

NEW YORK STATE SUPREME COURT
ROCKLAND COUNTY

**FILED AND
ENTERED ON
DATE**

**ROCKLAND
COUNTY CLERK**

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In The Matter of the Application of
MGD HOLDINGS HAV, LLC,

Index No:4725/04

Petitioner,

DECISION & ORDER

-against-

THE ASSESSOR OF THE TOWN OF HAVERSTRAW,
THE BOARD OF ASSESSMENT REVIEW OF THE
TOWN OF HAVERSTRAW, and THE TOWN OF
HAVERSTRAW,

Respondents.

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DICKERSON, J.

THE WINDFALL - SELECTIVE REASSESSMENT NO. 7

Within the context of Petitioner's motion to re-argue our earlier decision¹, this Court is again called upon to examine the concept of "selective reassessment"² and determine whether Respondent Assessor's explanation [i.e., assessing newly created property at or near market] of how and why he changed the assessed value on the subject property in 2004 from \$720,900 to \$1,345,000, is true and, further, was

his assessment methodology fair, reasonable, non-discriminatory [see e.g., Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336, 344, 109 S. Ct. 633 (1989)] and rational [see e.g., Matter of Towne House Villas Condominium v. Assessor of Town of Islip, 200 A.D. 2d 749, 607 N.Y.S. 2d 87 (2d Dept. 1994)] or was it a form of the prohibited policy of selective reassessment [see e.g., Stern v. Assessor of the City of Rye, 268 A.D. 2d 482, 702 N.Y.S. 2d 100 (2d Dept. 2000); DeLeonardis v. Assessor of the City of Mount Vernon, 226 A.D. 2d 530, 641 N.Y.S. 2d 83 (2d Dept. 1996); Markim v. Assessor of the Town of Orangetown, 9 Misc. 3d 1115(A) (Rockland Sup. 2005)].

Facially Reasonable Explanation

Stated, simply, and after a careful re-examination of the papers submitted in support of and in opposition to the Petitioner's motion for summary judgment dated April 5, 2005, and a review of the papers submitted in support of and in opposition to the Petitioner's motion for leave to reargue dated September 12, 2005 and the excellent presentations of counsel at oral argument held on December 23, 2005, this Court grants the Petitioner's motion to reargue, and upon reargument, adheres to its earlier decision and order dated July 13, 2005³ and once again finds that the Respondents have provided a facially reasonable explanation which appears to be fair and comprehensive, " applied even-handedly to all similarly situated property "⁴, for the 2004

change in assessment on the subject property which meets the threshold recommended in 10 ORPS Opinions of Counsel SBRPS 60 (" Instead, whenever an assessor changes the assessments of individual properties or of a particular type of property in a year when the entire roll is not revalued or updated, the assessor must be prepared to explain and justify the changes...the assessor should be prepared to offer proof of his assessment methodology in general so as to successfully withstand any...challenge ") and as discussed in Bock v. Assessor of the Town/Village of Scarsdale, 2006 WL 328503 (West. Sup. 2006)(" The Assessor developed and implemented a reasonable and comprehensive plan for the non-discriminatory reassessment of real property based upon the market cost of improvements determined by referring to all filed building permits and conducting an extensive investigation "; no selective reassessment found); Markim v. Assessor of the Town of Orangetown, 9 Misc. 3d 1115(A) (Rockland Sup. 2005)(" [T]he Assessor has failed to explain...his methodology...failed to provide a coherent (numerically based) explanation of his...assessments of the subject properties "; selective reassessment found); Joan Dale Young v. Assessor of the Town of Bedford, 9 Misc. 3d 1107(A) (West. Sup. 2005)(" The Assessor used standard tables and an Appraisal Manual relied upon by Assessors in the Town of Bedford since 1974...it is clear that the Respondents do have ` comprehensive ` plans for assessing vacant land and newly built homes and have applied R.A.R.'s and derived assessments

of similar properties in a uniform, fair and non-discriminatory manner
"; no selective reassessment found).

Assessing Newly Created Property

The subject property consists of a newly built apartment complex of nine buildings containing 168 rentable units, a clubhouse and caretaker's residence, all located at 1101-9408 Crystal Hill Drive, Town of Haverstraw, construction of which began in 1999 and which, according to the Petitioner, ended on January 7, 2002⁵, but, according to the Respondents, ended in 2003⁶. Since the subject property is newly created property it may be assessed, upon its completion, at or close to market [see e.g., Joan Dale Young v. Assessor of the Town of Bedford, 9 Misc. 3d 1107(A) (West. Sup. 2005) (" it is appropriate on the initial assessment of newly created property for an Assessor to consider, among other factors, [and " so long as the implicit policy is applied evenhandedly to all similarly situated property "'7] ' the current market value (of the newly created property and of comparable properties in the Town of Bedford) to reach a tax assessment "'8).

Why Is It Important When The Project Was Completed?

There is clearly a dispute as to when the subject property was completed, the resolution of which should be resolved at trial.

Determining the subject property's completion date is more than an academic exercise. In fact, it is critically important to both the Petitioner and the Respondents. Both agree that the subject property was partially completed in 2001 and that the initial assessment at \$561,900 which after discussions between MGD and the Assessor was reduced to \$364,900 because ninety of the apartments did not yet have Certificates of Occupancy⁹ was a partial assessment. The 2002 assessment on the subject property was raised from \$364,900 to \$470,000 to which MGD did not object¹¹. According to Respondents the increase in assessment was based upon the fact that the Premises had been further completed, but not yet fully constructed¹² ¹³.

Proper Assessment Or Selective Reassessment?

At this point the Petitioner and the Respondents disagree. The Petitioner asserts that the subject property was completed on January 7, 2002¹⁴ and, therefore, the 2002 assessment of \$470,000 was the final assessment of the newly created subject property and, further, that any future assessments could only be based upon the cost of improvements¹⁵ [See e.g., Matter of Stern v. City of Rye, 268 A.D. 2d 482, 483, 702 N.Y.S. 2d 100 (2d Dept. 2000) (" reassessment upon improvement is not illegal in and of itself. Here, the petitioners' properties were reassessed after recent improvement. However, rather than adding the value of the improvement to the prior assessment...the properties were

reassessed to a comparable market value that included the value of the improvement..."); Matter of Villemena v. City of Mount Vernon, 7 Misc. 3d 1020(A)(West. Sup. 2005)(Assessor " has not explained ' how he determined the additional market value ' attributable to each observed improvement "); Teja v. The Assessor of the Town of Greenburgh, Index No: 14628/03, J. Rosato, Decision May 27, 2004 (" Petitioners' argument, briefly stated, is that the only allowable increase in valuation above the assessment of June 1, 2001 could be one based solely on the addition of the kitchen appliances, which cost \$14,513.28. Anything more than this they contend is a ' welcome stranger ' increase based on the purchase price of \$1,175,000.00 paid in April 2002...This valuation technique is unconstitutional because it is a selective reassessment which denies equal protection guarantees...*if petitioner's home was completed...on June 1, 2001, and there is no evidence that it was not, there is no legal basis for such a ' partial valuation ' " [emphasis added]*); Carter v. The City of Mount Vernon, Index No: 19301/02, J. Rosato, Decision November 25, 2003 (assessment increased 48.9% after sale based upon "' certain improvements ' having been made to the property, without proper permits, by the prior owner "; assessor failed to " even identify, or enumerate just what specific renovations or improvements " were made); Bock v. Assessor of the Town/Village of Scarsdale, 2006 WL 328503 (West. Sup. 2006)(Assessor's " annual review process for changing assessments on real property in the Town/Village of Scarsdale based upon the cost of improvement...fair,

reasonable and non-discriminatory "); Dale Joan Young v. The Town of Bedford, 9 Misc. 3d 1107(A) (West. Sup. 2005)(" the prohibition against reassessment of improved property ` utilizing the recent purchase price as a basis for determining the increase in assessed value of a property on which improvements have been made ` (does not apply) to the initial assessment of newly created property on vacant, unimproved land ")].

The Initial Assessment In 2003 Was At Or Near Market

In 2003 the Assessor determined that the subject property was complete and ready for a full market assessment and `` initially placed an assessment on the Premises of \$1,345,000 (which when multiplied by an equalization rate of 8.01 resulted in a full value of \$16,791,510) `16. The Assessor also created an ` assessment worksheet `17 and obtained an appraisal prepared by D.C. Barrand Associates ` showing a value for the Premises of 19,690,000 `18. Relying upon the aforesaid appraisal and an estimated ` vacancy and collection loss rate of 5% `19, the Assessor decided to value ` the Premises at a somewhat lower amount...of \$16,729,088 `20 `21.

The 2003 Assessment Reduced At Petitioner's Request

In January of 2003 the Petitioner's Chief Financial Officer,

Ms. Christine McWalters, sent a letter to the Assessor which appears to ask for help in obtaining a lower assessment for 2003 [" we averaged 10.3% vacancy rate for 2002. Economic vacancy was 17.7% factoring in concessions "²²]. The Assessor asserts that he and the Board of Assessment Review [BAR] considered the aforesaid letter²³ and reduced the initial 2003 assessment from \$1,345,000 to \$720,900 [" I can state unequivocally that in providing my recommendation to the BAR in 2003, it was based upon the high vacancy rate as set forth in the letter and materials supplied by Ms. McWalters in her January 21, 2003 letter " ²⁴]. Not surprisingly, the Petitioner did not object to the lowered 2003 assessment of \$720,000 and, according to Respondents, should be estopped from objecting to the 2004 assessment of \$1,345,000²⁵.

Of course, the Petitioner disputes the significance of the McWalter's letter and how and why the initial 2003 assessment of \$1,345,000 was reduced to \$720,000²⁶ [" the Assessor conjured up a scenario which purported to show that 1) the Petitioner made an appeal to the Board for an assessment reduction based upon the supposed problem of high vacancy, and 2) the Board decided to reduce the 2003 assessment for that reason...the ' evidence ' relied upon by the Assessor in support of this scenario was either misrepresented or never existed "].

The 2004 Assessment

The 2004 assessment of \$1,345,000 [a restoration of the initial 2003 full market assessment] was based upon a significant improvement in the economic viability of the subject property²⁷ [" There was one reason and one reason only, as to why I increased the 2004 assessment from the 2003 assessment. It was because of the major turnaround at the project and that in contrast to 2003, the project had been nearly, fully rented "²⁸]. Of course, the Petitioner disputes the Assessor's rationale by challenging the accuracy and very existence of the vacancy rates²⁹ [" Assessor did not present any evidence in support of his contention that ` the reason for the increase in 2004 was...because the project had become stabilized and they were able to obtain nearly a full rate of occupancy, after they struggled through the difficult year of rental vacancies in 2003 ` "³⁰].

Looking For A Windfall

It appears that the Petitioner may be seeking what amounts to an extraordinary windfall [for a newly created property] of the 2002 assessment of \$470,000 [although Petitioner graciously appears willing to accept the 2003 reduced assessment of \$720,000³¹ which is logically inconsistent with its January 7, 2002 completion date argument] when the 2003 initial assessment [reduced because of Petitioner's hardship

request to \$720,000] and the 2004 assessment of \$1,345,000 were at or near market. The purpose of this tax certiorari proceeding is not to help subsidize the Petitioner's construction of luxury housing in a community much in need of such development projects.

Disputed Issues Of Fact Necessitate A Trial

A trial is necessary to resolve, among other things, the following factual disputes. When was the subject property completed and, hence, was the 2002 assessment a partial assessment or a full assessment of newly created property? What were the circumstances under which the 2003 initial assessment was reduced. What was the significance of the January 21, 2003 McWalters letter and what discussions and negotiations transpired between Petitioner and Respondents seeking a reduction based upon vacancy rates and, further, why didn't Petitioner challenge its 2003 reduced assessment and did this constitute an estoppel of the instant challenge to the 2004 assessment? Were the 2003 and 2004 assessments based upon vacancy rates and how were they calculated? What was the true value of the subject project in 2003 and 2004?

The Burden Of Proof

The evidence presented by the Respondents [and, conversely, the Petitioner's lack of credible evidence and Petitioner's failure to carry

its " heavy (evidentiary) burden " in challenging the 2004 assessment of the subject property [Krugman v. Board of Assessors of the Village of Atlantic Beach, 141 A.D. 2d 175, 182, 533 N.Y.S. 2d 495 (2d Dept. 1988); Nash v. Assessor of the Town of Southampton, 168 A.D. 2d 102, 108, 571 N.Y.S. 2d 951 (2d Dept. 1991)(" it cannot be said, on the present record, that the Town acted in bad faith...or that the plaintiffs were ` singled out for selective enforcement of tax laws that apply equally to all similarly situated taxpayers ` "); Waccabuc Construction Corp. v. Assessor of the Town of Lewisboro, 166 A.D. 2d 523, 525, 560 N.Y.S. 2d 805 (2d Dept. 1990)(failure to meet " heavy burden " of demonstrating that Lewisboro's 1983 assessment roll was improper or illegal ")] demonstrates that the Respondents' actions in using a combination of relevant factors, " applied evenhandedly to all similarly situated property " ³², to reassess the subject property in 2004 were fair, reasonable and non-discriminatory.

Conclusion

The Petitioner's motion to reargue is granted and upon reargument this Court adheres to it's earlier decision denying the Petitioner's motion for summary judgment.

This constitutes the Decision and Order of this Court.

Dated: February 21, 2006
White Plains, N.Y. 10601

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw, 8 Misc. 3d 1013(A)(Rockland Sup. 2005).

2. This Court has previously examined the concept of selective reassessment in Bock v. Assessor of the Town/Village of Scarsdale, 2006 WL 328503 (West. Sup. 2006)(no selective reassessment found); Markim v. Assessor of the Town of Orangetown, 9 Misc. 3d 1115(A)(selective reassessment found) and 6 Misc. 3d 1042(A)(Rockland Sup. 2005), Villamena v. The City of Mount Vernon, 7 Misc. 3d 1020(A)(West. Sup. 2005)(no selective reassessment found), and Dale Joan Young v. The Town of Bedford, 9 Misc. 3d 1107(A) (West. Sup. 2005)(no selective reassessment found). See also Dickerson, Real Property Selective Reassessment: Annual Method Best?, New York Law Journal, January 5, 2006, p. 7; Siegel, Reassessment on Sale, New York Law Journal, August 2, 2005, p. 16.

3. MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw, 8 Misc. 3d 1013(A)(Rockland Sup. 2005).

4. Stern v. Assessor of the City of Rye, 268 A.D. 2d 482, 483, 702 N.Y.S. 2d 100 (2d Dept. 2000)

5. Affirmation of Joseph F. Albert dated June 7, 2005 [" Albert Reply Aff. "] at para. 4; Affirmation of Joseph F. Albert dated September 12, 2005 [" Albert Reargue Aff. I "] at pp. 3-7.

6. Affidavit of David G. Adams sworn to May 17, 2005 [" Adams Aff. "] at para. 3; Affirmation of William M. Stein dated May 13, 2005 [" Stein Aff. "] at para. 6; Affidavit of David G. Adams sworn to November 1, 2005 [" Adams Reargue Aff. "] at para. 5.

7. Stern v. Assessor of the City of Rye, 268 A.D. 2d 482, 483, 702 N.Y.S. 2d 482 (2d Dept. 2000).

8. Stern v. Assessor of the City of Rye, 268 A.D. 2d 482, 483, 702 N.Y.S. 2d 482 (2d Dept. 2000).

9. Affidavit of Christine McWalters sworn to March 21, 2005 [" McWalters Aff. "] at para. 3.

10. MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw, 8 Misc. 3d 1013(A)(Rockland Sup. 2005).

11. McWalters Aff. at para. 4.
12. Adams Aff. at para. 3.
13. MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw, 8 Misc. 3d 1013(A)(Rockland Sup. 2005).
14. Albert Reply Aff. at para. 4; Albert Reargue Aff. I at pp. 3-7.
15. Affirmation of Joseph F. Albert dated November 23, 2005 [" Albert Reargue Aff. II "] at para. 2.
16. Adams Aff. at para. 4.
17. Adams Aff. at Ex. A.
18. Adams Aff. at para. 5 and Ex. B.
19. Adams Aff. at para. 7.
20. Adams Aff. at para. 6.
21. MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw, 8 Misc. 3d 1013(A)(Rockland Sup. 2005).
22. Ex. C to Adams Aff.
23. Adams Aff. at paras. 8-11; Affidavit of David C. Adams sworn to November 1, 2005 [" Adams Reargue Aff. "] at paras. 5-7.
24. Adams Reargue Aff. at para. 6.
25. Adams Reargue Aff. at para. 3.
26. Albert Reargue Aff. I at pp. 7-10; Albert Reargue Aff. II at paras. 3-11.
27. Adams Aff. at para. 12.
28. Adams Reargue Aff. at para. 4.
29. Albert Reargue Aff. I at pp. 11-14; Albert Reargue Aff. II at paras. 3-4, 7-10.
30. Albert Reargue Aff. I at p. 13.

31. Affirmation of Joseph F. Albert dated April 5, 2005
[" Albert Aff. I "] at para. 5.

32. Allegheny Pittsburgh Coal Co. v. County Commission of Webster
County, 488 U.S. 336, 345, 109 S. Ct. 633 (1989)