

2009 SURVEY OF NEW YORK STATE TAX CERTIORARI, EMINENT DOMAIN AND
REAL PROPERTY TAX EXEMPTION CASES

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Much transpired in 2009 in the fields of tax certiorari, eminent domain and real property tax exemptions.

The Court Of Appeals

Recently, the Court of Appeals addressed all of these areas starting with *Garth v. Board of Assessment Review for the Town of Richmond*¹, a tax certiorari case in which the Court concluded "that personal jurisdiction is not lacking in an RPTL article 7 proceeding where the petitioner omits the return date from the

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notice of petition". The court noted that setting a proper return date depends, in part, upon a given Judge's rules and that it's decision only applied in situations "where petitioner is unable to designate a return date" and "we have no occasion to address the rules applicable to other types of special proceedings". In *Goldstein v. New York State Urban Development Corp.*², an eminent domain case involving the condemnation of private property to make way for the construction of the massive Atlantic Yards project featuring a sports arena for the New Jersey Nets, a majority of the Court affirmed noting that "The land use improvement plan at issue 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". In *Matter of Aspen Creak Estates, Ltd. v. Town of Brookhaven*³, the Court affirmed a decision⁴ upholding the condemnation of a 39-acre parcel within the Town's Manorville Farmland Protection Area in order to prevent its development as a residential subdivision which served the public purpose of preserving the largest and most contiguous belt of productive agricultural land and the historic rural character of that portion of the Town. Although the claimant contended that *Kelo v. City of New London*⁵ required a preexisting farmland preservation

plan to justify the taking, the Court held that the public benefits of the taking were not incidental or pretextual in comparison with benefits to favored private entities. In *Hargett v. Town of Ticonderoga*⁶, an eminent domain case in which the condemnee earlier established that the condemnor "exceeded his authority in seeking to condemn certain real property"⁷, the Court held "We...conclude that reimbursement for attorney's fees and other costs incurred by a condemnee may be sought pursuant to EDPL 702(B) after it is determined...that the condemnor lacked authority to pursue the proposed acquisition". And in *Matter of Lackawanna Community Development Corp. v. Krakowski*⁸, a real property tax exemption case, petitioner, a non-profit New York State Community Development Corporation, filed a petition challenging the revocation of an exemption for a parcel which had been leased to a for-profit corporation. The Court found that the municipality had met its burden in justifying the revocation since it established that the sole activity occurring on the parcel was the for-profit activities of the lessee and that such activities were not reasonably incident to the petitioner's non-profit and charitable purposes.

Kelo Anyone?

In addition to the Court of Appeals affirming the Second

Department in *Goldstein and Aspen* and the Second Department's further reliance upon *Kelo* in *Matter of 49 WB, LLC v. Village of Haverstraw*⁹, the First Department recently discussed *Kelo* as well. In *In re Parminder Kaur v. New York State Urban Development Corp.*¹⁰, a majority rejected "the acquisition by condemnation... of approximately 17 acres in the Manhattanville area of West Harlem for the development of a new campus for Columbia University...It is recognized that *Kelo*...did not concern an area characterized as 'blighted'. However, the blight designation in the instant case is mere sophistry. It was utilized by (defendant) years after the scheme was hatched to justify the employment of eminent domain but this project has always primarily concerned a massive capital project for Columbia ...The time has come to...reject eminent domain takings solely based on underutilization. This concept...transforms the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal".

Timely Tax Assessment Challenges

It is well accepted that tax assessment challenges should

be made promptly so that municipal governments may operate more efficiently [see e.g., *Press v. County of Monroe*¹¹]. In two cases, *Cloverleaf Realty of New York, Inc. v. Town of Wawayanda*¹² and *Level 3 Communications, LLC v. DeBellis*¹³, the Courts dealt with untimely claims. In *Cloverleaf*, the Second Circuit Court of Appeals essentially revived a tax assessment challenge to "a special assessment roll to fund improvements to the water and sewer district that included the (subject) parcels"¹⁴ which had been dismissed in New York State Supreme Court as untimely applying a four-month statute of limitations [CPLR 217]. In *Cloverleaf* the Court of Appeals held in a subsequent federal action pursuant to 42 U.S.C. § 1983 "that dismissal of a claim solely for lack of timeliness in a New York state court does not preclude the same claim from being brought in another jurisdiction with a longer statute of limitations, including a federal court exercising its federal question jurisdiction". And in *Level 3* the corporate taxpayer installed, with the City of Mount Vernon's permission, conduits and fiber optic cables for the transmission of " signals for the benefit of customers...with facilities located elsewhere ". Level 3 obtained a determination from the State Board of Real Property Services that its fiber optic cables were " special franchise property " and should be assessed for the four years in dispute at relatively modest sums ranging from \$11,805 to \$20,348. The City of Mount Vernon

Assessor did not agree and assessed the fiber optic cables as " ordinary real property with a value of \$425,000 for each of the subject tax years ". The Court held that the State Board had exclusive jurisdiction and that RPTL article 5 " articulates a procedure for the correction of certain types of (assessment errors) and a three year statute of limitations applied instead of the much shorter limitation periods provided for in RPTL Article 7 (30 days) or CPLR Article 78 (4 months).

Valuation At Market

How should newly improved property [i.e., newly constructed residential homes] be valued¹⁵. At market using comparable sales methodology or the actual costs [i.e., equalized value] of improving the property? In *Carroll v. Assessor of City of Rye*¹⁶ the petitioner commenced construction of a residence on waterfront acreage that had been improved only by the existence of a storage shed located near the site of the new construction. When completed in 2005 the newly constructed property was assessed at its market value. The petitioner argued that the property should only be assessed based on actual construction costs incurred which, of course, was far below market value. On appeal, the Court affirmed, finding that, while the cost of construction is a significant indicator of value, at least in the

years soon after construction, evidence of comparable sales, relied upon by the assessor in arriving at the assessed value, is generally the preferred measure of a property's value for assessment purposes. However, in *David Weiner et al. v. Board of Assessors, Town of Harrison*¹⁷ petitioners' motion for partial summary judgement, based upon selective reassessment¹⁸, was granted, the Court determining that where the original, 3,600 square foot house was demolished and removed except for the foundation and portions of two of the original walls, both of which walls were utilized and expanded in the construction of a new, 7,800 square foot home, the work done did not constitute new construction, but rather an improvement to an existing structure. Based on the absence of proof of the existence of a comprehensive, municipality-wide reassessment plan¹⁹, the Court ordered a new assessment, in which the equalized value of the improvements is to be added to the prior assessment to arrive at the proper valuation for the tax years at issue.

Selective Reassessment

Taxpayer challenges to the selective reassessment of real property have been the subject of much litigation, particularly, in the Second Department²⁰. Selective reassessment takes many forms and has also been referred to as " reassessment upon

sale "21 and " improper assessment "22. Generally, selective reassessment involves discrimination and a violation of equal protection23. In *Barnett v. Assessor of the Town of Carmel*24 the taxpayer challenged the reassessment of his residential property from \$150,000 to \$240,000 without any improvements having been made during the subject period. The Court, relying upon, *inter alia*, *Bock v. Town/Village of Scarsdale*25, found selective reassessment in that " the Town has failed to come forward with any facts to (explain) the reason for the increase in the assessment...and whether or not the Town is following an equitable, comprehensive, written plan directed to the revaluation of all of the properties in the Town ".

Trade Fixtures: Inconsistent Use

In *Matter of West Bushwick Urban Renewal Area*26 the Court rejected a claim for compensation for the taking of trade fixtures consisting, primarily, of "fencing, gating, paving, curb cuts and a sidewalk for a parking lot" noting that "it is undisputed that the improvements on claimant's property must be removed for the highest and best use of the properties to be realized. Thus, the improvements are inconsistent with the properties' highest and best use as mixed commercial and residential properties...the claimants are not entitled to

recover compensation for the trade fixtures".

Real Property Tax Exemptions

In *Congregation Rabbinical College Of Tartikov, v. Town of Ramapo*²⁷, a non-profit religious corporation, sought the renewal of a religious exemption (pursuant to RPTL §420-a) for property on which a religious summer camp was operated for the benefit of petitioner, by an unaffiliated, for-profit contractor. The Court held that while a for-profit concession may be operated for the benefit of a non-profit property owner, such operation must be incidental to the owner's non-profit use of the premises. Since the only use of the premises was the for-profit day camp, the exemption was denied.

In *Southwinds Retirement Home v. The City of Middletown, et al*²⁸, petitioner challenged revocations of previously enjoyed charitable tax exemptions to two properties, the "warehouse parcel" and the "retirement home" parcel, which were located directly across the street from each other. In the former, SUNY Empire State College leased a portion of the premises, and petitioner used the remainder to "warehouse" items for its own use. In the latter, portions of the retirement home premises were leased variously as an adult day care center, a dining hall occasionally used for lunch and dinner purposes by other non-

profit organizations, and a beauty parlor, 80% of whose clientele were residents of Southwinds. The court granted the exemptions, finding that all leases with the exception of the beauty parlor were to other non-profit institutions (eligible themselves for exemption pursuant to RPTL 420-a [2]), and that the small beauty parlor, though a for-profit business, provided services (to the retirement home's residents) that were reasonably incidental to the owner's charitable purposes pursued on the premises.

And in *St. Francis Hospital v. Kathleen Taber, Assessor, Town of Poughkeepsie, et al*²⁹, the Court granted petitioner's motion for summary judgment seeking a partial tax exemption (32% of the subject parcel) pursuant to RTPL §420-a, finding that the leasing by the hospital of medical office accommodations at a medical office complex, to its own staff physicians, who were subject to its control and supervision, was reasonably incidental to the non-profit hospital's primary activities occurring on the premises.

ENDNOTES

1. *Garth v. Board of Assessment Review for the Town of Richmond*, 13 N.Y. 3d 176, 2009 WL 3294962 (2009)

2. *Goldstein v. New York State Urban Development Corp.*, ___N.Y. 3d___, 2009 WL 4030939 (2009).

3. *Matter of Aspen Creak Estates, Ltd. v. Town of Brookhaven*, 12 N.Y. 3d 735, 876 N.Y.S. 2d 680 (2009).

4. *Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven*, 47 A.D. 3d 267 (2d Dept. 2007).
5. *Kelo v. City of New London*, 545 U.S. 469 (2005).
6. *Hargett v. Town of Ticonderoga*, 13 N.Y. 3d 325, 918 N.E. 2d 933, 890 N.Y.S. 2d 421 (2009).
7. *Hargett v. Town of Ticonderoga*, 35 A.D. 3d 1122 (3d Dept. 2006), lv. denied 8 N.Y. 3d 810 (2007).
8. *Matter of Lackawanna Community Development Corp. v. Krakowski*, 12 N.Y. 3d 578, 2009 WL 1616500 (2009).
9. *Matter of 49 WB, LLC v. Village of Haverstraw*, 44 A.D. 3d 226 (2d Dept. 2007)(the court annulled a condemnation project concluding that the true reason for the Village's proposed condemnation of private property was to assist the developer of a geographically distinct, already-approved, and apparently desirable waterfront project in meeting its required obligations to provide affordable, private scattered-site housing and to reduce its costs in doing so)
10. *In re Parminder Kaur v. New York State Urban Development Corp.*, 2009 WL 4348472 (1st Dept. 2009).
11. *Press v. County of Monroe*, 50 N.Y. 2d 695, 704, 431 N.Y.S. 2d 394 (1980)(four month statute of limitations in assessment disputes enforced).
12. *Cloverleaf Realty of New York, Inc. v. Town of Wawayanda*, 572 F. 3d 92 (2d Cir. 2009).
13. *Level 3 Communications, LLC v. DeBellis*, 2010 WL 189573 (2d Dept. 2010).
14. *Id.* at 572 F. 3d 4.
15. See e.g., *Young v. Town of Bedford*, 37 A.D. 3d 729 (2d Dept. 2007), aff'g 9 Misc. 3d 1107, 2005 N.Y. Slip. Op. 51444 (West. Sup. 2005).
16. *Carroll v. Assessor of City of Rye*, 60 A.D.3d 943, 875 N.Y.S. 2d 558 (2nd Dept 2009), aff'g *Carroll v. Assessor of City of Rye*, 24 Misc. 3d 1208, 2007 WL 6687667 (N.Y. Sup. 2007).

17. *David Weiner et al. v. Board of Assessors, Town of Harrison*, 22 Misc.3d 257 (West. Sup. 2008).
15. See e.g., *Young v. Town of Bedford*, 37 A.D. 3d 729 (2d Dept. 2007), aff'g 9 Misc. 3d 1107, 2005 N.Y. Slip. Op. 51444 (West. Sup. 2005); *Carroll v. Assessor of City of Rye*, 24 Misc. 3d 1208, 2007 WL 6687667 (N.Y. Sup. 2007).
19. See e.g., *Bock v. Town/Village of Scarsdale*, 11 Misc. 3d 1052, 2006 N.Y. Slip Op. 50178 (West. Sup. 2006).
20. See Dickerson, *Real Property Selective Reassessment: Annual Method Best?*, *New York Law Journal*, Jan. 5, 2006, p. 4.
21. Siegel, *Reassessment on Sale*, *New York Law Journal*, August 2, 2005, p. 16.
22. *Schwaner v. Town of Canangdaigua*, 17 A.D. 2d 1068, 1069, 794 N.Y.S. 2d 233 (4th Dept. 2005).
23. See e.g., *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 344, 109 S. Ct. 633 (1989); *Corvetti v. Town of Lake Pleasant*, 227 A.D. 2d 821, 823, 642 N.Y.S. 2d 420 (3d Dept. 1996); *Matter of Fred Chasalow v. Board of Assessors*, 202 A.D. 2d 499, 609 N.Y.S. 2d 27 (2d Dept. 1994).
24. *Barnett v. Assessor of the Town of Carmel*, 2009 WL 5412779 (West. Sup. 2009, J. LaCava).
25. *Bock v. Town/Village of Scarsdale*, 11 Misc. 3d 1052(A), 414 N.Y.S. 2d 889 (West. Sup. 2006)
26. *Matter of West Bushwick Urban Renewal Area*, 888 N.Y.S. 2d 525, 2009 WL 3381544 (2d. Dept. 2009).
27. *Congregation Rabbinical College Of Tartikov, v. Town of Ramapo*, 23 Misc. 3d 1117 (Rockland Sup. 2009).
28. *Southwinds Retirement Home v. The City of Middletown, et al*, 2009 NY Slip Op 51180 (Orange Sup. 2009).
29. *St. Francis Hospital v. Kathleen Taber, Assessor, Town of Poughkeepsie, et al*, Index No: 5886/2008, (Supreme Court, Dutchess County, LaCava, J., June 25, 2009).