

precedent-setting
decision from the Michigan
Tax Tribunal regarding
conservation easement lands
+ lowered property taxes.

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL
SMALL CLAIMS DIVISION

DESIGNATED FOR PUBLICATION

INDIAN GARDEN GROUP,
Petitioner,

v

RESORT TOWNSHIP,
Respondent.

MTT Docket No. 157543
No. 205036

OPINION AND JUDGMENT

Tribunal Judge Presiding: Norman D. Shinkle
Location of Hearing: Traverse City, Michigan
Date of Hearing: July 5, 1994

The issue presented in this case is one of first impression. Pursuant to MCL 205.765; MSA 7.650, the Michigan Tax Tribunal declares this decision precedential.

FINDINGS OF FACT

The property is located in Emmet County, State of Michigan.

MTT No. 205036 represents the same issues on the same property for tax year 1994, thus is consolidated with MTT No. 157543.

This is a rehearing. The original hearing took place on June 24, 1993 in Potosky, Michigan. An Opinion and Judgment was entered, which is hereby vacated.

The assessments in issue cover the years 1991, 1992, 1993 and 1994. The following is information pertinent to the contested assessments:

TAX CODE	YEAR	RATIO	AV	SEV	PET'S TCV	RESP'S TCV*
24-22-06-300-018	1991	55.85%	\$25,000	\$22,384	\$5,360	\$44,800
Same	1992	50.00%	\$22,384	\$22,384	\$5,360	\$44,800
Same	1993	50.00%	\$25,000	\$25,000	\$5,985	\$50,000
Same	1994	39.14%	\$25,000	\$31,935	\$6,450	\$63,870

TAX CODE	YEAR	RATIO	AV	SEV	PET'S TCV	RESP'S TCV*
24-21-01-400-001	1991	55.85%	\$20,000	\$17,907	\$21,240	\$35,800
Same	1992	50.00%	\$17,907	\$17,907	\$21,240	\$35,800
Same	1993	50.00%	\$20,000	\$20,000	\$23,715	\$40,000
Same	1994	39.14%	\$20,000	\$25,549	\$25,550	\$51,098

*In this proceeding, AV refers to assessed value, SEV to state equalized value, and TCV to true cash value.

The property is classified for taxation purposes as Residential real property.

The average levels of assessment in effect for this property's classification for the years in issue are 55.85% for 1991 and 50% for 1992 and 1993 and 39.14% for 1994.

The interested school districts are Petoskey Public and Charlevoix-Emmet Intermediate.

The subject properties consist of:

#018 -- a vacant 20 acre parcel of land

#001 -- a vacant 79.8 acre parcel of land

The two parcels of vacant land are contiguous and contain approximately 100 acres of vacant land which is high rolling and forested. A stream appears on the property but then disappears before leaving the subject property. The subject property is somewhat rectangular in nature.

Petitioner granted a Conservation Easement to Walloon Conservancy, a non-profit corporation, incorporated under the laws of the State of Michigan. The Walloon Conservancy has as one of its purposes the preservation and conservation of natural areas for aesthetic, charitable and educational purposes. The easement is managed by the Little Traverse Conservancy.

This topic was thoughtfully explored in "Conservation Easements: Michigan's Land Preservation Tool Of The 1990s" by Thomas Grier, found in the University of Detroit Law Review, Volume Sixty-eight, Issue Two, Winter 1991.

The property is subject to this Conservation Easement as provided for in MCL 399.251-257. Generally, a Conservation Easement is an interest in land or body of water which restricts the use of the land or body of water in a manner consistent in maintaining the land predominantly in its natural, scenic or open condition.

The property also qualifies under Section 170(h) of the Internal Revenue Code which requires that

a conservation easement contribution be of a qualified real property interest, to be given to a qualified donee organization, and be contributed in furtherance of a conservation purpose.

The Tribunal finds the following facts: 1) None of the Grantors of the easement are a part of the Grantee Conservancy; 2) The easement is irrevocable - it runs with the land; 3) The Grantor may not subdivide the property; 4) No motorized recreational vehicles may be used on the subject property; 5) No real property improvements are allowed to the subject property except for a garage or storage building that could be built on the parcel bordering Indian Garden Road; 6) The Grantee may view the property at any time and enter the property at all reasonable times for inspections, observations, and to conduct studies; 7) The Grantor shall not remove rock, topsoil or similar materials; 8) The Grantor shall not place or use the property for advertising such as billboards; 9) The Grantor shall not remove any live trees unless dangerous; 10) The Grantor must pay all real estate taxes and assessments levied by authorities on the property; 11) The Grantor is responsible for the maintenance of the property.

The Tribunal finds that because of the Conservation Easement on the land, the highest and best use is as a nature preserve. The Tribunal further finds that the proper method to value property subject to a conservation easement is the "Before and After" market test. The following is a discussion of the appropriate methodology as developed with the consultation of Tribunal Judge R. Conrad Morrow.

DISCUSSION OF APPLICABLE APPRAISAL METHODOLOGY

The appraisal problem requires a determination of the True Cash Value of the land after specified property rights embodied in a conservation easement have been granted in perpetuity to a qualified Conservancy. The appropriate valuation methodology employs valuation concepts found in a process generally known as a "Before and After" appraisal.

The terminology applicable to this process is:

1. **Before Value (BV)** is the True Cash Value of the real property before the granting of rights;
2. **After Value (AV)** is the True Cash Value of the property after the rights have been granted;
3. **Difference (Diff)** is the amount of True Cash Value Difference between the Before Value and the After Value, being the value of those real property rights which have been granted.

Stated in the simple terms of a formula: (1) If the Difference is to be determined, then the After Value is subtracted from the Before Value, or $BV - AV = \text{Diff}$; (b) If the After Value is to be determined, then the Difference is subtracted from the Before Value, or $BV - \text{Diff} = AV$; (c) If a

comparison of the Difference is required, then BV vs. AV is examined for the merits of the Diff.

The valuation principle involved in this simple concept is found in several familiar applications. In eminent domain, the Before and After method uses the $BV - AV = \text{Diff}$ formula as the compensation basis for easement or fee simple taking of property. In taxation work involving real property special assessments, the Before and After method uses BV vs. AV to examine the merits of proportionality when the Difference is compared with the cost of the special assessment.

In the matter at hand, the appraisal purpose is to estimate the True Cash Value of the real property after granting of the easement and the specified rights. The appropriate "Before and After" method is $BV - \text{Diff} = AV$. This process is explained in IRS Revenue Ruling 73-339, which pertains to the calculation of the value of a charitable contribution for conservancy easements. Quoting from a portion of the ruling (the term "fair market value" has the same meaning as True Cash Value):

Open space easements in perpetuity may be valued separately and distinctly. However, more often than not open space easements in perpetuity are granted by deed of gift so that there is usually no substantial record of market place sales to use as a meaningful or valid comparison. As a consequence, the valuation of an open space easement in perpetuity is generally made on the basis of the "Before and After" approach. Thus, the difference between the fair market value of the total property before the granting of the easement and the fair market value of the property after the grant is the fair market value of the easement given up.

Adopting these valuation principles, and adapting them to the valuation of real property which is subject to a conservation easement, THE TRIBUNAL FINDS that the appraisal of the True Cash Value of the property will involve application of these steps as of each relevant tax date in contention:

1. Determine the Highest and Best use of the property as though the Conservation Easement had not been granted (the Before Value property). The Highest and Best use of the property after the easement has been granted will most likely be as a nature preserve subject to the Conservation Easement (the After Value property).
2. Use comparable market sales data to determine the True Cash Value of the property in accord with the determined Highest and Best Use - as though the Conservation Easement had not been granted (the Before Value).
3. Examine the Conservation Easement document, and enumerate the easement property rights which have been granted (those contained in the Difference).
4. Evaluate the easement property rights granted, and determine the amount of value diminishment attributable to the granting of the Conservation Easement (the Difference), expressed either as (a) the percentage of loss from the Before Value, or (b) the dollar amount of that loss.

Because it is unlikely sales data for actual conservation easement properties will be available, seek market data which possesses characteristics which most nearly approximate degree of loss of property rights and utility.

5. Determine the value of the real property as diminished by the granting of the easement (the After Value), by means of either applying the percentage loss to the Before Value, or deducting the dollar amount of loss (the Difference) from the Before Value.

The resulting After Value is the True Cash Value of the property for the relevant year. It is determined on a case-by-case basis. The value diminishment caused by the conservation easement is not an exemption. The True Cash Value of the property is to be determined on a year-by-year basis according to the applicable and available market evidences.

DISCUSSION OF VALUATION PROOFS PRESENTED AT HEARING

Petitioner's witness, Robert Frame, testified that he used comparables that could be developed, as opposed to property that is undevelopable. Mr. Frame testified that there were no reliable sales of property subject to conservation easements. Petitioner relied on an appropriate market approach. Mr. Frame used five comparables initially, but disregarded two due to large required adjustments. After applying appropriate adjustments, Mr. Frame concluded a per acre True Cash Value of \$760.00 prior to factoring in the Conservation Easement effect. This would equal a True Cash Value of \$76,000.00 for the two subject parcels combined.

A conservation easement adjustment was then calculated by creating a fraction; the numerator of which is the average per acre price of unbuildable wetland river front lots and the denominator of which is the average price of the buildable river front lots. By doing this Mr. Frame estimated that the percentage of value loss by Petitioner due to the Conservation Easement is approximately equal to the diminishment in value of river front lots due to the inability to develop the riverfront lots with typical real property improvements.

Mr. Frame used seven sales of unbuildable wetland river front lots and three sales of buildable river front lots. This fraction was \$55.00 over \$155.00 or 35% rounded. This percentage applied to the previous True Cash Value prior to the conservation easement adjustment of \$76,000.00 equals \$26,600.00 as of December 31, 1990. Petitioner argues that this value should be frozen for tax year 1992 and increased to \$29,700 for 1993 and \$32,200 for 1994.

Respondent agreed at hearing that the easement had a negative effect on the property value. Respondent appeared to agree with most of Petitioner's assertions, but for the tax year 1994 value.

Respondent testified that Agricultural properties increased approximately 8% for 1994 and Residential property increased approximately 28% for 1994.

CONCLUSIONS OF LAW

The Tribunal Referee, in the initial hearing, found that because the restrictive easement was voluntary, it could not be compared to wetlands. This fact, coupled with the provision that the Grantor remained responsible for maintenance and taxes, led the Referee to conclude the easement did not require a "division determination" and had no negative impact on the land value.

The issue of the valuation impact from a conservation easement has not been before the Michigan Court of Appeals nor a Tribunal Judge prior to this case. A similar issue was dealt with in Lochmoor Club v Grosse Pointe Woods, 10 Mich App 394-398, (1968), where a private club voluntarily placed permanent restrictive covenants limiting building on an otherwise buildable adjacent parcel. The court held that "[...]and restricted in its use, such as in the instant case, cannot be compared in valuation to subdivision lots in the same general area which may be utilized for the erection of homes. To ignore such a restriction constitutes fraud on the taxpayer...." Id. at 398.

The Tribunal finds that the restrictive easement does affect value because it was created in accordance with State and Federal law with the express intent of placing permanent limitations upon the property that negatively affect the market value.

The Tribunal adopts the "Before and After" market methodology discussed above and agrees with Petitioner's calculations to determine the True Cash Value. Petitioner has reasonably measured the percentage loss of rights in the subject property. Some of these rights given up are contained in the "Finding of Facts" section of this opinion.

The Tribunal finds the value given up by Petitioner as a result of the Conservation Easement is 65% of what the True Cash Value would otherwise be. Thus, the correct percentage to be applied to Petitioner's True Cash Value is 35%.

The Tribunal agrees with Petitioner's percentage increases of 11.65% for 1993 and 8.35% for 1994. The Tribunal notes that the subject property should increase in value approximately equal to undevelopable land in the area.

From its examination of the evidence received at the hearing in this matter, the Tribunal concludes that the true cash values and revised assessments of the subject property are as follows:

<u>TAX CODE</u>	<u>YEAR</u>	<u>RATIO</u>	<u>REVISED AV</u>	<u>SEV</u>	<u>TCV</u>
24-22-06-300-018	1991	55.85%	\$2,994	\$2,680	\$5,360
Same	1992	50.00%	\$2,680	\$2,680	\$5,360
Same	1993	50.00%	\$3,000	\$3,000	\$6,000
Same	1994	39.14%	\$2,544	\$3,250	\$6,500

<u>TAX CODE</u>	<u>YEAR</u>	<u>RATIO</u>	<u>REVISED AY</u>	<u>SEV</u>	<u>TCY</u>
24-21-01-400-001	1991	55.85%	\$11,363	\$10,620	\$21,240
Same	1992	50.00%	\$10,620	\$10,620	\$21,240
Same	1993	50.00%	\$11,850	\$11,850	\$23,700
Same	1994	39.14%	\$10,059	\$12,850	\$25,700

JUDGMENT

IT IS HEREBY ORDERED that the true cash values and lawful revised assessments for the subject property shall be those specified in the "conclusions of law" portion of this opinion.

IT IS FURTHER ORDERED that the persons having responsibility for the assessment rolls, tax rolls and tax bills, for the years in issue, correct the rolls and bills to reflect the lawful assessments as shown, subject to the processes of equalization, within 20 days of the date this judgment is entered. The resulting assessments as equalized shall not exceed 50% of the true cash values for the property determined by the Tribunal.

IT IS FURTHER ORDERED that, as dictated by the Tribunal's ruling in this matter, the person in possession of the tax roll shall collect taxes, any applicable interest, or issue a refund within 20 days after entry of the 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. Interest shall accrue from the date of payment of tax to April 1, 1994 at the rate of 9% per year. After March 31, 1994, 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%.

IT IS FURTHER ORDERED that the true cash value of the property for 1994 is the amount in this Opinion and Judgment and that such true cash value is subject to the application of the level of assessment for 1994 as finally determined and at that time the assessor is to correct or cause the assessment roll for 1994 to be corrected to reflect an assessment as finally determined subject to the processes of equalization. The resulting assessment, as equalized, shall equal but shall not exceed 50% of the true cash value.

MICHIGAN TAX TRIBUNAL

Entered: FEB 17 1998

By



