed for the Project, to convert any General Common Element into one or more additional Condominium Units and/or into Limited Common Elements appurtenant to one or more Units,

> by an amendment or series of amendments to this Master Deed, without the consent of any Co-owner, mortgagee or other person.

Further, the Master Deed in Section 7.6 provides:

> **Expansion, Contraction, Conversion Not Mandatory.** There is no obligation on the part of the Developer to expand, contract, withdraw, or convert the Condominium Project, nor is there any obligation to add or withdraw portions of the Project in any particular order, nor to construct particular improvements on any withdrawn lands. The Developer may, in its discretion, establish all or a portion of the lands withdrawn from the Project as a separate condominium project (or projects) or any other form of development. There shall be no negative reciprocal easements which arise against any adjacent lands as a result of the creation or operation of this Project.

Pursuant to Section 7.6 of the Master Deed, Petitioner reserved these rights for six years beyond March 16, 2006, until March 16, 2012.

MCA in section 61, MCL 559.161 provides:

> Upon the establishment of the condominium project each condominium unit, together with and **inseparable** from its appurtenant share of the common elements, shall be a sole property subject to ownership, mortgaging, taxation, possession, sale, and all types of juridical acts, inter vivos or causa mortis independent of the other condominium units. (Emphasis added.)

With this background, we look to each side's position.

Richmond relies on the provisions of the Condominium Act in its Motion, without supporting case law. Richmond argues that the assessment and taxation of the "common element" amounts to double taxation. However, given that the sole issue presented by Richmond to the March Board of Review and the Tax Tribunal, was whether the "common element" was exempt, the level of assessment is not before the Tribunal. The crux of Richmond's argument is that the taxable value of the remaining property, designated as a "common area," should have been assessed against each of the 17 individual condominium units even though Petitioner, as Respondent argues, retained the right to establish a total of 145 condominium units.

Respondent, in addition to moving for summary disposition, proffered three arguments it contends raises genuine issues of material fact upon which reasonable minds could differ.

Respondent first argued that Section 3 of the General Property Tax Act authorizes the City to assess the Property to Richmond. MCL 211.3. Second, Respondent argued that the Property is not a "common element," so the City has properly separately assessed it to Richmond. Third, Respondent argued that because of Richmond's retention of rights in the Property, the Property is a separate "condominium unit" so the City has properly assessed it as a separate piece of property taxable to Petitioner, Richmond.

The Tribunal holds that Petitioner's arguments do not entitle it to summary disposition, due to the unambiguous provisions of the Condominium Act dealing with the taxation and control of condominium units.

As noted, Petitioner does not claim the subject property is tax exempt. Petitioner claims that the taxable value of the property should have been assessed against each of the individual condominium units.

Respondent argues, assuming that the subject property is a common area, that the General Property Tax Act provides that property taxes may be assessed to an assignee or agent who has control or possession of the property, and that the agent may be treated as the owner, MCL 211.3. Respondent relies on Section 4.4 of the Master Deed, which specifically identifies Richmond as the Co-owners' agent in connection with the Property. However, the agency issue does not have to be resolved because the developer did not relinquish control of the property. Therefore, the subject property may not be designated as a common element.

Respondent's second and third arguments focus on the degree of ownership interest in, or the beneficial use of, the Property by the Co-owners and Richmond. Respondent argues that the level of control retained by Richmond belies the assertion that the subject property is a common element. Respondent asks the Tribunal to look beyond the term "common element" in Richmond's Master Deed and find that the parcel in question is actually a unit as defined in the MCA and taxable as such because the rights reserved by the developer confer a total separate ownership for a six-year period. Respondent asserted that the reasoning in *Bay Harbor*, *supra,* should govern.

In *Bay Harbor*, *supra*, the Tribunal found that according to the unambiguous language of the Membership Plan, the developer expanded rights to use the clubhouse and its appurtenant facilities to non co-owners, persons outside the condominium association. Respondent asserts there is a parallel between *Bay Harbor*, *supra,* and the instant case, "…because persons other than the condominium co-owners had partial control over the club, the club's property could not be considered a common element, despite the master deed that designated the parcel as a common element."

It is apparent to the Tribunal that the plain meaning of MCA, Section 61, MCL 559.161, requiring that the interest in the common elements be **inseparable** from the individual condominium unit, is at the heart of *Bay Harbor, supra*. After an interest in the clubhouse was extended to non co-owners, individual units were no longer inseparable from ownership in the "common area." Although in *Bay Harbor*, the developer did not reserve statutory rights under the Condominium Act as Petitioner has in the instant case, the Membership Plan in *Bay Harbor* provided for the developer to exclusively own, operate and control the Yacht Club until it received a sum certain or a specified date passed. In the instant matter, Richmond, in its Master Deed, reserved rights that maintain the level of control that is contrary to the plain meaning of section 61 of the MCA, which requires that the interests in the common area be inseparable from the interests of the co-owners. In *Bay Harbor*, *supra*, the developer did not reserve those rights. It simply owned and controlled the property. In the instant matter, as the developer retains full control over the common area, it is not until the six years have elapsed that Petitioner may

sustain an argument that the "common area" is indeed an inseparable, appurtenant part of the ownership interest of the condominium unit co-owner.

The degree of control over property by a developer in a convertible condominium project like Richmond's straddles the fence between permitted statutory control and actual control. If one looks at the market reality and asks who really controls the land designated as a common area, it is obviously controlled by the developer, even though a right to retain control is given under the MCA statute. The convertible area of a convertible condominium project is a unit, or a portion of the common elements referred to in the condominium documents, within which additional condominium units or general or limited common elements may be created in accordance with this act. MCL 559.105(3).

The mere designation of the subject property as a common area with the reservation of rights by the Developer in the Master Deed does not take the property out of taxation. The Court held, where a corporation put land-use restrictions in its bylaws to attempt to diminish property tax liability for corporately held property, that neither a private individual nor a corporation may rely on self-imposed restrictions on the sale of property as a means of avoiding taxes, see *Canada Creek Ranch Association, Inc v Montmorency Township*, 206 Mich App 498, 522 NW2d 690 (1994).

If the option to convert and develop the property is not elected after six years, the option expires. Petitioner's rights are governed by the provisions of the MCA and the Master Deed. Although Richmond's control of the property does not exceed the time span allowed by statute, the Tribunal finds that Richmond's Property labeled as a "common element" is not truly a common element until after the six years have run, ending the developer's rights to expand the condominium development. The co-owner of the individual condominium units does not own an inseparable, appurtenant share of the common elements until the six years have elapsed. To rule otherwise would be to elevate form over function.

Further guidance on the property valuation of common elements can be found in Department of Treasury State Tax Commission Bulletin No. 1, February 8, 1990, which the Tribunal notes is not controlling, but is authoritative. The bulletin indicates various types of common elements including a community building, swimming pool or tennis court built on a lot solely reserved for the use of the co-owners of the lots in the subdivision. The STC bulletin notes:

"The properties are not exempt but their value has been included as a part of the value of the lots in the recorded platted subdivision(s)."

"Community property that is to be considered at zero assessed value shall be restricted by a permanent irrevocable plat dedication or deed restriction."

What can be gleaned from the foregoing is that "common elements" enhance the value of the individual condominium units. The Tribunal finds that it is beyond the ambit of the law, and the plain meaning of the MCA statute, to so loosely define as "common element" the area that is still within the full control of the developer. In the instant matter, the MCA specifically requires, as noted above, that the individual condominium unit be inseparable from its appurtenant share of

the common elements, MCL 559.161. In construing a statute, words which have acquired a well-defined technical meaning must be understood in their technical sense; where words have no statutory definition or controlling judicial definition, the words must be construed according to common and approved usage. *Brown v Department of State Highways*, 126 Mich App 392, 337 NW2d 76 (1983). There is no ambiguity in the term "inseparable."

This Tribunal has considered Petitioner's Motion for Summary Disposition under the criteria for MCR 2.116(C)(10), and based on the pleadings and other documentary evidence filed with the Tribunal, and review of the hearing transcripts, determines that denying Petitioner's motion and granting Respondent's motion for summary disposition is appropriate. Thus, Respondent is entitled to summary disposition as a matter of law under MCR 2.116(I)(2).

VIII. JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Respondent's Counter Motion for Summary Disposition is GRANTED.

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

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Final Opinion and Judgment within 90 days of the entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and 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 Opinion and Judgment. As provided by 1994 PA 254 and 1995 PA 232, being MCL 205.737, as amended, interest shall accrue for periods after March 31, 1985, but before April 1, 1994, at a rate of 9% per year. After March 31, 1994, but before January 1, 1996, interest shall accrue at an interest rate set monthly at a per annum rate based on the auction rate of the 91-day discount treasury bill rate for the first Monday in each month, plus 1%. After December 1, 1995, interest shall accrue at an interest rate set each year by the Department of Treasury. Pursuant to 1995 PA 232, interest shall accrue (i) after December 31, 1995, at a rate of 6.55% for calendar year 1996, (ii) after December 31, 1996, at a rate of 6.11% for calendar year 1997, (iii) after December 31, 1997, at a rate of 6.04% for calendar year 1998, (iv) after December 31, 1998, at the rate of 6.01% for calendar year 1999, (v) after December 31, 1999, at the rate of 5.49% for calendar year 2000, (vi) after December 31, 2000, at the rate of

6.56% for calendar year 2001, (vii) after December 31, 2001, at the rate of 5.56% for calendar year 2002, (viii) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (ix) after December 31, 2003, at the rate of 2.16% for calendar year 2004, (x) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (xi) after December 31, 2005, at the rate of 3.66% for calendar year 2006, (xii) after December 31, 2006, at the rate of 5.42% for calendar year 2007, and (xiii) after December 31, 2007, at the rate of 5.81% for calendar year 2008.

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

MICHIGAN TAX TRIBUNAL

Entered: June 23, 2008 By: Stuart Trager, Tribunal Judge