STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

IN THE MATTER OF THE APPLICATION
UNDER ARTICLE 7 OF THE REAL
PROPERTY TAX LAW OF ILENE FLAUM
AND ESTATE OF L. GIANGUALANDO,

Petitioners,

vs.

MEMORANDUM DECISION

ASSESSOR, TOWN OF AMHERST, THE
BOARD OF ASSESSMENT REVIEW OF THE
TOWN OF AMHERST, COUNTY OF ERIE AND
STATE OF NEW YORK,

Index No. 7260/07

Respondents.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Wolfgang & Weinmann**
Attorneys for Petitioners
Peter A. Weinmann, Esq., of Counsel

Phillips Lytle LLP
Attorneys for Respondents
Ronald S. Shubert, Esq., of Counsel
Sean C. Mc Phee, Esq., of Counsel

Hodgson Russ LLP
Attorneys for Intervenor
Michael B. Risman, Esq., of Counsel

CURRAN, J.

The instant motion came before the court in a proceeding brought pursuant to article 7 of the Real Property Tax Law seeking reduction of the assessment of commercial property in the Town of Amherst. Respondents Assessor, Town of Amherst, and the Board of

Assessment Review of the Town of Amherst, County of Erie and State of New York (hereinafter the Town Respondents) move for an order (I) striking Petitioner's Statement of Income and Expenses and declaring that it fails to comply with 22 NYCRR 202.59 (b), (ii) directing Petitioners to disclose materials requested in the Town Respondents' Demand to Produce or, alternatively, (iii) striking the petition and/or precluding Petitioners from offering any evidence at trial. Intervenor-Respondent Clarence Central School District joins the motion and seeks responses to its outstanding discovery requests. The papers were submitted on March 13, 2008, without oral argument.[1]

BACKGROUND AND PROCEDURAL HISTORY

Petitioners own a commercial plaza on Main Street and Transit Road in Respondent Town. The property includes two tax parcels that were tentatively and finally assessed by Respondents on the 2007-2008 assessment roll for $2,116,000. The petition filed on July 30, 2007 alleges that the proper assessment value is $1,066,400.

In August 2007, Respondents sought disclosure of documents through a Demand to Produce (*see* McPhee Affirm., Exhibit C). Intervenor-Respondent Clarence Central School District (hereinafter School District) served its own Omnibus Demands upon Petitioners in September 2007 (see Risman Affirm., Exhibit A).

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[1] On March 13, Petitioners submitted an "Affidavit in Reply to Affirmation filed March 11, 2008", to which the Town Respondents objected, calling it a surreply. Surreplies are not provided for by the CPLR, and this Court does not accept them, without prior permission; petitioners' March 13 submission has therefore not been considered in this decision and is not part of the record herein.

On or about November 6, 2007, Petitioners served a 2006 Income Statement for the property, which consisted of one page, listing total income and expenses (*see* McPhee Affirm, Exhibit E). The Income Statement is not verified or certified (*see* 22 NYCRR 202.59 [b]). The Town Respondents thereafter requested by letter full and complete responses to their Demand to Produce (*see* McPhee Affirm., Exhibits F & G). Nothing further was produced. This motion followed.

Petitioners opposed the motion, and included with its responding affidavit four copies of its Income Statement. Attached to the Statement is a certification by Michael Palumbo (whose relationship to the Petitioners is not given) that the Income Statement is true and correct. In addition, Petitioner provided what it asserts is "relevant" information, including a copy of a storm drainage easement over the premises granted to the Town, along with copies of leases and lease modification agreements relating to the property.

DISCUSSION

The Town Respondents contend that the materials they seek through their Demand to Produce should be disclosed because they are relevant to the issue of valuation of the property. Those materials are: 1) copies of any prior appraisals on the property; 2) information regarding and documents relating to renovations and/or improvements; 3) applications for mortgages; 4) any existing notes and mortgages related to the property; 5) management and maintenance contracts; 6) purchase price; 7) costs of construction; 8) insurance coverage; 9) surveys; 10) rent rolls and leases; 11) the presence or absence of contamination on the premises; and 12) estimates of remediation, if necessary (hereinafter "the materials sought by the Town").

The School District propounded interrogatories, which also request many documents (*see* Risman Affid., Exhibit A). The School District's requests are broader than those of the Town Respondents. Counsel for the School District asserts that the information sought is necessary to evaluate the assessment as well as any appraisal reports that may be filed.

Disclosure in a special proceeding pursuant to Real Property Tax Law article 7 is governed by CPLR 408 (*see Matter of Xerox Corp. v Duminuco*, 216 AD2d 950 [4th Dept 1995]). "[F]or a court to direct disclosure, the information sought must be found to be material and necessary to the defense. 'The words, "material and necessary", are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason'" (*Matter of General Elec. Co. v Macejka,* 117 AD2d 896, 897 [3rd Dept 1986], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]; *see Matter of Consolidated Edison Co. of New York, Inc. v State Board of Equalization and Assessment*, 112 Misc 2d 422, 423 [Sup Ct Albany County 1982]). Further, this Court has particularly broad discretion in the control of the discovery in special proceedings (*see* CPLR 408; *see also Matter of General Elec. Co. v Macejka*, 117 AD2d at 897).

Case law holds that issues concerning rents charged for the property, leases, costs of construction, construction contracts, fire insurance and mortgages are all material to proceedings under article 7 of the Real Property Tax Law (*see Matter of Hilton Inns, Inc. v Board of Assessors*, 39 Misc 2d 792, 795 [Sup Ct Westchester County 1963] [material questions at Board of Review upon administrative appeal include rentals and other income, costs of construction, construction contracts, mortgages, and fire insurance]; *see also Matter of*

Shults v Commission of Assessment and Taxation, 85 AD2d 928 [4th Dept 1981] [petitioner compelled to produce fire insurance policies for tax year in question]; *Matter of Food Fair, Inc. v Board of Assessment Review*, 78 AD2d 335, 337 [3rd Dept 1981] [capitalization of net income is usually best index of true value]; *Matter of Rock-Time, Inc. v Finance Admin*., 75 AD2d 526 [1st Dept 1980], *appeal dismissed* 53 NY2d 704 [1981] [acquisition and construction costs and mortgage information all relevant to assessment]).

Petitioners contend, however, that leave of court was required before interrogatories were propounded and documents requested by Respondents. CPLR 408 does require leave of court "for disclosure" other than notices to admit. The apparently common local practice, however, is for municipal respondents or their appraisers to issue discovery requests without first seeking a court order, and for the parties to voluntarily participate in disclosure. Where such voluntary practice breaks down, motions such as this one ensue. Nonetheless, Petitioners cannot be subject to dismissal of the petition or other preclusion where the requisites of CPLR 408 have not been complied with. The Court will instead treat this motion as a request for disclosure under CPLR 408.

Upon consideration, the Court deems the documents sought by the Demand to Produce to be material and necessary to the Town Respondents' ability to prepare an appraisal and to fully prepare for cross-examination of Petitioners' expert at trial. Therefore, the Court grants the motion of the Town Respondents insofar as it seeks to compel full and complete responses to its Demand to Produce, which appears at Exhibit C to the McPhee affidavit, with the exception of the phrase "documentation supporting any expenses for the subject premises" in request number 10, which is stricken as excessively vague and overreaching (*cf. Matter of*

General Electric Co. v Macejka, 252 AD2d 700, 701[3rd Dept 1998], *lv dismissed* 92 NY2d 1012 [1998] [affirming denial of motion to compel petitioner to produce profit and loss data of petitioner's business]).

Petitioners contend that they are not required to create documents that do not already exist in order to respond to demands to produce (*see Matter of General Electric Co. v Macejka*, 252 AD2d at 701). However, they fail to identify which of the documents requested by Respondents do not exist. Further, if Petitioners do not have the documents deemed material and necessary in their possession and control, case law holds that the petitioner in a tax certiorari proceeding is "obligated to furnish the name and address of the party having the material sought or submit a statement that the name and address are unknown to them" (*Matter of Food Fair, Inc*., 78 AD2d at 338). Moreover, the practical means of advising a requesting party that a responding party does not have possession, custody or control of requested documents is to provide a client affidavit informing the requestor that a diligent search has been made for the particular documents in question but that none has been found. This also allows the requestor to rely upon the assurance at trial.

With respect to the School District's Omnibus Demands, the Court determines that they are overly broad and patently burdensome (*see e.g. Matter of Time Warner Entertainment Co., LP v State Board of Real Property Services*, 196 Misc 2d 211, 216 [Sup Ct Albany County 2003]). For example, the School District's demands include requests for copies of any presentations made to any lenders with respect to the premises within the last five years; all accounting records related to the property; tax returns of Petitioners; copies of or information concerning leases for comparable buildings; documents and information relating to

sales of comparable properties; and very general requests for documents and information related to the three major methods of valuation. Because of the burdensome nature of the interrogatories and document requests propounded by the School District, the Court denies its motion to compel responses to its Omnibus Demands, without prejudice to its ability to propound a more tailored request, after it has reviewed the information and documents produced by Petitioners under the Town Respondents' demand to Produce.

The Town Respondents also move to strike the Income Statement served by Petitioners on November 5, 2007. The regulations require that "[b]efore the note of issue and certificate of readiness may be filed, the petitioner shall have served on the respondent, in triplicate, a statement that the property is not income-producing, or a copy of a verified or certified statement of the income and expenses on the property for each tax year under review" (22 NYCRR 202.59 [b]). Unfortunately, neither the regulations nor case law provide guidance to the Court concerning the necessary contents of such a statement.[2] After consideration, the Court directs that, under the circumstances, provision of a standard "Statement of Operations" as would be produced by an accountant for the property is sufficient. In this case, that was apparently what was produced by Petitioners to the Town Respondents.

Concerning the certification issue[3], Petitioners' certification is inadequate only to the extent that it does not identify the person certifying the information or his relationship to

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[2] The Court at this point declines to impose requirements for the type of forms used elsewhere (*see* e.g. N.Y.C. A.D.C. §11-208.1).

[3] A certification is an attestation that the statement is true or meets certain criteria (*see* Blacks Law Dictionary [8th Ed. 2004] [certify]).

the Petitioners. In the future, the certification should accompany the Statement of Income and Expenses when it is served. To the extent, however, that Respondents seek to strike the now-certified Statement of Income and Expenses served in this proceeding, that request is denied.

Finally, the regulations require that the Statement of Income and Expenses be filed in the County Clerk's office, but only at the time of the filing of the note of issue. Here, the parties are still conducting discovery, so Petitioner is not remiss for not filing it.

In conclusion, the Court grants the motion of the Town Respondents insofar as it seeks to compel full and complete responses to its Demand to Produce, which appears at Exhibit C to the McPhee affidavit, with the exception of the phrase "documentation supporting any expenses for the subject premises" in request number 10, which is stricken, and otherwise denies the motion. The Court denies the motion by the School District in its entirety, subject to leave to serve a more tailored request, if necessary, after review of the discovery demanded by the Town Respondents. The Town Respondents shall submit an order on notice.

DATED: April 29, 2008

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HON. JOHN M. CURRAN, J.S.C.