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SUMMARY OF TAX CERTIORARI, EMINENT DOMAIN AND REAL PROPERTY TAX EXEMPTIONS CASES 2010-2011

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Much transpired in 2010 in the fields of tax certiorari, eminent domain and tax exemptions. Specifically, the Courts continue to explore the ramifications of *Kelo v. City of New London*[1], the scope of real property tax exemptions for forests, wealthy seniors and MTA police stations, inverse condemnation by telecommunications companies, notice and jurisdiction, valuation of gravel mining pits, electric transmission lines and refuse

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collection services and the propriety of a JHO's decision to dismiss SCAR petitions based upon homeowners failure to permit inspection of their properties by Town assessor.

And in 2011 § 3-c of the General Municipal Law also known as the "real property tax levy cap for local governments except the city of New York" was enacted. In addition the courts addressed a variety of issues including the constitutionality Real Property Tax Law article 18, the legality of Nassau County's retroactive reassessment program based upon post tax status date improvements, tax exemptions for a religious art center, an Islamic school and a home for the at risk and homeless and eminent domain proceedings and the highest and best use doctrine.

The Governor's 2% Tax Cap

On June 30, 2011 Governor Cuomo signed into law the tax cap statute which seeks to "control the ever-rising property tax by limiting the amount by which entities (e.g. schools and local governments) may increase property taxes each year"[2]. The statute, § 3-c of General Municipal Law, provides, *inter alia*, that (1) "No local government may increase its property tax levy by more than 2 percent or the rate of inflation (whichever is less), (2) "A local government may exceed the tax levy cap if the governing body enacts, by a two-thirds vote, a local law...

overriding the tax levy cap" and (3) "The cap will have limited exceptions". There are corresponding changes in applicable provisions of the Education Law. The concept of a tax levy cap[3] as noted by Governor Cuomo seeks to help taxpayers by imposing "Discipline, a rigor and a scrutiny to the process...It doesn't ultimately limit or direct, but it challenges the local governments to find savings. It informs the citizens and it's working"[4]. There can be little question that the Governor's tax levy cap program is a game changer in the area of tax certiorari and governmental financing. What exactly transpires remains to be seen.

The Court Of Appeals

Consistent with its 2009 decision in *Matter of Goldstein v. New York State Urban Dev. Corp.*[5] the Court of Appeals in *Kaur v. New York State Urban Development Corp.*[6] reversed the Appellate Division First Department's annulment of a determination by the New York State Urban Development Corporation (UDC) approving the acquisition of 17 acres of privately owned property for Columbia University's project to, *inter alia*, build 16 "new state-of-the-art" buildings. In finding that the Project qualified as a "civic project" under the UDC Act the Court noted that "In addition to hiring 14,000 people for construction...Columbia estimates that

it will accommodate 6,000 permanent employees...the Project... Provides for the expansion of Columbia's educational facilities and countless public benefits to the surrounding neighborhood".

And in *Gordon v. Town of Esopus*[7] petitioner's 104 acres on the Hudson River had since 1978 been certified by the DEC as "forest land" pursuant to RPTL § 480-a which provides for an 80% tax exemption of assessed valuation as long as certain conditions are met. Starting in 2002 the Town of Esopus began assessing the petitioner's "forest" land as vacant land, "a determination that would allow the land to be assessed for tax purposes based on its present potential for development, it 'highest and best' use". In reversing the Appellate Division Third Department's affirmance of the Town's treatment of petitioner's "forest land" the Court noted that the Legislature in enacting RPTL § 480-a sought to "preserve New York's forest land and to make the management of forest land more economical for property owners" and held that "forest land is recognized...as an established category of use, not some sort of taxpayer charade to reduce the assessed value of land".

And in *Matter of Eternal Flame of Hope Ministries*[8] the Court of Appeals determined that a religious organization was entitled to a real property exemption for the property pursuant to RPTL §420-a[1][a]. The property consisted of an art studio "consisting of the art studio, a small barn, a four-bedroom

chalet, two small rural cabins and undeveloped land upon which a brook and seasonal waterfall...used for the creation of religious art, spiritual talks and prayer, and the entire property is used regularly for spiritual retreats. Mass and prayer services are an integral part of the events at the property, and are held when visitors are present"[9]

The Wealthy And Healthy

In *Miriam Osborn Memorial Home Association v. Assessor of City of Rye*[10] the Appellate Division Second Department held that the Miriam Osborn Memorial Home (Osborn), a home providing care, primarily, to indigent elderly women from 1908 to the early 1990s, would no longer receive a 100% tax exemption pursuant to RPTL § 420-a(1). The reason being that in the 1990s the Osborn, faced with difficult financial circumstances, transformed itself "from an adult home for indigent elderly women to a full-scale CCRC (Continuing Care Retirement Community) designed to attract wealthy seniors with high end housing units and amenities". At the new Osborn the entrance and monthly maintenance fees were high[11], the operating costs were high[12] and "73% of the applicants (252 seniors) placed on the waiting list...have an individual or joint net worth with their spouses of between $2 million and $25 million. No applicant on the waiting list has a net worth of less

than $325,000". Regarding the status of the Osborn's skilled nursing facility the Court rejected a partial hospital use exemption "where, as here, the primary use of the property is not for an exempted purpose, the property owner is not entitled to any exemption, even if a small portion of the property is used for an exempted purpose". And lastly, in terms of valuation theory the Court rejected the City of Rye's business enterprise income analysis finding that "in tax certiorari valuation, the income stream subject to capitalization measures the rental value of the property, exclusive of the business conducted on the property".

Inverse Condemnation

Not since the 1980's case of *Loretto v. Teleprompter Manhattan CATV Corp.*[13] have the courts been called upon to address the equities of the use of private property in New York City by telecommunication companies for the allegedly uncompensated placement of terminal boxes, cables and other hardware. In *Corsello v. Verizon New York, Inc.*[14], a class of property owners challenged defendant's use of "inside-block cable architecture" instead of "pole-mounted aerial terminal architecture " often turning privately owned buildings into "community telephone pole(s)". On a motion to dismiss, the

Appellate Division, Second Department held that an inverse condemnation claim was stated noting that the allegations "are sufficient to describe a permanent physical occupation of the plaintiffs' property". The court also found that a General Business Law § 349 (GBL) claim was stated for "[t]he alleged deceptive practices committed by Verizon...of an omission and a misrepresentation; the former is based on Verizon's purported failure to inform the plaintiffs that they were entitled to compensation for the taking of a portion of their property, while the latter is based on Verizon's purported misrepresentation to the plaintiffs that they were obligated to accede to its request to attach its equipment to their building, without any compensation, as a condition to the provision of service". The court also found that although the inverse condemnation claim was time barred, the GBL 349 claim was not ["A 'defendant may be estopped to plead the Statute of Limitations...where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action'"].

Post Judgement Condemnation Issues

In *Matter of Village of Dobbs Ferry v. Stanley Avenue Properties, Inc., et al*[15], the Village was ordered to pay the sum of $1,372,750 for the calculated loss from the taking. The Court

did not, however, direct submission of a Judgement on Notice pursuant to 22 NYCRR 202.48. The parties then, in good faith, engaged earnestly in protracted settlement negotiations which, at one point produced an apparent agreement which was favorable to he Village and would have relieved it of its obligation to pay the condemnation award in exchange for a commitment by the claimant to build affordable housing, with County financing, on the remainder parcel. After approximately twenty-nine months however, the negotiations irretrievably broke down. After the Judgement was submitted, the Village moved to deem the compensation award abandoned, and claimant cross-moved to have the clerk ordered to enter Judgement. Supreme Court, excusing the belated filing, granted the cross-motion finding that the 60 day limitation of 22 NYCRR 202.48 was inapplicable since submission of a judgement was not originally ordered by the Court, and that the Village, having participated in the process that caused the delay, should not now be able to successfully assert that claimant has abandoned its right to enforce the judgement.

County of Rockland v. Donald A. Lucca, Jr., et al[16] involved the issue of where to deposit advance payment funds where there were competing claims (two apparently unsatisfied mortgages on the property) in addition to the condemnees' ownership interest. Supreme Court held that the deposit of the advance funds was to be made with the County Clerk pending final resolution of the

percentage of entitlement of each of those interests.

In *Matter of City of New York (West Bushwick Urban Renewal Area)*[17], the Supreme Court ruled that EDPL 304 (H) must be strictly construed, and the City, in this fixtures claim, was denied relief when its motion for reimbursement of its advanced payment was not made within thirty days of service of the order of the Appellate Division with notice of entry.

Notice And Jurisdiction

When an attorney commences tax certiorari proceedings pursuant to RPTL Article 7, notices of petitions and petitions must (unless otherwise indicated) be mailed to the superintendent of the school district in which the property or any part thereof is located [RPTL §708(3)]. A recurring problem in tax certiorari practice occurs when multiple school districts are located within a municipality or township and mailing of the notices and petitions is mistakenly and incorrectly made to the superintendent of an adjoining school district, also located within the municipality, rather than to the superintendent of the district in which the property is actually located. In *Board of Managers of Copley Court Condominium v. Town of Ossining*[18], the Second Department recently determined, on this issue, that "... the mistake or omission of [the] petitioner's attorney does not constitute good cause shown within the meaning of RPTL 708(3) to

excuse [the] petitioner's failure to comply with that section."[19] To reach its decision in *Copley,* the Second Department relied on, among other cases, *Matter of Gatsby Industrial Real Estate, Inc. v. Fox*[20], and last year's Fourth Department decision in *Matter of MM1, LLC v. LaVancher*[21]. Both cases involved a failure to mail a copy of the petition to the local school district (as required under RPTL § 708 [3]), which failure was not excused for good cause shown. The latter Court did hold, however, that such failure of notice is not a jurisdictional defect, since the mailing is not service upon the school district, and that the trial court properly granted leave to commence a new proceeding pursuant to CPLR §205(a). Thus, following *MM1*, it would appear that the petitioner in *Copley* might, pursuant to CPLR 205(a), be able to seek leave to commence a new action for at least some of the tax years at issue.

Other RPTL 708(3)Issues

While RPTL 708 (3) requires that the notice of petition and petition be mailed to the superintendent (see supra), the Supreme Court in *Matter of Hansen v Town of Red Hook*[22] approved an alternate procedure. Petitioner's attorney called and spoke to the superintendent's personal secretary who notified him that she and the superintendent would be unavailable to receive the papers at the time that the attorney intended to personally deliver them, but directed

him to serve the notice and petition upon another named district employee who would then bring the papers to her for delivery to the superintendent upon his return from vacation. The attorney timely followed the instructions and later confirmed that the notice and petition were received by the secretary and the superintendent, and then conveyed, per district policy, to the tax collector.

In *Matter of Ryan v. Town of Cortlandt*[23], the Town and petitioner settled the matter for assessment reductions in each tax year, and petitioner presented the stipulation to the school district for refunds. The district, rather than seeking the usual remedy of dismissal for failure by petitioner to timely serve the superintendent, instead only sought (and was granted) intervention in order to be relieved of the binding effects (pursuant to RPTL 726 [1] [c])of the prior settlement.

Other Exemption Cases

In an interesting decision, *Matter of Warrensburg Commons LPT v Town Assessor of the Town of Warrensburg*[24], the Third Department found that the failure to comply with a regulation of the Division of Housing and Community Renewal that directs owners of low income housing to provide income documentation to the local assessor did not preclude the use of RPTL 581-a as a valuation method and, thus, was not fatal to the petitions.

In *Matter of Metropolitan Transportation Authority v City of Mount Vernon*[25], the Supreme Court determined that pursuant to Public Authorities Law §1275 property rented by the MTA for the purposes of establishing and maintaining an MTA Police Department Station is property that is leased by the Authority for transportation purposes notwithstanding that the lessor is a private and not a tax exempt entity. The decision also noted the distinction in the application process for a real property tax exemption between RPTL Article 4, Title 2 involving private property wherein the applicant is required to fill in and submit an official ORPS application form to the taxing authority, and an application pursuant to RPTL Article 4, Title 1 wherein a public authority seeking an exemption need merely advise the municipality or taxing authority of the property status and/or the proposed use to claim an exemption.

In *Matter of St. Francis Hospital v Taber*[26], the Second Department found that the hospital was entitled to only a partial exemption for its parking garage. Certain spaces were used by its attending physicians who also had offices and engaged in the private practice of medicine as sub-tenants in a medical office building located on hospital property. Since such private practice of medicine is primarily a commercial enterprise, not entitled to a tax exemption under RPTL 420-a, the parking spaces subleased to those offices cannot be said to further the hospital's purposes as to create an entitlement to an exemption.

In *Matter of Lake Forest Senior Living Community, Inc v Assessor of the City of Plattsburgh, et al*[27], the Third Department affirmed the Supreme Court's finding that, even though there was no change in the property's use, revocation of petitioner/congregate living facility's exemption was appropriate. Here, petitioner's providing of housing to middle income seniors, none of whom received supplemental security income or other governmental benefits, at market rates does not constitute a charitable activity. Additionally, the fact that personal care services (many of which are not provided free of charge) are available to residents does not make its activity charitable.

In *Rockland Hebrew Educational Center, Inc. v Village of Spring Valley, et al*[28], Supreme Court determined that even though the Village failed to disprove that the primary use of the premises was the conducting of religious activity in conformance with the Center's avowed religious purpose, the holding of religious services at the site in knowing violation of the village zoning code was a complete bar to eligibility for a RPTL §420-a (1) exemption. Since the evidence showed that the Rabbi presided as clergyman for the Center and that he and his family resided at the premises, petitioner was entitled to a "Parsonage Exemption" under RPTL §462.

In *Matter of Association for Neighborhood Rehabilitation, Inc.*[29] petitioner applied to have 11 of its properties exempted from real property taxes pursuant to RPTL §420-a. Petitioner not-for-profit corporation had, as one of its primary missions, to provide housing to

people who are at high risk of becoming homeless including, among others, the mentally infirm or disabled, people who are drug or alcohol dependent, domestic violence victims, and low income individuals. Respondents' argument that Supreme Court erred in determining that petitioner's properties were used exclusively for charitable purposes was rejected by the Third Department, which found that while the statute speaks of exclusive use, "it has long been clear that the statute's 'used exclusively' language should be understood to mean 'used principally'"... Upon analysis of the different categories presented, all 11 properties were found to be exempt as petitioner had proved that the single room occupancies (39 units in three properties) were used exclusively for charitable purposes; that caseworkers funded by the Office of Mental Health were available at residences; that residents referred to petitioner by various agencies had been screened to ensure they met the criteria for high risk of homelessness; and that families residing in the housing project (Gaslight Village) faced barriers to self-sufficiency such that simple rent subsidies to live elsewhere would not have addressed their underlying problems.

In *Matter of Al-Ber, Inc.,*[30] petitioner, a not-for profit organization exempt from federal taxation, provided religious, charitable, and educational services to the Islamic community. In 2001, it entered into a 99-year lease agreement with Clio Realty with respect to the subject property for the purpose of operating an

Islamic school. Pursuant to the lease, petitioner agreed to pay all real estate taxes on the subject property. Petitioner also entered into a purchase option contract with Clio providing it with the exclusive option to purchase the property until April 1, 2016. In 2005, petitioner applied for a real estate tax exemption on the property. The application was denied by the New York City Department of Finance because legal title to the subject property was not held in petitioner's name. Petitioner's CPLR Article 78 petition challenging the denial of its application was dismissed on cross-motion. The Second Department affirmed the Supreme Court's dismissal of the proceeding finding that RPTL §420-a (1)(a) provides that "Real property *owned* by a corporation or association organized or conducted exclusively for religious, charitable, ... educational... purposes...shall be exempt from taxation as provided in this section" (emphasis added). Thus, the Court reasoned, the party seeking the exemption must hold legal title to the subject property, and petitioner, as lessee, has yet to acquire title.

In *Matter of Altman,*[31] petitioner, an ordained rabbi of the denomination known as Reformed Judaism, owned the subject premises which she utilizes as her primary residence. She was previously employed as Associate Rabbi at Temple Beth El of Great Neck and received a partial clerical exemption for the tax year 2008/2009. On or about January 1, 2008 she voluntarily resigned he position as Associate Rabbi and accepted employment as Associate Dean of the

Hebrew Union College and Director of its Rabbinic School. She applied for new partial clerical exemption based on her new position and responsibilities at Hebrew Union College. The application was denied by the Assessment Review Commission of Nassau County (ARC) which, based on the trial testimony, reasoned that "the exemption is primarily for the clerical leader of a congregation" and that if the ARC determines or believes that the position is primarily administrative in nature, it will not qualify for an exemption under RPTL §460. Petitioner testified that as Dean of the seminary she is directly involved with the pastoral training of students enrolled to become rabbis. She is an integral part of the daily worship services, delivers sermons to the student congregation, and has discussions and critiques with students regarding their sermons. In granting the exemption, the Court noted that "Respondent offered no rational basis for its strained construction and the corresponding denial of the RTPL §460 exemption in the context of the within proceeding..."; that "Respondent has submitted no credible documentary evidence to establish that petitioner's work was predominantly administrative, rather than rabbinic and pastoral in nature..."; and that "Unlike the aforementioned section 462, there is no requirement in section 460 that the applicant be an officiating clergyman of a religious corporation."

Interesting Valuation Theories

In *Matter of John Jay College of Criminal Justice*[32], the First Department, *inter alia*, affirmed the trial court's denial of a motion to re-open the record or to grant a new trial. The speculative nature of the proposed development did not support petitioner's proposed highest and best use. Among the factors considered were the inability to obtain any financing commitment at the time of the taking, or any signed leases for the development. The appraisal, rejected by the court, was also speculative as based on capitalization of income. The appraiser's addition of $37.8 million in value for entrepreneurial profit was properly rejected since any claimed developer enhancements were only at the preliminary stage and there was credible testimony that the plans were not compliant with the zoning or the special permits for the property.

Gravel Mining

Similarly, the Supreme Court in *Matter of Metropolitan Transportation Authority (Washed Aggregate Resources, Inc., Claimant)*[33], which involved a claim for the valuation of gravel mining properties taken in eminent domain, rejected claimant's discounted cash flow analysis and its methodology for a number of reasons

including the fact that the appraisers valued a hypothetical quarry operation based upon assumptions regarding business activity, production levels, and income never previously generated, and compounded that error by calculating only the present worth of the property rather than completing the analysis by discounting that figure to get the present worth of the reversion of the remaining land.

Electric Transmission Lines

In a proceeding to review assessments of parcels consisting of gas and electric transmission lines, the Second Department in *Matter of Central Hudson Gas and Electric v Assessor of Town of Newburgh*[34] found that the Supreme Court erred in granting a motion to strike that portion of claimant's trial appraisal report concerning valuation of easements on which transmission lines were placed based upon the Town's determination that easements were not subject to tax as real property. When an assessor values real property, although the owner of the property is taxed on the full value of the land, the holder of the easement is normally not additionally taxed for the benefit incurred from the easement. Thus, in this case the Town had ascribed a land value of $0.00 on its rolls to each of the parcels on which the utility lines were located and considered as improvements. The parties agreed that the appropriate method of valuation for all

components of the utility was "reproduction cost new less depreciation." While the value of the easements is not taxable, the trial Court erred in striking that portion of the petitioner's appraisal which included the costs of acquiring those easements. In a "reproduction cost new less depreciation" analysis, those costs were necessary to the re-creation of the value of functioning transmission lines, and therefore must be considered in re-calculating reproduction cost of the subject transmission lines.

Refuse Collection Services

In *New York Telephone Company v. Supervisor, Town of North Hempstead*[35], the Second Department affirmed Supreme Court's granting of partial summary judgement to Verizon New York and refund for special ad valorem levies relating to garbage and refuse collection services for Verizon's "mass property" comprising telephone poles, lines, wires, and electrical conductor enclosures. The levies were invalid under RPTL §102(14) because the properties did not and could not receive any direct benefit from the refuse collection service.

Mobile Home Parks

Petitioner/owner of two mobile home parks totaling over 106 acres and housing 241 units brought a proceeding to challenge the assessor's

combined full market valuation of the properties at $8,278,100. In *Matter of Northern Pines MHP LLC v. Board of Assessment Review of the Town of Milton et al.*[36], the Third Department affirmed the Supreme Court's adaptation of petitioner's appraisal and its valuation of $5,950,000 finding that it focused on the extensive experience of petitioner's appraiser in the mobile home industry, his detailed documentation of the character and configuration of each mobile home, his use of four similar mobile home parks in his market comparison analysis, his reliance on figures in his income analysis that were based on income actually generated by the properties, and his use of a capitalization rate that was supported by documentary evidence introduced at trial, whereas there was no support in the record for respondents' position that the property had tripled in value since it was purchased four years earlier.

Standing

In *Matter of Corporate Woods 11, LP* [37], Wellpoint, Inc. leased petitioner's six story building. Under the terms of the lease, while Wellpoint was required to pay to petitioner a portion of the property taxes, petitioner made all tax payments to the taxing authorities. In 2006, Wellpoint commenced a tax certiorari proceeding challenging the 2006 and 2007 assessment. The matter was settled by stipulation, and by an Order and

Judgement reducing the assessments. In 2008, the parties agreed to a five year lease renewal which in part required petitioner to be responsible for a larger share of the taxes. In 2009, petitioner grieved the tax assessment, but the challenge was denied pursuant to the three year repose period imposed by RPTL §727(1) following a court-ordered reduction. Petitioner brought a tax certiorari proceeding alleging that Wellpoint was not aggrieved within the meaning of RPTL §704(1) and therefore lacked standing to commence the 2006 proceeding. Supreme Court granted Wellpoint's CPLR §3211(a)(1) and (7) motion to dismiss. The Third Department affirmed, finding that Wellpoint's standing was necessarily decided in the prior proceeding, that petitioner did have a full and fair opportunity to contest the prior determination, and that it was in privity with Wellpoint for collateral estoppel purposes. The record showed that Petitioner received actual notice in August, 2007 that Wellpoint was conducting a tax certiorari proceeding when one of its officers supplied requested financial information to a Town Appraiser and "... revealed his awareness of the pending litigation by directing the appraiser to obtain a requested copy of the lease from Wellpoint, as petitioner "was not a party to this case." Petitioner, whose interest in reducing its property tax was financially aligned with Wellpoint and who benefitted by having its 2009 tax liability lowered by the reduced assessment that

Wellpoint had obtained, took no action to contest Wellpoint's standing or to intervene in the action, and was therefore bound by the prior settlement and the three year repose period.

SCAR Home Inspections

In *Matter of Yee v. Town of Orangetown*[38], three homeowners brought an article 78 proceeding to review a judicial hearing officer's dismissal of their Small Claims Assessment Review (SCAR) proceeding which challenged the valuation of their property and the tax assessments imposed by the Town. At the pretrial conferences of the SCAR proceedings held before the Judicial Hearing Officer (JHO), the towns requested that their representatives be permitted to inspect the homes of the petitioners. The petitioners refused to permit the inspections. The towns made an oral application for dismissal of the SCAR petitions, asserting that they had the right to inspect the petitioners' homes. The JHO dismissed the SCAR petitions, with prejudice, holding that, when a homeowner files a SCAR petition, that homeowner makes a limited and revocable waiver of a right to privacy and consents to inspection and, upon a demand for an inspection by the Town, must comply to avoid dismissal of the proceeding. Supreme Court adopted the JHO's position and dismissed petitioner's Article 78 proceeding. The Second

Department reversed, holding that the JHO exceeded his authority by directing that the homeowners consent to an inspection of their properties by the Town assessor or face dismissal of their SCAR proceeding. The Appellate Panel noted that when the Judicial Hearing Officer's determinations are contested, the court is limited to ascertaining whether those determinations have a rational basis. Additionally, while RPTL §732(2) contemplates and authorizes a viewing by the fact finder (here the JHO), it does not apply to an adversarial party such as the tax assessors in this case. The Court also found that the JHO's determination to require an inspection without the homeowners' permission violated Fourth Amendment principles and petitioners' rights against unreasonable search and seizure, noting that "except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant."

Other SCAR Cases

In *Matter of Seidel v. Board of Assessors*[39] the Appellate Division, Second Department in reviewing the issue of whether Nassau County may consider improvements made to real property after the taxable status date in assessing property values for

the particular tax year to which the taxable status date applies noted that the New York State Division of the Budget has asserted that Nassau County has "'notoriously flawed assessment and assessment review systems'"[40]. In this case the County had misconstrued its Administrative Code § 6-24.1(e) which required the Board of Assessors to enter newly assessed (post taxable status date) improvements "on the next following tentative assessment roll". Somewhat disconcerting to taxpayers who challenged the County's retroactive assessments was their treatment before the small claims assessment review (SCAR) board whereat the hearing officer "found that he lacked the jurisdiction to rule on the petitioners' contention that the assessments were illegal" thus forcing the petitioners to proceed to Supreme Court to obtain a proper review. Such treatment clearly defeats the purpose of SCAR which, *inter alia*, is to encourage aggrieved taxpayers to file small tax assessment claims without an attorney and receive fair and expeditious treatment.

Matter of Greenfield v. Town of Babylon Dept. of Assessment[41], Supreme Court's dismissal of motion to annul hearing officer's determination in the SCAR proceeding that homeowner had failed to establish that the assessed valuation of his property exceeded its full value was affirmed by the Second Department. When such a determination is contested, the court's role is limited to ascertaining whether there was a rational basis for

that determination. Here, petitioner submitted the applicable residential assessment ratio (RAR) which, by definition is the median percentage of value applied to residential property by the assessing unit during the preceding year. Homeowner, however, failed to establish that the full market value of his property, multiplied by the applicable RAR, was less than the assessed valuation of his property.

In *Matter of Sass v. Town of Brookhaven*,[42] the Second Department found that the decision of the hearing officer to deny a claim for assessment reduction lacked rational basis and was arbitrary and capricious where petitioner submitted sales figures from six comparable properties tending to establish that tax assessment appeared excessive or unequal, the town submitted no opposition, and the hearing officer, without any stated reason, ignored comparable properties in reaching his conclusion.

Eminent Domain[43] - Highest and Best Use

In *Gyrodyne Company of America v. State of New York*[44], the Appellate Division Second Department noting that "The measure of damages in a case involving partial taking of real property is the difference between the value of the entirety of the premises before the taking and the value of the remainder after the

taking" affirmed a finding of the trial Court that rejected the State's appraisal of $26 million based upon light industrial development and accepting the petitioner's appraiser's highest and best use as a residential development. "New York state must pay about $98 million plus six years of interest"[45].

In *Matter of Village of Haverstraw*[46], Claimant (AAA) brought an Article 5 proceeding challenging the valuation of its 18.9 acre river front property by the Village. Condemnor/Village, urging that the highest and best use of the property was "light industrial" made an offer for the taking of $2,596,150. AAA, based upon the substantial size of the property, its excellent location with superb Hudson River views, and sewer and road access opined that its highest and best use was as a multi-family residential/condominium development. With a per unit valuation of $47,000, AAA estimated its total valuation to be $16,300,00. After a thorough analysis, the Court rejected the Village's methodology, conclusions, and comparable property evaluations and adopted AAA's highest and best use conclusion. However, finding the number of units that claimant's expert determined would be approved to be "speculative", it declined to value the parcel on a "per unit" basis, opting instead for a "per acre" valuation as more appropriate in this case, and utilizing Claimant's comparable properties, but with modifications to a number of its adjustments, arrived at a final conclusion of value

of $6,500,000. The Court also rejected the Village's alternate theory that valuation by the owner at "highest and best use" for tax purposes was established by prior tax settlements with the Town and Village in which full market value was set at $1,200,000. The Court refused to use an older assessment stipulation as its basis for evaluation, since the basis for the property's appraisal and its actual condition for tax purposes was unclear from the record.

In *Matter of Willis Avenue Bridge Replacement*[47], Supreme Court granted subtenant Waste Management's motion to direct the condemnor City of New York to make an advance payment in the amount of $925,000 plus interest directly to Waste Management and not to the owner/landlord. The City had previously notified Waste Management of the availability of the advance payment to compensate it for the loss of its leasehold interest on damaged parcels not otherwise compensated for in an earlier advancement made to the landlord. However, prior to the receipt of the payment, the City notified Waste Management that the advanced payment had erroneously been authorized to Waste Management, and should have been authorized to Harlem River, as owner/landlord, subject to Waste Management's interests as sublessee. The First Department affirmed the lower court, holding that "The City cites no legal authority to support its claim that a single advance payment must be made to the owner/landlord and that an advance

payment cannot be made directly to a subtenant to compensate it for its leasehold interest." In the decision, the Court analyzed the lease agreement and noted that it did not preclude an advance payment award being made directly to Waste Management.

In *Michael Chevere, et al., v The City of New York*[48], plaintiffs owned two tax lots. Their home was located on Lot 29. Immediately adjacent was a 40 x 100 foot side yard (Lot 30) which sat entirely in the bed of an unopened, unbuilt mapped street. Plaintiffs brought an action to declare void that part of a 51 year old municipal map which depicted the undeveloped street bed underlying Lot 30. A consent judgement, in a prior case, had determined portions of the municipal map designating similar "mapped streets", adjoining Lot 29, to be void. Supreme Court granted the motion, noting that while a prior consent judgement may not be used as an admission of liability, it may be used as a yardstick by which to gauge what the City would regard as a rational and reasonable outcome when a mapping is over 50 years old with no current intent to activate the street. Plaintiffs additionally argued that the mapping of their property as a never to be opened street was a "taking of property" without appropriation. In New York State, a permanent restriction on property, "so that it may not be used for any reasonable purpose must be recognized as a taking."(citation omitted). The Court rejected this theory finding that there was no appropriation

since the mapped lot, which adjoined the lot on which their home sat, was usable for suitable private and personal recreational use by plaintiffs, and a taking has been defined as depriving an owner of all economic use of the property. Additionally, plaintiffs purchased the lot when it was already mapped as an unbuilt street. They have not demonstrated that its value has been proportionately diminished during the time of their ownership. A property owner's loss of value must be precisely calculable, and even if there had been a decrease in value, mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.

Eminent Domain - EDPL §701 Additional Compensation

In *Matter of City of New York (Newtown Cr. Water Pollution Control Plant Upgrade [Second Taking])*[49], a protracted condemnation action, in view of the complexity of the issues presented, the amount of work performed, and the success achieved by the attorneys in convincing the court to make an award far in excess of the initial amount offered by the condemnor, a contingency fee in the amount of 25% of the increased award (as per the retainer agreement) plus interest ($3,091,783.57) was deemed appropriate and awarded by the court. Additionally, since

the municipality chose to deposit the funds with its own department of finance which charged an administrative fee, instead of with an escrowee who did not charge a fee, the municipality must bear this cost, and remit the administrative fee to the condemnee. Certain miscellaneous expenses, however, could not be characterized as necessary to receive adequate and just compensation. These included “computer research”, which was merely a substitute for attorney’s time, and expenses for copying and messenger services which fell within the compensation for attorney’s fees. Costs for travel, meals, and lodging were not compensable where it is presumed that all of the services could have been obtained by retaining professionals who maintained their offices in the local metropolitan area. Similarly, expenses incurred for utilizing a car service were not compensable since the metropolitan area was well served by public transportation. Other miscellaneous expenses such as postage and telephone calls are generally considered to be part of overhead and not separately compensable.

In *Megamat Laundromat, Inc.*[50], the trial court's finding of $1,104,026 as the current sound value of the trade fixtures was reversed and remitted for recalculation, with the Appellate Division finding the court's total CSV award (nearly twice the original cost for constructing and equipping the entire laundromat approximately four years earlier) to be a "windfall."

Upon remand, the trial court re-calculated a total amended award of $539,993.99 plus interest. Claimant brought a motion for additional allowances pursuant to EDPL §701. Condemnor argued that additional compensation should be denied since the reduced award only barely exceeded the Village's proof at trial of $419,939. Claimant countered that the award, even as reduced upon remittur, is several times the condemnor's pre-vesting offer of $110,105, which occasioned the necessity of appraisal fees, trial expenses, etc. The court agreed that, in order to achieve just and adequate compensation, claimant was entitled, under §701, to an allowance for attorney fees, appraisal costs, and appropriate costs and disbursements (upon re-submission of a proper bill of costs), but reduced the amount of legal and appraisal fees to 50% of the amount sought - based upon claimant's pursuit of a valuation theory which was squarely rejected upon appeal, which constituted an amount substantially in excess of the recalculated amount, and which played no role in the courts revaluation of the trade fixtures.

Discovery Issues

Normally, in a tax appeal context, any party who fails to serve an appraisal report by the exchange date is precluded from offering expert testimony on value unless such default is excused

by the Court upon application and good cause shown. In *Matter of Long Island Industrials Group v. Board of Assessors*[51], the dismissal of the proceeding relating to the earliest tax year for failure to serve its appraisal by the exchange date was conceded to be proper by the County of Nassau, however, the Second Department found that the Supreme Court erred when it precluded valuation testimony for the succeeding years in issue. The succeeding cases could not be consolidated, nor could notes of issue be filed, until after the income and expense statements were filed in August, 2008. The latter event occurred after the Court ordered exchange date in the earliest case, and said date did not apply to the proceedings in the succeeding tax years. Where no exchange date is ordered, parties must submit appraisals at least 10 days before trial (*see* 22 NYCRR 202.59 [e][1][I]). Since the Court never ordered exchange dates in the succeeding cases, the County was given leave to serve its appraisals by that date, or earlier, if so ordered.

In *Matter of Wendy's Restaurants, LLC v. Assessor, Town of Henrietta*[52], the Fourth Department affirmed Supreme Court's granting of the Town's motion to compel discovery of, inter alia, profit and loss statements, balance sheets, asset depreciation schedules, and gross and net sales revenues for the years at issue. The requested matters were relevant to the valuation of the properties, and contrary to petitioner's contention, owners

of owner-occupied business properties are not exempt from the requirements of 22 NYCRR 202.59 (b).

In *Matter of Hampshire Country Club v. Assessor of The Village of Mamaroneck*, et al[53], while the matter was being readied for trial, respondents asserted that a recent sale of the property had occurred, and served notice pursuant to CPLR 3120 for disclosure of the details of the purported sale. Discovery was permitted despite the lateness of the request with the Court recognizing that "...a recent sale of the subject is the best evidence of value for the property, absent an abnormality, and the details of the sale may shed considerable light on whether the sale does properly reflect the current market value of the property. If so, respondents' appraisers' should have access to those details, in order to deal with this post-appraisal sale in a supplemental appraisal, and thereafter at trial."

ENDNOTES

1. *Kelo v. City of New London*, 545 U.S. 469 (2005).

2. Governor's Program Bill 2011 (Program Bill #1 Revised).

3. There may have been some confusion initially about exactly what was to be capped, i.e., the tax levy or the individual homeowners tax bill. It is clear that the individual homeowner's taxes will not be capped. See Harrison Oks 4.713 percent tax rate hike at www.lohud.com (December 19, 2011)("Local property owners will see

their town tax rate go up agin-this time by 4.713 percent...the Republican-amended version which was ultimately passed stayed within the state's 2 percent cap on tax levy increases"). It is also clear that some municipalities may not abide by the statute. See Tax cap springs leaks: Towns call law unsustainable amid capital projects, pension hikes at www.lohud.com (December 5, 2011).

4. Coumo defends 'rigor' of tax-levy cap; few towns plan to override it at www.lohud.co (November 7, 2011).

5. *Matter of Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y. 3d 511 (2009)("The land use improvement plan at issue [Atlantic Yards project featuring a sports arena for the New Jersey Nets] is not directed at the wholesale eradication of slums, but rather alleviating relatively mild conditions of urban blight...It does not seem plausible that the constitutionality of a project of this sort was meant to turn upon whether its occupancy was restricted to persons of low income").

6. *Kaur v. New York State Urban Development Corp.*, 15 N.Y. 3d 235 (2010)("6.8 million gross square feet in size, the Project provides for the creation of about two acres of publically accessible open space, a retail market along 12th Avenue and widened, tree-lined sidewalks").

7. *Gordon v. Town of Esopus*, 15 N.Y. 3d 84 (2010).

8. *Matter of Eternal Flame of Hope Ministries, Inc. v King,* 16 NY 3d 778, 2011 NY Slip Op 01322 [2011].

9. *Matter of Eternal Flame of Hope Ministries, Inc. V. King,* 76 A.D. 3d 775 (2010).

10. *Miriam Osborn Memorial Home Association v. Assessor of City of Rye*, 80 A.D. 3d 118, 909 N.Y.S. 2d 493 (2d Dept. 2010)

11. *Id* at 909 N.Y.S. 2d 498-499 ("by 2003 the entrance fees ranged from $301,400 to $825,000 (and the monthly fees in 2003) ranged from $2,595 to $3,741. The Osborn reserves the right to terminate a resident's contract for failure to pay monthly fees").

12. *Id* at 909 N.Y.S. 2d 499, fn1 ("Some of the costs covered by the monthly fees include an executive chef who earns an annual salary in excess of $100,000, along with one dozen cooks and preparation cooks, high end food items such as Angus beef, cavier

and lobster and expensive works of art").

13. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), revg. 53 N.Y. 2d 124 (1981), aff'g 73 A.D. 2d 849 (1st Dept. 1979).

14. *Corsello v. Verizon New York, Inc.*, 77 A.D. 3d 344 (2d Dept. 2010). See also: *Corsello v. Verizon New York, Inc.*, 76 A.D. 3d 941 (2d Dept. 2010)(class certification denied).

15. *Matter of Village of Dobbs Ferry v. Stanley Avenue Properties, Inc., et al*, 29 Misc.3d 1205 (A) (Supreme Court, Westchester County, 2010).

16. *County of Rockland v. Donald A. Lucca*, Jr., et al, 28 Misc. 3d 1047 (Supreme Court, Rockland County, 2010).

17. *Matter of City of New York (West Bushwick Urban Renewal Area)*, 2010 NY Slip Op 20208 (U) (Supreme Court, Kings County, 2010)

18. *Matter of Copley Court Condominium v. Town of Ossining,* --- N.Y.S.2d ---, 2010 WL 5187960 (N.Y.A.D. 2 Dept., 2010 N.Y. Slip Op. 09508).

19. A contrary result in a case on point had been reached in 2007 by the Third Department which, in *Matter of Harris Bay Yacht Club, Inc. v Town of Queensbury,* 46 A.D. 3d 1304, 1306 [3d Dept. 2007], found that good cause under RPTL 708(3) was shown as "...petitioner made a good faith effort to comply with the statute but, in doing so, made a factual, geographical mistake with no apparent prejudice to the district."

20. *Matter of Gatsby Industrial Real Estate, Inc. v. Fox*, 45 A.D.3d 1480 (4th Dept. 2007).

21. *Matter of MM1, LLC v. LaVancher*, 72 A.D.3d 1497 (4th Dept. 2010).

22. *Matter of Hansen v. Town of Red Hook*, 28 Misc. 3d 1236(A) (Supreme Court, Westchester County, 2010).

23. *Matter of Ryan v. Town of Cortlandt*, 912 N.Y.S.2d 857, 2010 NY Slip Op. 20490 (Supreme Court, Westchester County, 2010).

24. *Matter of Warrensburg Commons LPT v. Town Assessor of the Town of Warrensburg,* 69 A.D. 2d 1282 (3d Dept. 2010).

25. *Matter of Metropolitan Transportation Authority v. City of Mount Vernon,* 913 N.Y.S. 2d 509, 2010 NY Slip Op. 20482 (Supreme Court, Westchester County, 2010).

26. *Matter of St. Francis Hospital v. Taber*, 76 A.D. 3d 635 (2d Dept. 2010).

27. *Matter of Lake Forest Senior Living Community, Inc v. Assessor of the City of Plattsburgh, et al*, 72 A.D. 3d 1302 (3d Dept. 2010).

28. *Rockland Hebrew Educational Center, Inc. v. Village of Spring Valley, et al*, 28 Misc. 3d 1240 (A) (Supreme Court, Rockland County, 2010)

29. *Matter of Association for Neighborhood Rehabilitation, Inc. v Board of Assessors of The City of Ogdensburg, et al,* 81 AD 3d 1214 [2011].

4. *Matter of Al-Ber, Inc., Doing Business as El-Ber Islamic School v New York City Department of Finance, et al,* 80 AD 3d 760 [2011].

31. *Matter of Altman v Assessment Review Commission of the County of Nassau*, 2011 NY Slip Op 32419(U)[Nassau Sup. 2011, J. Adams].

32. *Matter of John Jay College of Criminal Justice of the City University of New York, et al v. The Dormitory Authority of the State of New York,* 74 A.D. 2d 460 (1st Dept. 2010).

33. *Matter of Metropolitan Transportation Authority (Washed Aggregate Resources, Inc., Claimant)*, 28 Misc. 3d 1229 (A) (Supreme Court, Dutchess County, 2010).

34. *Matter of Central Hudson Gas and Electric v. Assessor of Town of Newburgh*, 73 A.D.3d 1046 (2nd Dept. 2010).

35. *New York Telephone Company v. Supervisor, Town of North Hempstead*, 77 A.D.3d 121 (2nd Dept. 2010).

36. *Matter of Northern Pines MHP LLC v. Board of Assessment Review of the Town of Milton et al.*, 72 A.D.3d 1314 (3rd Dept. 2010).

37. *Matter of Corporate Woods 11, LP v Board of Assessment Review of the Town of Colonie, et al,* 83 AD 3d 1250 [2011].

38. *Matter of Yee v. Town of Orangetown*, 76 A.D.3d 104 (2nd Dept 2010).

39. *Matter of Seidel v. Board of Assessors*, 88 A.D. 3d 369, 931 N.Y.S. 2d 623 (2d Dept. 2011).

40. Budget Report on Bills, Bill Jacket, L 2002, ch 401, at 4.

41. *Matter of Greenfield v. Town of Babylon Dept. of Assessment,* 76 A.D.3d 1071 (2nd Dept. 2010).

42. *Matter of Sass v. Town of Brookhaven*, 73 A.D.3d 785 (2nd Dept 2010).

43. For other interesting eminent domain cases on the issue of valuation see *Matter of Metropolitan Transportation Authority*, 86 A.D. 3d 314, 927 N.Y.S. 2d 67 (1st Dept. 2011)(valuation of air rights); *Matter of City of New York* (No. 7 Subway Extension), 33 Misc. 3d 1202(A)(N.Y. Sup. 2011)(discussion of the "project influence doctrine...[A] condemnee is only entitled to compensation for what it has lost, not what the condemnor has gained"); *Matter of City of New York (Grantwood Retention Basin),* 33 Misc. 3d 586, 929 N.Y.S. 2d 478 (N.Y. Sup. 2011)(restriction diminishing value of property, speculative value of property, subjective component of valuation).

44. *Gyrodyne Company of America v. State of New York*, 89 A.D. 3d 988, 2011 WL 5865845 (2d Dept. 2011).

45. Pierson, Panel Rules Against State In Eminent Domain Case, New York Law Journal, November 29, 2011, p. 1.

46. *Matter of Village of Haverstraw*, 2011 NY Slip Op 52218(U) [West. Sup. 2011, J. LaCava].

47. *Matter of Willis Avenue Bridge Replacement*, *Waste Management of New York, LLC, et al., Respondents; City of New York, Appellant,* 80 A.D. 3d 435 [2011].

48. *Michael Chevere, et al. v The City of New York*, 31 Misc. 3d 337, [Richmond Sup. 2010].

49. *Matter of City of New York (Newtown Cr. Water Pollution*

Control Plant Upgrade [Second Taking]), 30 Misc. 3d 816 [Kings Sup. 2010].

50. *Matter of Village of Portchester (Megamat Laundromat, Inc.)*, 30 Misc. 3d 1210 (A) [West. Sup. 2011].

51. *Matter of Long Island Industrials Group v. Board of Assessors*, 72 A.D.3d 1090 (2nd Dept 2010).

52. *Matter of Wendy's Restaurants, LLC v. Assessor, Town of Henrietta*, 74 A.D.2d 1916 (4th Dept. 2010).

53. *Matter of Hampshire Country Club v Assessor of The Village of Mamaroneck*, et al, 29 Misc.3d 1239 (A) (Supreme Court, Westchester County, 2010).