REPRESENTATIVES FOR PETITIONERS:
Jeffrey Bennett, Attorney for Petitioners
Bradley Hasler, Attorney for Petitioners

REPRESENTATIVES FOR RESPONDENTS:
Dixie Packard, Clay Township Assessor
Kevin Poore, Clay Township Assessor's office

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Brenwick TND Communities, LLC and BDC Cardinal Associates, LP, Petitioners, vs. Clay Township Assessor, Hamilton County Assessor, and Hamilton County Property Tax Assessment Board of Appeals, Respondents.	Petition Nos.	Various (see attached list)
	Parcel Nos.	Various (see attached list)
	County:	Hamilton
	Township:	Clay
	Assessment Year:	2003

Appeal from the Final Determination of
Hamilton County Property Tax Assessment Board of Appeals

May 15, 2006

FINAL DETERMINATION

The Indiana Board of Tax Review (the Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUES

1. The parties presented multiple issues, which the Board restates as follows:
   (1) Whether the common areas of the Village of West Clay and Prairie View subdivisions had a market value-in-use of zero dollars as of the March 1, 2003, assessment date;
   (2) Whether the assessment of the common areas of the Village of West Clay and Prairie View subdivisions violates the Equal Protection Clause of the United States Constitution;
   (3) Whether the assessment of the Village of West Clay and Prairie View subdivisions violates the Privileges and Immunities Clause of the Indiana Constitution; and
   (4) Whether the Respondent assessed the common areas of the Village of West Clay and Prairie View subdivisions in a uniform and equal manner in comparison to similarly situated property within Hamilton County.

PROCEDURAL HISTORY

2. On or about May 7, 2004, Petitioners, Brenwick TND Communities, LLC ("Brenwick") and BDC Cardinal Associates, LP ("BDC") filed Form 130 Petitions for Review of Assessment concerning multiple parcels of real property located in Clay Township, Hamilton County, Indiana and owned by each Petitioner separately. The Hamilton County Property Tax Assessment Board of Appeals (PTABOA) issued its final determinations with regard to the assessments of the parcels owned by BDC on or about September 1, 2004. The PTABOA issued its final determinations with regard to the assessments of the parcels owned by Brenwick on or about September 16, 2004. The Petitioners filed a separate Form 131 Petition to the Indiana Board of Tax Review for Review of Assessment (Form 131 petition) with respect to each parcel on October 1, 2004.

3. Due to the predominance of common legal and factual issues and to the similarity of evidence presented by Brenwick and BDC, Petitioners moved for a consolidated hearing of

their appeals before the Indiana Board of Tax Review on December 16, 2005. The parcels under appeal (and their corresponding petition numbers) are set forth in the Agreed Notice of Parcels Under Appeal (Agreed List), which was filed jointly by the parties on January 12, 2006, as requested by the Administrative Law Judge at the December 16, 2005, hearing. A copy of that Agreed List is attached to this Final Determination, incorporated herein and labeled as Exhibit 1. The Board granted the Petitioners' motion for a consolidated hearing and now issues this Final Determination on the consolidated appeals of Brenwick and BDC.

4. Pursuant to Ind. Code § 6-1.1-15-4 and § 6-1.5-4-1, a hearing was held on December 16, 2005, in Noblesville Indiana before David Pardo, the duly designated Administrative Law Judge (ALJ) authorized by the Board under Ind. Code § 6-1.5-3-3.

HEARING FACTS AND OTHER MATTERS OF RECORD

5. The following persons were sworn and presented testimony at the hearing:

For the Petitioners:

Anthony Lehn, Capstone, LLC

For the Respondents:

Dixie Packard, Clay Township Assessor
Kevin Poore, Deputy Assessor, Clay Township

6. The Petitioners submitted the following exhibits:

Petitioners' Exhibit A:	Affidavit of Phyllis Bishop of Omni Management Services regarding management of the Village of West Clay,
Petitioners' Exhibit B:	Affidavit of Phyllis Bishop of Omni Management Services regarding management of Prairie View,[1]
Petitioners' Exhibit C:	Declaration of Covenants and Restrictions, The Village of West Clay,
Petitioners' Exhibit D:	Declaration of Covenants and Restrictions, Prairie View,

[1] On or about February 14, 2006, the Petitioners filed Petitioners' Unopposed Notice of Filing Substitution Pages for Exhibits PA and PB (Notice). Pursuant to the Notice, the Petitioner averred that each exhibit was missing one line of text. Counsel for the Petitioners averred that he had discussed the matter with the Respondent and that the Respondent had no objection to the substitution. The Board therefore considers Exhibits PA and PB with the substituted material.

Petitioners' Exhibit E:	Market Value-in-Use Appraisal of the Common Areas of Village of West Clay,
Petitioners' Exhibit F:	Market Value-in-Use Appraisal of the Common Areas of Prairie View,
Petitioners' Exhibit G:	Property record cards for common areas of the Village of West Clay,
Petitioners' Exhibit H:	Property record cards for common areas of Prairie View,
Petitioners' Exhibit I:	Aerial map of the Village of West Clay,
Petitioners' Exhibit J:	Aeriel map of Prairie View,
Petitioners' Exhibit K:	Excerpts from the 2002 Real Property Assessment Manual,
Petitioners' Exhibit L:	Robert W. Owens, *Subdivision Development, Bridging Theory and Practice*, 66 APPRAISAL JOURNAL 274 (July 1, 1998).

The Respondent submitted the following exhibits:

Respondent's Exhibit A:	Clay Township Assessor – Preliminary Hearing Notes,
Respondent's Exhibit B:	Clay Township Assessor – Summary Report for State Hearings,
Respondent's Exhibit C:	PTABOA Land Value Guidelines,
Respondent's Exhibit D:	An unsigned copy of findings of fact and conclusions of law issued by the Board in the case of *Pine Valley Community Ass'n v. Allen County Property Tax Assessment Bd. of Appeals*, Pet. No. 02-057-00-2-8-00009,
Respondent's Exhibit E:	Excerpt from 2002 Real Property Assessment Manual,
Respondent's Exhibit F:	Excerpt from an unidentified publication of the Appraisal Institute,
Respondent's Exhibit G:	Copy of Ind. Code § 6-1.1-2-1,
Respondent's Exhibit H:	Excerpt from an appraisal of Timber Creek Condominiums,
Respondent's Exhibit I:	Aerial map, property record cards and sales disclosure forms for parcels within Village of West Clay Section 3004,
Respondent's Exhibit J:	Aerial map for a portion of Woodshire subdivision, brochure for Woodshire subdivision, property record cards and sales disclosure statements for three parcels within Woodshire subdivision,
Respondent's Exhibit K:	Respondent's Summary of Witness Testimony and Evidence.

7. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:

Board Exhibit A:	Form 131 Petitions,

Board Exhibit B:	Hearing Notices,
Board Exhibit C:	Letter from counsel for Petitioners waiving requirement under Ind. Code § 6-1.1-15-4(g) that hearings be held within nine (9) months from the date of filing,
Board Exhibit D:	Exhibits from the PTABOA hearings,[2]
Board Exhibit E:	Hearing sign-in sheet.
Board Exhibit F:	The Petitioners' Unopposed Notice of Filing Substitution Pages for Exhibits PA and PB,
Board Exhibit G:	Petitioners' Post Hearing Brief and proposed Final Determination, Findings of Fact and Conclusions of Law[3]

8. The one-hundred-and-seven (107) parcels under appeal consist of land and some improvements located in subdivisions in Carmel commonly known as Village of West Clay (West Clay) and Prairie View. *See Exhibits PA, PB, PE, PF, PI, PJ.* Brenwick, which is the developer of West Clay, owns the parcels located in West Clay. BDC, which is the developer of Prairie View, owns the parcels located in Prairie View. The parcels under appeal are the common areas of West Clay and Prairie View. *See Exhibits PA, PB.* Unless the context clearly indicates otherwise, the Board shall refer to the parcels under appeal collectively as the "Common Areas" throughout this Final Determination.

9. A list of the assessed values for the individual Common Area parcels is attached to this Final Determination, incorporated herein, and labeled as Exhibit 2. The total assessed values for Common Area parcels located within Prairie View are as follows: Land $227,300, Improvements $551,700. The total assessed values for Common Area parcels located within West Clay are as follows: Land $500,200; Improvements $2,781,900.

10. The Petitioners request that the Common Areas in West Clay and Prairie View be assessed for zero dollars ($0.00).

11. The ALJ did not conduct an on-site inspection of the subject properties

[2] The Hamilton County Assessor forwarded the exhibits from the PTABOA hearing to the Board. The ALJ provided the parties with a copy of the assessor's correspondence and the exhibits from the PTABOA hearing because it was unclear whether those documents were also served on the parties. The ALJ indicated that those exhibits would not become part of the evidentiary record unless they were introduced into evidence by one of the parties. Neither party offered the PTABOA exhibits into evidence, although those exhibits appear to be duplicative of other exhibits offered by the parties.

[3] At the hearing, the ALJ provided the parties with sixty (60) days in which to file post hearing briefs and proposed findings of fact and conclusions of law. The Petitioner timely filed both documents. The Respondent did not submit a post hearing brief or proposed findings of fact and conclusions of law.

JURISDICTIONAL FRAMEWORK

12. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions; and (3) property tax exemptions; that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Ind. Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

ADMINISTRATIVE REVIEW AND THE PETITIONERS' BURDEN

13. A Petitioner seeking review of a determination of the county property tax assessment board of appeals has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998).

14. In making its case, the taxpayer must explain how each piece of evidence is relevant to the requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) ("[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis.").

15. Once the petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the petitioner's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the petitioner's evidence. *Id.; Meridian Towers*, 805 N.E.2d at 479.

ANALYSIS

Issue 1

Whether the common areas of the Village of West Clay and Prairie View subdivisions had a market value-in-use of zero dollars ($0.00) as of the March 1, 2003, assessment date

Parties' Contentions

16. The Petitioners contend that the Common Areas are burdened by easements and restrictions upon their use and conveyance to such an extent that they have no market value-in-use. According to the Petitioners, the value of the Common Areas is fully reflected and captured in the premium paid by residential lot owners within the two subdivisions.

17. The Petitioners presented the following evidence and argument in support of their position:

A. Brenwick and BDC, as developers of West Clay and Prairie View, currently own the Common Areas within those subdivisions. *Lehn testimony; see also Exs. PA, PB.* The Common Areas, however, are intended for the common benefit of the owners of residential lots throughout West Clay and Prairie View. *Id.* Brenwick and BDC intend to convey the Common Areas to the homeowners' associations after all lots are sold within the respective subdivisions. *Id.* The Common Areas generally consist of parks, irregularly shaped green space, drainage areas, roundabouts, lakes, ponds and community buildings. *See Lehn testimony; Exs. PI, PJ.*

B. The covenants and restrictions applicable to West Clay create an easement for the owners and occupants of residential lots within the subdivision to use the West Clay Common Areas. *See Lehn testimony; Ex. PC at ¶21(d), pp. 32-33.* Similarly, the covenants and restrictions applicable to Prairie View create an easement for the owners of residential lots within the subdivisions and their guests to use the Prairie View Common Areas. *See Lehn testimony; Ex. PD at ¶19(d), ¶19(f), pp. 22-24.* Thus, while the Petitioners own the Common Areas, those areas exist solely for the benefit and use of lot owners and occupants of West Clay and Prairie View. *Lehn testimony.*

C. The covenants applicable to West Clay do not allow conveyance of the Common Areas to persons other than a "Permitted Title Holder." *See Lehn testimony; Ex. PC at ¶21(a), p. 32, ¶21(h), p. 35.* A "Permitted Title Holder" is defined to include certain non-profit owners' associations, any educational institution, the City of Carmel or a non-profit or governmental entity. *See Lehn testimony; Ex. PC at ¶1, pp. 2, 4, 7.* In addition to limiting the persons or entities to which the Common Areas may be conveyed, the covenants applicable to West Clay further restrict the use of the Common Areas by a

Permitted Title Holder. A conveyance may be made to a Permitted Title Holder only for use as a park, right-of-way, public utility, or for other public purpose. *See Lehn testimony; Exhibit PC, ¶21(a), page 32.* In other words, Common Areas may only be conveyed for purposes generally of public benefit, most of which would be exempt from taxation. *See* Ind. Code § 6-1.1-10-1 *et seq*.

D. Similarly, the covenants applicable to Prairie View provide that the Common Areas may be transferred by the developer or the non-profit homeowners' association to a public agency, authority or utility for use as roads, utilities, parks, or other public purposes. *See Lehn Testimony; Ex. PD at ¶19(a), p. 22.* Thus, according to BDC, the entities to which the Common Areas of Prairie View may be conveyed and the uses to which the Common Areas may be devoted are significantly restricted.

E. Moreover, the limited pool of potential purchasers of the Common Areas in each subdivision would also face practical limitations upon acquiring the Common Areas. Constructing improvements on the Common Areas would be highly impractical, as many of them are small and irregularly shaped, or even flooded as ponds or lakes. *See Lehn testimony; Exhibits PI, PJ.*

F. Anthony Lehn of Capstone, LLC, who qualified as an expert appraiser without objection at the hearing, prepared Limited Summary Report Appraisals for the Common Areas of West Clay and Prairie View. *Lehn testimony; Exs. PE, PF*. Mr. Lehn prepared those appraisals in conformance with the Uniform Standards of Appraisal Practice ("USPAP"). *Id*. Mr. Lehn concluded that the March 1, 2003, market value-in-use of the Common Areas was zero ($0.00). *Id.*[4] Mr. Lehn reached his conclusion based largely on the impact of the easements burdening the Common Areas and the restrictions on transfer of the Common Areas. *See id.*

I. Mr. Lehn explained that the people who are deriving value from the Common Areas are the lot owners of West Clay and Prairie View, respectively, and not the record owners of the Common Areas. According to Mr. Lehn, a residential subdivision developer recovers its development costs and seeks to gain a profit not by selling common areas, but rather by selling residential lots. *See Lehn testimony; Ex. PL at 1-4; Exs. PE, PF.* Thus, the

[4] Mr. Lehn explained in his testimony that, in trending back to the January 1, 1999, valuation date pursuant to the 2002 Indiana Real Property Assessment Manual, the March 1, 2003, value of the Common Areas remains zero. *See Lehn testimony*.

price at which the developer is willing to sell a lot necessarily accounts for the costs incurred in developing and constructing common areas. *Id.* Correspondingly, the value derived by lot owners from the Common Areas is reflected in the sale price of each lot, because the desirability of the Common Areas adds a premium to the price that a buyer is willing to pay for a lot. *Id.* Thus, any value that is being derived from the Common Areas is fully captured in a premium that is attached to the price of each lot in West Clay and Prairie View on a pro-rata basis. *Id.*

J. Mr. Lehn also considered the possibility that Common Area facilities might be rented to third parties. *See Lehn testimony*. Even if such rentals were to occur, the leased Common Areas would remain burdened by the same restrictions on their use and marketability. Any income from the leasing of the Common Areas would go to the homeowners, either in the form of cash payments or through a reduction in the assessment of maintenance fees. *Lehn testimony*. Thus, the potential for leasing the Common Areas did not affect Mr. Lehn's opinion of value. *See Lehn testimony*.

18. The Respondent, Clay Township Assessor, contends that the Common Areas have some market value-in-use beyond any increase in value to the individual residential lots within Prairie View and West Clay.

19. The Respondent presented the following evidence and argument in support of its position:

A. The Respondent's witness, Kevin Poore, acknowledged that the Petitioners made a "compelling" case. *Poore testimony*. Nonetheless, the Respondent believes that it followed the standards set forth by the PTABOA in assessing the Common Areas. *Id*. In the absence of specific guidance in the 2002 Real Property Assessment Manual (Manual) or the Real Property Assessment Guidelines for 2002 – Version A (Guidelines), the PTABOA created a "land order" and accompanying guidelines to address the unique issues posed by common area land. *Id.; Ex. RC*. Pursuant to the PTABOA's land order, unimproved common area land within Hamilton County subdivisions, subdivision ponds and private roadways are to be priced at the rate for undeveloped unusable commercial land, which is $3,000 per acre. *Id*. Improved/developed common area land is to be

priced using the appropriate commercial rate for commercial land that is not included in any delineated commercial neighborhood. That rate is derived from the residential rate for the particular neighborhood in which the common area land is located. *Id.* Because it followed the PTABOA's standard in assessing the Common Areas, and because the issue at hand could affect subdivisions throughout the county, the Respondent believes that any change in the assessment of the Common Areas should be made pursuant to a directive from the Board or Indiana Tax Court. *Poore testimony*.

B. The Respondent contends that the Common Areas cannot have zero value because Ind. Code § 6-1.1-2-1 requires all property within the State of Indiana as of the assessment date of a given year to be assessed and taxed for that year. *Poore testimony; Ex. RG*. In support of its position, the Respondent submitted an unsigned decision of the Board in *Pine Valley Community Ass'n v. Allen County Property Tax Assessment Bd. of Appeals*, Pet. No. 02-057-00-2-8-00009. In that case, the Board denied a taxpayer's claim for exemption of common area land based upon the taxpayer's purported charitable use of that land, and held that the property at issue was subject to 100% taxation. *Id*.

C. The Respondent also points to following definition of "true tax value" contained in the Manual: "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." *Ex. RB*. The Respondent submitted an excerpt from an unidentified publication of the Appraisal Institute, defining "use value" as "the value a specific property has for a specific use." *Exs., RB, RF*. The Respondent contends that, while value-in-use and value-in-exchange may be viewed as the same in efficient markets where properties are regularly traded, such is not the case for certain special-purpose properties like the Common Areas. *Poore testimony; Ex. RB.* According to the Respondent, the Common Areas were created for various reasons, including: to provide water retention and drainage, to serve as a buffer, to provide community improvements such as pools and clubhouses, and to provide green space. *Id*. Each of those functions may be viewed as having some utility to the subdivisions the Common Areas service as well as to the homeowners within those subdivisions. *Id*.

D. Moreover, although the Respondent recognizes that the Common Areas have "limited to zero marketability," it contends that there are at least some instances where common area

land might be transferred. *Ex. RB; see also Poore testimony.* For example, the Respondent posits that a city or county might seek to acquire common area land in order to widen a roadway. *Id.* According to the Respondent, such acquisitions involve the payment of money to the homeowners' association and/or the individual lot owners. In support of that position, the Respondent submitted a portion of an appraisal of Timber Creek condominium complex. *Poore testimony; Ex. RH*. The appraisal was prepared for the City of Carmel in conjunction with its acquisition of a portion of the complex's common area land for purposes of widening a road. *Id*. The Respondent also contends that there have been some instances where individual lot owners seeking to widen their lots have acquired portions of common areas in other subdivisions in Hamilton County. *Poore Testimony*. According to Mr. Poore, that is precisely what happened in Woodshire subdivision. *Id.* Mr. Poore testified that the developer of Woodshire split a tract of land within the subdivision into separate parcels, despite the fact that the developer's brochure had promoted the tract as a "preserve." *Poore testimony; Ex. RJ*. The developer then sold those parcels to individuals who constructed homes on them. *Id.*

E. The Respondent also pointed to transfers within West Clay itself. The Respondent submitted an aerial map of a portion of West Clay containing Parcel No. 17-09-28-00-004.000 (Parcel 4), which is one of the parcels under appeal. *Ex. RI*; *Board Ex. A (Pet No. 29-003-03-1-5-00082).* Mr. Poore testified that, beginning in 2000, Brenwick split a larger parcel of land containing what is now identified as Parcel 4 into smaller units, including Parcel Nos. 17-09-28-00-06-004.001 (Parcel 001), 17-09-28-00-06-004.002 (Parcel 002), 17-09-28-00-06-004.003 (Parcel 003), and 17-09-28-00-06-004.004 (Parcel 004). *Poore Testimony; Ex. RI.* The Respondent submitted property record cards and sales disclosure statements showing that Brenwick sold some of the split parcels in 2003 – 2005. *Id.* Most of the sales disclosure statements do not contain information regarding the parcel numbers or sale prices of the properties at issue; however, it appears that Brenwick sold Parcel 002 to BB Retail Enterprises, LLC for $107,490 on November 12, 2003. *Ex. RI*.

F. Finally, the Respondent attempted to impeach Mr. Lehn's opinion of value on two grounds. First, the Respondent pointed to what it views as a contradiction in Mr. Lehn's appraisals. In the body of his appraisals, Mr. Lehn indicates that the market value-in-use

of the Common Areas is "virtually $0.00," whereas his final conclusion of value in each appraisal is $0.00. The Respondent contends that "virtually $0.00" is different from "$0.00." Second, the Respondent questioned Mr. Lehn regarding whether he would view a private church or school as having no market value, given that those types of properties also provide a community benefit. *Poore cross examination of Lehn.*

Discussion

20. Insofar as the Board can determine, the Petitioners' claims that the Common Areas should be assessed at zero value presents a question of first impression under Indiana law. The Parties agree that the 2002 Real Property Assessment Manual (Manual) and the Real Property Assessment Guidelines for 2002 – Version A (Guidelines) are silent with respect to the assessment of common areas of subdivisions where those common areas are held for the benefit of the owners of lots within the subdivision. Similarly, the Board finds no Indiana cases directly on point. A number of courts from other jurisdictions, however, have addressed that precise issue. *See, e.g., Forrest Lake Property Owners Ass'n, Inc. v. Baldwin County Bd. of Equalization,* 659 So.2d 607 (Ala. 1995); *Recreation Centers of Sun City, Inc. v. Maricopa County, 62 Az. 281, 782 P.2d 1174 (1989); Quivira Falls Community Ass'n v. Johnson County*, 634 P.2d 1115 (Kan. 1981); *Supervisor of Assessments of Anne Arundel County v. Bay Ridge Properties, Inc.*, 310 A.2d 773, 776 (Md. 1973); *Sun City Summerlin Community Ass'n v. State of Nevada,* 113 Nev. 835, 944 P.2d 234, 239 (1997); *Locke Lake Colony Ass'n, Inc. v. Town of Barnstead*, 489 A.2d 120, 121 (N.H. 1985); *Tualatin Development Co. v. Department of Revenue*, 473 P.2d 660, 664 (Or. 1970); *Lake Monticello Owners' Ass'n v. Ritter,* 327 S.E.2d 117, 121 (Va. 1985); *Twin Lakes Golf & Country Club v. King County*, 548 P.2d 538, 539 (Wash. 1976).

21. In *Supervisor of Assessments of Anne Arundel County v. Bay Ridge Properties, Inc.*, 310 A.2d 773 (Md. 1973), Maryland's highest court addressed an appeal from an order of the tax court abating and cancelling the assessment of beach property owned by the developer of a residential subdivision. *Bay Ridge,* 310 A.2d at 773-74. The developer's predecessor had recorded subdivision plats showing a beach area. *Id.* at 774. The developer and its

predecessor conveyed lots within the subdivision by reference to the plats, and, in some cases, conveyed deeds containing a specific right to use the beach area for bathing, boating or fishing. *Id.* In some instances, the developer and its predecessor also covenanted not to erect or permit the erection of dwellings, bathhouses or commercial buildings on the beach. *Id.* Consequently, the developer retained bare legal title to the beach area, but it was precluded from making any disposition or gainful use of the area. *Id.*

22. The county supervisor argued that, although the existence of an easement may diminish the value of the servient estate burdened by that easement, the fact that 380 lots in the subdivision remained unsold meant that the beach area retained assessable value upon which the developer should pay annual taxes. *Id.* at 775. The court rejected the supervisor's argument for two reasons. First, the court found that, by implication, the easements were intended to attach to lots as soon as the plats were recorded and the first lot was sold. *Id.* at 776. Second, the court found that the combination of the grant of easements and the imposition of restrictions against disposition and improvement deprived the beach area of whatever value it otherwise might have had. *Id.* In support of its position, the court cited the following testimony of the developer's appraiser:

> It is not the beach itself that has value, it is the lots that lie behind the beach that have the value; and this is shown in the price that the lots sell for and it is consequently shown in the assessed value of those lots. But the beach itself has no fair market value. . . .

Id. (footnote omitted) (emphasis added).

23. Maryland is not the only state to recognize that common area properties encumbered by restrictions may be devoid of value. In *Locke Lake Colony Ass'n, Inc. v. Town of Barnstead,* 489 A.2d 120 (N.H. 1985), the property at issue was owned by a homeowners' association and consisted of common area parcels containing a lake, community lodge, golf course, ski slope, marina, ball fields, tennis courts, beaches, swimming pools and other recreational areas. 489 A.2d at 121. The New Hampshire Supreme Court affirmed the lower court's ruling that the common area parcels were so encumbered by an easement in favor of the lot owners that they had no taxable value. 489 A.2d at 124. This was the case even though two-thirds of the members of the homeowners' association could vote to amend the instruments

that encumbered the common area parcels with easements. 489 A.2d at 123. In reaching its holding, the *Loch Lake* court rejected the town's claim that assigning a zero value to the common areas would encourage taxpayers to create homeowners' associations to avoid the payment of taxes on valuable property, reasoning:

> Municipalities will not lose significant tax revenues in cases such as the one before us, because, although "a landowner whose property is subject to an easement is entitled to a reduced valuation, the value of the easement [is] added to the estate of the dominant owner." *Gowen v. Swain*, 90 N.H. 383, 387-88, 10 A.2d 249, 252 (1939). "Presumably assessors take into account this effect of easements on value in making their appraisals." *Id*. at 387, 10 A.2d at 252.

489 A.2d at 123-24. *See also Ritter*, 327 S.E.2d 117 (reversing trial court's decision that common area consisting of a golf course and clubhouse should be assessed at full value and remanding for assessment at nominal value); *Twin Lakes Golf & Country Club*, 548 P.2d 538 (affirming trial court's decision that golf course burdened by easements in favor of surrounding lot owners had no fair market value, even though the covenants creating the easements could be amended by a 75% majority of the lot owners); *Tualatin Development Co.*, 473 P.2d 660 (holding that a golf course should be assessed at zero value where the property was designated as open space under local zoning ordinances, and where there was no meaningful market for the property due to the restrictions on its use).

24. There also are a number of decisions in which courts have rejected claims by developers or homeowners' associations that common areas held for the benefit of surrounding lot owners should be assessed at zero or nominal value. *See, e.g.*, *Forrest Lake Property Owners Ass'n, Inc. v. Baldwin County Bd. of Equalization*, 659 So.2d 607 (Ala. 1995); *Quivira Falls Community Ass'n v. Johnson County*, 634 P.2d 1115 (Kan. 1981); *Timber Trails Community Ass'n v. County of Monroe*, 614 A.2d 342 (Pa. Commw. 1992); *Sun City Summerlin Community Ass'n v. State of Nevada*, 113 Nev. 835, 944 P.2d 234, 239 (1997); *Recreation Centers of Sun City, Inc. v. Maricopa County, 62 Az. 281, 782 P.2d 1174 (1989)*. In many of those cases, however, the courts addressing the issue have not rejected the possibility that such common areas might have zero or only nominal value, but rather have held that the taxpayers did not make a factual showing to support such a finding. Thus, for example, the Alabama Supreme Court indicated that it had "no quarrel" with the rationale expressed in

Twin Lakes, supra, that "when the use of land is so restricted that its ownership is of no benefit or value, the assessment for tax purposes should be nothing." *Timber Trails*, 659 So.2d at 609 (quoting *Twin Lakes,* 548 P.2d at 540). The court did note, however, that it believed that encumbrances to a property are only one factor among many that an assessor must make in determining the just value of the property. *Id.* (citing *Dep't of Revenue v. Morganwoods Greentree, Inc*., 341 So.2d 756, 758 (Fla. 1976)). The trial court had heard conflicting evidence regarding the value of the common areas and the effect of the encumbrances, and it found that the assessment reflected the impact of the encumbrances on the value of the property. *Id*. The Alabama Supreme Court found that the trial court's decision was supported by substantial evidence. *Id*. *See also Quivira Falls Community Ass'n* 634 P.2d at 1121 (distinguishing *Twin Lakes, Bay Ridge* and *Taulatin* on grounds that most, if not all, of those cases involved evidence that the common areas had little or no value or that the value was included in the valuation of the surrounding lots, whereas, in the case before it, neither of the taxpayer's witnesses testified that the property had no value); *Sun City*, 944 P.2d at 239 (recognizing proposition that restrictions on use and alienability of land might be extreme enough to render land valueless for tax purposes, but finding that restrictions in case before it were not sufficiently severe to do so); *but see Recreation Centers of Sun City,* 782 P.2d 1174.

25. Thus, the majority of courts that have addressed the issue have recognized that common areas of a housing development may be burdened with easements and other restrictions on their use and transfer to such a degree as to render those common areas devoid of market value. Whether any given common area is burdened so severely as to deprive it of any market value, however, is a factual question that the taxpayer must prove through competent evidence.

26. This view is consistent with the general legal principles underlying Indiana's scheme of real property assessment. The Indiana General Assembly has mandated that real property is to be assessed based upon its "true tax value." The Manual defines "true tax value" as, "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." 2002 REAL PROPERTY ASSESSMENT MANUAL at 2

(incorporated by reference at 50 IAC 2.3-1-2). Thus, like the jurisdictions from which the above-cited cases arose, the market value of a property is central to its proper assessment.

27. The Respondent, however, appears to argue that Indiana's system of assessment is distinct from the other systems at issue because of its focus on "value-in-use" as opposed to purely market value. Thus, according to the Respondent, although special-purpose properties such as the Common Areas may not exchange in the market, they still have utility to their owners. *See Poore testimony*; MANUAL at 4 ("A seller of a special-purpose industrial property would accept nothing less than the utility being gained from the property. For properties currently in use, this amount would be termed the value-in-use (i.e. the ask price.").

28. The concept of value-in-use, however, does not mean that the legal titleholder of a property always derives economic utility from that property. It is true that, although certain types of property exchange only infrequently due to their unique uses, there often is an amount of money that would entice the owner of such a property to part with it, because the money replaces the economic utility derived from the property. In the present case, however, the Petitioners do not contend that the reason the Common Areas and properties like them do not readily exchange has anything to do with the unwillingness of buyers to pay an amount sufficient to replace the utility being gained from those properties. To the contrary, the Petitioners contend that the reason those properties do not sell is because the developer has already transferred valuable property rights in exchange for an economic benefit sufficient to replace the utility gained by the developer from the property - the increase in value to the residential lots that the developer will sell.

29. Moreover, both the Guidelines and decisions of the Indiana Tax Court make clear that easements and other restrictions on the use of property must be considered in determining the property's true tax value. *See Talesnick v. St. Bd. of Tax Comm'rs,* 756 N.E.2d 1104, 1108-09 (Ind. Tax Ct. 2001)(remanding to State Board of Tax Commissioners for proceeding to determine the extent to which a taxpayer was entitled to a negative influence factor based upon a water flowage easement burdening his land); REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A, ch. 2 at 78, 94 (incorporated by reference at 50 IAC 2.3-

1-2)(providing for negative influence factors to account for decreases in value based upon "encumbrances, restrictive covenants, or obstructions that limit the use of the land."). In fact**,** the Guidelines expressly contemplate circumstances in which a property may have no market value-in-use to its legal title-holder due to restrictions on the owner's use of the land. For example, the Guidelines require application of a 100% negative influence factor to classified forest land, classified wildlife habitat, classified riparian land, classified windbreak land and classified filter strip land. GUIDELINES, ch. 2 at 102-03.

30. Thus, common areas within a subdivision may be so encumbered as to deprive them of any market value-in-use. Clearly, the encumbrances must be severe and a taxpayer seeking to demonstrate that real property is devoid of any market value-in-use bears a heavy burden. Nonetheless, it is a factual question. The Board therefore turns to the evidence presented by the Petitioners.

31. A property's market value-in-use, as ascertained through application of the cost approach set forth in the Guidelines, is presumed to be accurate. *See* MANUAL at 5; *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005) *reh'g den. sub nom. P/A Builders & Developers, LLC,* 842 N.E.2d 899 (Ind. Tax 2006). A taxpayer, however, may use an appraisal prepared in accordance with the Manual's definition of true tax value to rebut the presumption that an assessment is correct. MANUAL at 5; *Kooshtard Property VI*, 836 N.E.2d at 505-06 n.1 ("[T]he Court believes (and has for quite some time) that the most effective method to rebut the presumption that an assessment is correct is through the presentation of a market value-in-use appraisal, completed in conformance with the Uniform Standards of Professional Appraisal Practice [USPAP].").

32. Mr. Lehn performed an appraisal of the Common Areas of each subdivision. *Lehn testimony; Exs. PE, PF*. Mr. Lehn performed those appraisals "in accordance with generally accepted appraisal standards set forth by the Appraisal subcommittee of the Federal Financial Institution Examination Council and by the Appraisal Foundation in accordance with USPAP." *Id.; see also Lehn testimony.* In each instance, Mr. Lehn concluded that the Common Areas had a market value-in-use of zero. *Id.* Mr. Lehn based his opinion on the

easements burdening the Common Areas as well as on the severe restrictions on their transfer and use. *Id.* Mr. Lehn found that the Common Areas "have no market value in use as to their owner because the areas are not marketable for sale and are restricted so as to benefit only persons other than the owner. . . . Any utility gained from the [Common Areas] is reflected entirely in the higher lot premiums, and the higher property wealth of the lot owners. . . ." *Exs. E, F*. Mr. Lehn further testified that it would be impractical for any potential purchaser to construct improvements on the Common Areas, as many of the parcels are small and irregularly shaped, and in some instances, consist of lakes and ponds. *Lehn testimony*.

33. Moreover, the Petitioners supported Mr. Lehn's conclusions by introducing evidence establishing the extent of the easements and restrictions upon which Mr. Lehn predicated his opinion of value. The undisputed evidence demonstrates that the Common Areas are burdened by easements in favor of the owners of the residential lots throughout West Clay and Prairie View and their guests. *See Lehn testimony; Ex. PC at ¶ 21(d), pp. 32-33; Ex. PD at ¶ 19(d), 19(f), pp. 22-24.* In addition to the easements, the covenants applicable to both subdivisions impose severe restrictions on the entities to whom the Common Areas may be conveyed and the uses to which the Common Areas may be devoted. Thus, the covenants of West Clay limit the transfer of the West Clay Common Areas to certain non-profit owners' associations, any educational institution, the City of Carmel or a non-profit or governmental entity. *Lehn testimony; Ex. PC at ¶ 21(h) p. 35, ¶ 1 pp. 2,4,7.* Similarly, the covenants of Prairie View provide that the developer or homeowners' association can convey the Common Areas to public agencies, authorities or utilities. *Lehn testimony; Ex. PD at ¶ 19(a), p. 22.* Moreover, the respective covenants of the subdivisions limit the use of the Common Areas to public uses such as parks, roads, rights-of-way, and public utilities. *Ex. PC at ¶ 21(d), pp. 32-33; Ex. PD at ¶ 19(a), p. 22.*

34. Thus, the Petitioners presented the type of evidence contemplated by the Manual and Tax Court as relevant to rebut the presumption of the correctness of an assessment. Based upon this evidence, the Petitioners established a prima facie case that the current assessments of the Common Areas are incorrect and that the Common Areas should be assessed for zero

value. The burden therefore shifted to the Respondent to introduce evidence to rebut or impeach the Petitioners' evidence. *See Meridian Towers East & West* 805 N.E.2d at 479.

35. The Respondent attempted to impeach Mr. Lehn's opinion of value in two ways. First, it pointed to language in Mr. Lehn's appraisals indicating that the market value-in-use of the Common Areas is "virtually zero." *Poore testimony; Exs. PE, PF*. According to the Respondent, this statement conflicts with Mr. Lehn's ultimate opinion that the Common Areas have zero value. At best, however, this is a minor contradiction. The difference between "virtually zero" and "zero," may be little more than semantics. It is clear both from Mr. Lehn's appraisal and his testimony, that he found the market value-in-use of the Common Areas to be zero.

36. The Respondent also questioned Mr. Lehn regarding whether he would reach a different conclusion in appraising a privately owned church or school, both of which provide a community benefit similar to the benefit provided by the Common Areas. *Poore cross examination of Lehn*. Mr. Lehn, however, answered that he would need to examine whether there were any covenants or restrictions on transfer of the property in question. If there were no such restrictions, Mr. Lehn testified that he likely would arrive at a different conclusion of value than the conclusion he arrived at for the Common Areas. *Lehn testimony*. Mr. Lehn's answer was consistent with his appraisals and with his testimony on direct examination. Although Mr. Lehn testified that the utility of the Common Areas is ultimately reflected in the increased market value of the residential lots throughout the subdivisions and that the lots closest to the Common Areas sell for comparatively higher premiums than do the more distant lots, Mr. Lehn based his opinion of value on the burdens and restrictions imposed on the Common Areas, not upon the increase in value of the residential lots. Thus, the case at hand is distinct from situations where the value of neighboring properties is increased due to their location near private churches, schools and other amenities. In those cases, the properties containing the amenities are not necessarily encumbered and restricted for the benefit of the neighboring lots, and they continue to have economic utility for their owners.

37. Next, the Respondent points to Ind. Code § 6-1.1-2-1 for the proposition that all property located within Indiana on an assessment date is subject to tax and assessment. *Poore testimony; Ex. RG*. According to the Respondent, if a property is not exempt from taxation, it must be assessed and taxed for some value. *Poore testimony*. Ind. Code § 6-1.1-2-1, however, does not preclude a property from being assessed for zero value, if that is reflective of its market value-in-use. In fact, as discussed *supra*, the Guidelines expressly contemplate the application of a 100% negative influence factor to certain types of classified land. GUIDELINES, ch. 2 at 102-03. Application of such an influence factor results in a value of zero.[5]

38. The Respondent also claims that even though the Common Areas have "limited to zero marketability," they nonetheless have a value-in-use. *Ex. RB; see also Poore testimony*. For example, the Respondent points to various uses for the Common Areas, such as water retention, drainage, buffers, community improvements such as pools and clubhouses, and green space. According to the Respondent, each of those uses can be viewed as having some utility to the subdivisions that the Common Areas serve. The utility of the Common Areas to the lots in the subdivision, however, is largely a function of the easements in favor of those lots. To the extent that the common areas have utility to the owners of the lots benefited by those easements, that utility should be reflected in the assessments of those individual residential lots.

39. The appropriate question is not whether the Common Areas have utility to the owners of residential lots within the subdivision, but instead whether the Common Areas have any economic utility to the Petitioners, or similar users, as legal title-holders. The Respondent attempts to identify such utility by positing narrow circumstances under which the Common Areas "theoretically" could be transferred. *Ex. RB; Poore testimony*. According to the Respondent, one such circumstance would be a transfer to the city or county for the creation of or widening of a road. In support of that position, the Respondent submitted a portion of

[5] The Respondent also submitted an unsigned decision of the Board in which the Board concluded that a homeowners' association was not entitled to a charitable use exemption for the common areas of Pine Valley subdivision. *See Ex. RD; Poore testimony*. That decision does not address a claim by the homeowners' association that the common areas in question had limited or no market value-in-use. *See id*. The Board therefore finds that the decision has no relevance to the issues presented in this case.

an appraisal of Timber Creek condominium complex. *Poore testimony; Ex. RH.* The appraisal was prepared for the City of Carmel in conjunction with its acquisition of a portion of the complex's common area land for purposes of widening a road. *Id.* The Respondent also contends that there have been some instances in which individual lot owners seeking to widen their lots have acquired portions of common areas in other subdivisions in Hamilton County. *Poore Testimony.* According to Mr. Poore, that is precisely what happened in Woodshire subdivision. *Id.*; *Ex. RJ.* The Respondent further points to transfers occurring within West Clay. Specifically, the Respondent points to the split of the larger tract of land containing what is now Parcel 4. *Poore testimony; Exs. RI.*

40. The Board assigns no weight to the Respondent's evidence concerning the appraisal of the common areas of Timber Creek condominium complex and the transfer of parcels within Woodshire subdivision. The Respondent did not sufficiently explain how that evidence is relevant to the proper valuation of the Common Areas. First, absent a detailed explanation of its relevance and reliability, the Board will not assign any weight to an excerpt from an appraisal of an entirely different property than the properties under appeal. Moreover, the Timber Creek appraisal does not purport to value the interest of a developer or homeowner's association in the common areas of the condominium complex. To the contrary, it appears that the appraisal sought to value the interest of the owners of the individual units within the condominium complex, given that each owner had 1/192 interest in the common area. *See Ex. RH.* Similarly, the Respondent did not present any evidence to establish what, if any, easements or restrictions burdened the Woodshire parcels, or how such easements or restrictions were similar to those burdening the Common Areas within West Clay and Prairie View. Absent such evidence, the Board cannot infer that the covenants applicable to West Clay or Prairie View would permit similar transfers.

41. The Respondent's evidence concerning the splitting of West Clay Parcel 4 is another matter. That parcel, at least as it currently exists, is one of the Common Area parcels under appeal. *See Board Ex. A (Petition No. 29-003-03-1-5-00082).* What is not as clear, however, is whether the larger parcel, as it existed prior to the split, was designated as common area. The Petitioners submitted an aerial map of West Clay with the common areas outlined in purple.

See Lehn testimony; Ex. PI. Neither Parcel 4, nor the larger tract of which the Respondent alleges Parcel 4 was a part, are outlined in purple on the Respondent's aerial map. *Ex. PI*. Moreover, neither party submitted a copy of the plat or plats referenced by the West Clay Covenants as delineating the Common Areas at issue in this appeal. Consequently, the Board finds that the Respondent did not prove that Brenwick transferred any portion of the Common Areas.

42. Moreover, even if the split parcels had been part of the Common Areas of West Clay, the Respondent did not explain how the conveyance of those parcels demonstrates that the Common Areas have a market value-in-use greater than zero. The Respondent did not present any evidence concerning either the amount of the proceeds of the sales or how those proceeds were distributed. The sale of a parcel burdened by easements could occur in one of two ways. It could involve the purchase of the property subject to those easements, or it could involve a payment to the beneficiaries of the easements to release their equitable interests in the servient estate. If a property is sufficiently burdened by easements, it is possible that virtually the entire sale price would be attributable to purchasing the equitable interests of the easement beneficiaries rather than the bare legal title to the servient estate.

43. Finally, there is evidence that the covenants for each subdivision allow for the improved portions of the Common Areas to be leased to third parties. *Lehn testimony*. The Board finds this to be significant, in that the exclusivity of lot owners' rights to use common areas is an important factor in judicial recognition of the Petitioners' theory that common areas of residential subdivisions may have zero market value. *See, e.g., Timber Trails*, 614 A.2d at 346 (reversing trial court's finding that common areas, including golf courses, had zero value where individuals who were not property owners in relevant subdivisions were extended membership privileges and charged membership fees). The parties, however, did not identify the provisions under the covenants allowing the Common Areas to be rented, the frequency with which the Common Areas are rented, or the amount of income generated from renting the Common Areas. Moreover, Mr. Lehn testified without contradiction that any money generated from renting the common areas would go to the homeowners within the subdivision either as cash payments or through a pro-rata reduction in maintenance fees.

Lehn testimony. Consequently, Mr. Lehn's vague testimony that the Common Areas could be leased is insufficient to demonstrate that the Common Areas have any market value-in-use.

44. Based upon the foregoing, the Petitioners demonstrated by a preponderance of the evidence that the current assessment is incorrect and that the Common areas should be assessed for zero value.

45. The Board, however, emphasizes that its finding is based upon the unique facts presented in this case. The Petitioners presented the expert opinion of a qualified appraiser to support its claim, whereas the Respondent relied largely upon general concepts regarding market value-in-use and suppositions about the utility of the Common Areas. The Respondent's chief witness repeatedly testified that the Petitioners had made a "compelling case" and that the Common Areas likely have "little to zero marketability." *See Poore testimony; Ex. RB.* While the Respondent asserted that the Common Areas had some utility to the Petitioners and similar users, it did not present a countervailing appraisal or any other evidence to quantify that utility.

46. Finally, the Board's resolution of the above referenced issue renders it unnecessary to address the Petitioners' remaining claims.

SUMMARY OF FINAL DETERMINATION

48. Petitioners have established a *prima facie* case that the 2003 assessed value of the Common Areas is zero. Respondents' evidence failed to rebut Petitioners' *prima facie* case. Respondents are hereby ordered to change the 2003 assessed value of the Common Areas to zero.

_____ _____

Date Commissioner, Indiana Board of Tax Review

1028960

IMPORTANT NOTICE

- Appeal Rights -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Trial Rules are available on the Internet at <http://www.in.gov/judiciary/rules/trial_proc/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.