BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

LAKE CUSHMAN COMPANY and LAKE CUSHMAN MAINTENANCE COMPANY,	)	
Appellants,	)	Docket No. 35051
v.	)	Re: Excise Tax Appeal
STATE OF WASHINGTON DEPARTMENT OF REVENUE,	)	FINAL DECISION
Respondent.	)	

This matter came before the Board of Tax Appeals (Board) for an informal hearing on December 21, 1988, following a determination of the Department of Revenue (Department) denying a reduction from leasehold excise tax for land owned by the Lake Cushman Company and the Lake Cushman Maintenance Company. Donald Burrows of Miller and Associates, Inc., represented the appellants. Benjamin Clifford, Secretary of the Lake Cushman Maintenance Association, testified for the appellants. Patricia Johnson, Administrative Law Judge, represented the Department.

FINDINGS AND ISSUES

This appeal of the Lake Cushman Company and the Lake Cushman Maintenance Company (Maintenance Co.) involves leasehold excise tax assessed by the Department under Chapter 82.29A RCW. The portion protested relates to the value used as the basis for assessment of certain greenbelt areas and the golf course of the development known as Lake Cushman.

On September 18, 1985, S. Gordon Craig, Mason County Assessor, requested that the Department audit the lease between Lake Cushman and the City of Tacoma. In 1987, the Department audited the lease. Following the provisions of RCW 82.29A.020(2) addressing leases which have been in effect for ten years or more without renegotiation, the Department established a taxable rent for the leased property under 82.29A.020(2)(b). In order to determine the taxable rent, the Department had to establish a current market value for the property. At the request of the Department, the Mason County Assessor's Office performed an appraisal to determine the current market value. The Assessor's value was based on

sales of residential lots for the years 1983, 1984, 1985, and 1986 through the time of appraisal. The common areas and greenbelts were given no value. The Assessor valued the golf course using Marshall and Swift, a cost publication accepted by the appraisal profession. The golf course was valued at $315,000 ($35,000 per hole). The Assessor determined a total market value of $21,140,100 for the Lake Cushman property.

The Department applied an 8 percent rate of return to this market value to determine taxable rent of approximately $1,691,208. The Department then applied the 12.84 leasehold excise tax to the taxable rent in order to determine the $217,151 tax due.

The Department reduced the original audit assessment figure to $178,336 after it determined that a 7 percent rate accurately reflected a fair rate of return on the property. These adjustments were reflected in the Department's Final Determination No. 88-160.

The appellants petitioned the Department for correction of the assessment relating to the value assigned to the golf course. The Department, in Determination No. 88-160A affirmed its original decision that the golf course had value. In doing so, the Department relied on the position taken in Determination No. 86-242, 1 WTD 139 (1986) which rejects the argument that Twin Lakes Golf Club v. King County, 87 Wn.2d 1, 548 P.2d 538 (1976) applied to the valuation in that case. The Department did not address additional common areas in Determination No. 88-160A.

The appellants contend before this Board that the excise tax should be $174,026 based on the grounds that the additional common areas and the golf course have no value.

The issues before this Board are (1) whether common areas identified by the appellants in Exhibit A-1 have market value, and (2) whether the golf course has market value.

On March 1, 1966, the City of Tacoma leased to the Lake Cushman Company 4,638 acres surrounding the Lake Cushman Reservoir in Mason County. The lease term is for 99 years, with an option to renew for a period not exceeding 99 years. Over the last 20 years, Lake Cushman Company has developed the property into approximately 2,944 residential lots, with parks, campgrounds, golf course, etc.

The terms of the lease between the City of Tacoma and the Lake Cushman Company call for periodic adjustment to the lease payments and for the lessee to develop the property.

A leasehold excise tax has been paid on the Lake Cushman property since the inception of the leasehold excise tax in 1976. The sublessees of the developed property pay proportionate shares of the lessee's leasehold excise tax.

A nonprofit entity, the Maintenance Co., was formed to operate the golf course and maintain common areas. It is a sublessee of the Lake Cushman Company. Its membership consists of the original developers and additional members accepted by them. The Maintenance Co. is run by an elected group of lot owners who must act for the benefit of the owners but it is still controlled by the majority vote of the original developer. When the development reaches a certain stage of completion and the development company has no further investment to make, it will turn the Maintenance Co. over to the owners.

When an individual lot owner purchases a lease assignment, that owner does not automatically become a member of the Maintenance Co. The owners may be required to pay a fee to the Maintenance Co. for maintenance of the common areas and roads even though they do not have association membership. (See appellants' Exhibit 6, "Property Report," at 21).

Common Areas

Lake Cushman Company dedicated common areas and greenbelts on the face of the plats to the Maintenance Co. for the benefit of the lot owners. The additional greenbelt areas at issue in this appeal (Exhibit A-1) are actually used as greenbelt but are not so dedicated on the face of the plats. The appellants state that amending the plat records to indicate that the additional areas are dedicated as common areas is, as a practical matter, virtually impossible to accomplish because of the widespread geographical dispersion of the owners (sublessees). As an alternative, the Lake Cushman Company is preparing an amendment to the Assignment of Lease between the Lake Cushman Company and the nonprofit Maintenance Co. This amendment would assign these properties to the Maintenance Co. to be used as common areas for the full term of the 99-year lease with the City of Tacoma.

The common areas in question are not specifically addressed in the Department's Determinations Nos. 88-160 or 88-160A. At the Board's request and subsequent to the hearing, the Department submitted plat materials showing the common areas and greenbelt areas identified in the appellants' December 18 exhibit materials (Exhibit A-1) as those areas under appeal. These materials are admitted as an

exhibit for the purposes of clarifying the areas at issue. The Department, through a supplemental memorandum, argues that areas properly designated on the unamended plat maps as common areas and greenbelts have been given zero value. It is the Department's position that only those lots actually designated as common areas or greenbelt on the unamended plat maps are restricted in use and unavailable for sale. The Department further argues that the lots in question here are listed on the unamended plat maps as "lots" and are not subject to restraints on use or sublease by the appellant, Lake Cushman Company, and therefore have value.

Golf Course

The appellants argue that the legal restrictions and profitability of the golf course at issue in this appeal are similar to the facts in Twin Lakes Golf Club v. King County, 87 Wn.2d 1, 548 P.2d 538 (1976). The appellants also suggest that the Sahalee golf course in Sahalee Country Club v. Board of Tax Appeals, 108 Wn.2d 26, 735 P.2d 1320 (1987) is a profit-making operation that may be sold by the developer, which makes it dissimilar to the Lake Cushman golf course.

The Department argues that the Lake Cushman development is subject to conditions similar to those in existence at the Sahalee golf course and does not meet the requirements of the court in the Twin Lakes case.

Although the Lake Cushman golf course is identified on the plat in Division 8, no dedication appears on the plat for the golf course. The long-term assignment of lease executed in March 1970 between Cushman Development Company and the Maintenance Co. (appellants' Exhibit 3) does not restrict the use of the golf course to owners and purchasers of property within the development. The protective covenants do not address the golf course. The long-term assignment of lease was amended in August 1988 and now requires that the golf course be dedicated for golf purposes for the remainder of the 99-year lease and for the benefit of all the owners and purchasers of property within the jurisdiction of the Maintenance Co. Mason County has no zoning restriction requiring that this golf course remain a golf course.

The golf course is an integral part of the residential community known as Lake Cushman. The required Federal Disclosure Report indicates that the golf course is open to the public. Public use of the course is not limited except for the remote location of the course.

The golf course has operated at a small profit three out of the last four years but suffered losses ranging from $1,001 to $23,302 four out of the last eight years. The Lake Cushman course is a 9-hole course in contrast to the 18-hole courses at Sahalee and Twin Lakes.

At the time of assessment, the assignment of lease did not convey an ownership interest in the golf course to individual lot owners but the owners did receive the benefit of lower green fees by virtue of owning the property.

ANALYSIS AND CONCLUSIONS

The appellants and respondent were each given full opportunity to place their arguments before the Board. The Board, having considered all the testimony and documentary evidence submitted by the parties in support of their respective positions, hereby enters the following analysis and conclusions:

Tax laws must be strictly construed in favor of application of the tax. Budget Rent-a-Car v. Department of Revenue, 81 Wn.2d 171, 500 P.2d 764 (1972). RCW 84.40.030 establishes the standard of valuation--true and fair value. Generally, all property is taxable unless it qualifies for a statutory exemption or something about its character causes it to receive a zero valuation. In Sahalee, at 30, the court states that "to obtain a zero valuation, a taxpayer must show more than restrictions on the use of its property and a history of unprofitability; the taxpayer must also show that these factors deprive the property of all market value."

Common Areas

Concerning the additional common areas identified by the appellants as having no value, the Superior Court in Tapps Island Association v. Pierce County, Cause No. 81-2-02866-2, at 4 and 18 (1985) found that a common area which is clearly marked on deeds and/or plat maps and which is clearly, legally designated as common area is so restricted that it is deprived of all value. At the time of assessment, we find no restrictive dedication of the greenbelt parcels at issue here, either on the face of the plat or in the Assignment of Lease between the Lake Cushman Company and the nonprofit Maintenance Co. In fact, at the time of assessment, the parcels were without restriction and were available for any use or alienation desired by the owner. The appellants' contention that the additional common areas have no value is not supported by any showing of proof that the these areas

were, at the time of assessment, subject to the restrictions normally applied to "common areas."

Golf Course

Concerning the golf course, the Washington Supreme Court in Sahalee compared the operation of the Sahalee and Twin Lakes golf courses and indicated important differences causing one golf course to have a market value and the other golf course not to have a market value.

The court repeatedly stated in Sahalee that Twin Lakes is not to be read to state that factors influencing market value should cloud judgment as to whether a piece of property has a market value. "Today we reemphasize that the critical element of Twin Lakes is the subject property's market value. Any other factor is relevant only to the extent that it can be shown to affect market value. (Emphasis added.) Sahalee, at 27.

> Twin Lakes, therefore, clearly states that the bottom line is market value. Therefore, to obtain a zero valuation, a taxpayer must show more than restrictions on the use of its property and a history of unprofitability; the taxpayer must also show that these factors deprive the property of all market value.

(Emphasis added.) Sahalee, at 30.

Restrictions on use - In Sahalee, the court was convinced that the use would remain golf course. "Although zoning regulations would allow converting the club's property to a residential subdivision, practical restrictions (such as the configuration of the course and the limited access) limit the property to use as a golf course." Sahalee, at 27-28. As in Sahalee, the Lake Cushman golf course is an integral part of a residential community but its access is not limited, and the appellants provided no proof that the configuration of the course restricted a change in use.

The feature rendering the Twin Lakes golf course unusable for any other purpose was the encumbrance of both zoning (governmental) and conveyancing restrictions regarding use and nonalienation of the property. The appellants here have not presented proof of governmental restrictions as to use of the Lake Cushman golf course. Concerning conveyancing restrictions at the time of assessment, the long-term assignment of lease to the Maintenance Co., the protective covenants and the dedication statement, and the Federal

Disclosure Report contained no specific reference to restrictions on the Lake Cushman golf course.

Membership and Use - Homeowners in Twin Lakes had rights to the golf course on the basis of their Twin Lakes home ownership. Covenants restricted the use of the golf course for the benefit of the lot owners in the development and deeds referred to the covenants. The deeds also conveyed the right to become a member of the golf club and to use the golf course. At Lake Cushman, individual lot owners have the right to use the course and the benefit of lower green fees but not ownership or, for that matter, even automatic membership in the Maintenance Co. Ownership resides in the nonprofit Maintenance Co. which continues to be controlled by the developers.

Profitability - In Twin Lakes, at 2 and 4, the court found that the "substantial, apparently unavoidable financial loss" experienced by the golf club ranged between $22,331 and $44,734 every year. The court concluded that use of the land as a golf course had been unprofitable and would continue to be so, and that zoning restrictions required the property to continue to be used in this unprofitable manner. In Sahalee, the club was capable of generating some profit (over $100,000), and investors considering a purchase of the property could "change the operation of the course into a money-making venture, partially through expanding the number of its members." Sahalee, at 31. The Lake Cushman golf course operated at a very small profit three out of the last four years but suffered losses ranging from $1,001 to $23,302 four out of the last eight years. Lake Cushman is a 9-hole course, while Sahalee and Twin Lakes are 18-hole courses, and that could affect the profitability of the course in comparison to Twin Lakes and Sahalee. The course has not lost $22,000 to $44,000 a year as was the case in Twin Lakes, nor has it made a profit of over $100,000, as was the case in Sahalee. Although the Lake Cushman golf course may not have the profit generating capability of Sahalee, neither does it operate at a substantial financial loss every year.

There is evidence that takes this case out of the Twin Lakes concept. We find that the subject property is not so burdened or encumbered that ownership is of no benefit or value. Having determined that the Lake Cushman golf course has value, we must determine the value, taking into account the appropriate benefits and burdens. In this case, we must rely on the Department's cost approach to value because it is the only evidence of value presented.

DECISION

Based on the evidence presented, the Determination of the Department of Revenue is sustained.

DATED this _____ day of _____, 1989.

BOARD OF TAX APPEALS

_____
LUCILLE CARLSON, Chair

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RICHARD A. VIRANT, Vice Chair

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WAC 456-08-540. **Petition for Rehearing.** (1) Any party may after a final decision of the board file a petition for rehearing. A petition for rehearing must be filed within fifteen days of service of notice of final decision in the hearing. The petition for rehearing, and an answer, if called for, must be served on the other parties in the hearing, and three copies filed with the board.

(2) The filing of a petition for rehearing shall suspend the final decision of the board until it is denied by the board or a modified decision is entered by the board.

(3) In response to a petition for rehearing, the board may (a) deny, (b) call for an answer, (c) modify its decision, or (d) permit a rehearing.