

New York Law Journal

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Tax Certiorari, Eminent Domain, Real Property Impunity: 2007-08

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12-23-2008

Much has transpired in the fields of tax certiorari, eminent domain and real property tax exemptions in 2007-08.

Recently, the Court of Appeals addressed all of these areas starting with *Consolidated Edison Co. of New York v. City of New York*,¹ a tax certiorari case involving the valuation of the Arthur Kill electric generating station with both sides agreeing to use the prederegulation² "speciality" valuation methodology of Reproduction Cost New, Less Depreciation [RCNLD].

In *Consolidated*, the Court held that it was appropriate, under the circumstances of this case only, to allow usage of functional obsolescence due to excess construction costs in the RCNLD method of valuation [allowing its use "may . . . further the purpose of valuation proceedings to arrive at a fair and realistic appraisal of the value of the property"]. In *Pall Corp. v. Board of Assessors of the County of Nassau*³ and *Steel Los III/Goya Foods Inc. v. Board of Assessors of the County of Nassau*,⁴ two taxpayers who had entered into PILOT [payments in lieu of taxes] agreements commenced tax certiorari proceedings obtaining substantial refunds from Nassau County the net effect being that two school districts faced substantial deficits. The Court held in both cases that the "no charge-back" provision of the Nassau County Administrative Code applied to the PILOT payments and the County must absorb the cost of any tax refund without burdening the school districts with a shortfall in their respective budgets.

In an eminent domain matter, *McCurdy v. State of New York*,⁵ the Court of Appeals sought to establish "the proper measure of damages when a condemnor takes a temporary easement that encumbers a vacant parcel's entire highway frontage." Finding that the claimant failed to demonstrate "that (he) was, in fact, planning to sell or develop his

property [e.g., failure to apply for 'highway work permit to construct an entrance connecting the parcel to the Montauk Highway']" the Court remitted for further proceedings.

And in three cases, *Adult Home at Erie Station v. Assessor of City of Newburgh*,⁶ *Regional Economic Community Action Program Inc. v. Bernaski*⁷ and *United Church Residences of Freedomia v. Newell*,⁸ the Court of Appeals reviewed applications for real property tax exemptions pursuant to RPTL 420-a. In granting an RPTL 420-a real property tax exemption the Court found in *Adult Home* that the "property is used to provide housing to poor people at below market rates. This is plainly a 'charitable' purpose" and found in *Regional* that although the facility received market rents it was "engaged in social work, helping people, alcoholics, drug addicts and other afflicted members of society to become productive and useful citizens. This is undoubtedly a charitable activity." And in *United* the Court held that it was error to determine "that petitioner's receipt of HUD subsidies, raising the rent received for their low-income housing units for the elderly to the equivalent of market rates, removed them from RPTL 420-a tax exemption."

Post- 'Kelo' Decisions

In two decisions the Second Department considered the impact of *Kelo v. City of New London* on local condemnation projects. In *Matter of 49 WB, LLC v. Village of Haverstraw*⁹ 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. And in *Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven*¹⁰ the court upheld 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 within the town and the historic rural character of that portion of the town. The *Aspen* court also held that the condemnation was not a subterfuge to improperly confer benefits upon private persons.

Striking Appraisals

There are four basic methodologies used to value real property, i.e., income capitalization, comparable sales, RCNLD and recent sales price in an arm's-length transaction. Some cases, however, may not get to a valuation analysis because the appraisal is stricken as in *Johnson v. Kelly*¹¹ since "petitioners' appraisal, rather than addressing the total acreage, only appraised the unimproved land portion of the property while ignoring the value of the improved acre and the improvements," or as in *Niagara Mohawk Power Corp. v. Town of Moreau Assessor*,¹² one party's appraisal is stricken and the other party's appraisal is disregarded because its "use of straight-line depreciation (is) unreliable" or partially stricken as in *Central Hudson Gas & Electric Corp. v. Assessor of the Town of Newburgh*.¹³

Income Approach

In *VGR Associates LLC v. Assessor of the Town of New Windsor*,¹⁴ a tax certiorari proceeding involving the value of an anchor store in a shopping center, the court accepted the income approach, rejected the respondents' "half-box theory" and the petitioner's "fictionalizing" of taxes, examined factors such as the selection of economic rents,¹⁵ stepped-up rentals, tenant improvements, vacancy and collection losses and double counting management fees and chose a non-institutional capitalization rate. In affirming the Appellate Division noted that

Improvements made by the tenant are outside the rental payments . . . (and) do not contribute to the income the property is able to produce.¹⁶

In *Mill River Club v. Board of Assessors*¹⁷ the Court addressed the valuation of a not-for-profit country club golf course using the capitalization of income method ["Because most golf courses are run by specialized companies under operating leases, the net income a course's owner is likely to derive corresponds to the rent a tenant-operator will be willing to pay, and that rent, in turn, depends on the revenue the golf course is likely to produce"] and upheld, inter alia, the treatment of estimated market rent as triple net lease rather than gross lease thus declining "to add a tax factor to the capitalization rate".¹⁸

In *Prospect Owners Corp. v. Tax Commission of the City of New York*,¹⁹ a tax certiorari proceeding involving the value of 403 residential unit cooperative apartment complex, the court accepted the income approach ["Although the sales comparison approach was also used by respondents 'as a check or test of reasonableness to confirm the income approach'"] noting that a cooperative building's "market value should be calculated as no more than if it were a rental building as required by law."²⁰ rejected petitioner's view that "the assessed values should have been reduced by the estimated cost of replacing windows . . . and pipes" finding "that any future expenditure for windows and water pipes would be offset by future MCI rent increases").²¹

Sales Comparison Approach

The use of comparable properties recently sold as a measure of value, subject to appropriate adjustments²² is frequently used either as a primary valuation methodology or as a check to the income capitalization method.²³

Recent Arm's-Length Sale

In *Park Place Realty LLC v. Assessor of the Village of Bronxville*.²⁴ a tax certiorari proceeding, the court valued a one-story commercial building (relying) upon a recent sale price of \$1,325,000 as best evidence of value ["Among the recognized valuation methods 'the best evidence of value, of course, is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy'"] finding the sale to be an arm's-length transaction.²⁵

In *Eckerd Corp. v. Assessor of the City of Watervliet*²⁶ the court noted that the subject

national chain pharmacy store "was sold in an arm's-length transaction for approximately \$4 million (in 2001 and resold in 2003) in another arm's-length transaction for \$4.85 million" and approved the Supreme Court's reliance "upon these recent sales as best evidence of value."

And in *CCM Associates of Clifton Park, LLC v. Board of Assessment Review*²⁷ the court in valuing a shopping center noted, inter alia, that petitioner's 2006 arm's-length transaction in purchasing the shopping may well be "the best evidence of value."

Dividing Line

• **Between Newly Created Property and Improvements.** The courts in the Second Department have permitted, in the absence of a "comprehensive revaluation of all real property in town,"²⁸ assessors to assess newly created property at market (see *Joan Dale Young v. The Town of Bedford*²⁹) ("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 even-handedly to all similarly situated property']"³⁰ the current market value "of the newly created property and of comparable properties in the Town of Bedford to reach a tax assessment"); *Markim v. Assessor of the Town of Orangetown*³¹ ("Newly created property such as the subject 11 properties may be initially assessed at or near market value"); *MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw*³² ("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 Since the subject property is newly created property it may be assessed, upon its completion, at or close to market").³³

Two Walls and a Foundation

However, what if a new house [7,800 square feet] is built on top of the foundation of a recently demolished 3,600-square-foot house and the new house is constructed using two walls of the demolished house? Is this newly created property or an improvement on an existing structure to be valued only based upon the cost of improvements (see *Stern v. Assessor of the City of Rye*³⁴) ("However, rather than adding the value of the improvements to the prior assessment . . . the properties were reassessed to a comparable market value that included the value of the improvements . . . those properties with recent improvements bore a discriminatory tax burden not imposed on similarly situated properties that had also appreciated, but which had no recent improvements"). That question was answered by the court in *Weiner v. Board of Assessors of the Town of Harrison*.³⁵ In *Weiner*, the court rationalized the decisions in *Bock v. Scarsdale*³⁶ ("this Court has also found that the gutting and renovation of a home, even where the work performed exceeded the price it was purchased for, was nevertheless an improvement of the pre-existing premises and not new construction") involving a gut/renovation with the decisions in *Young*, supra, and *Carroll v. City of Rye*,³⁷ which dealt with newly created property and held that "Here, petitioner has demonstrated, as a matter of law, that the work done to the home consisted of an improvement to an existing structure, albeit one that gutted and substantially doubled the square footage of the residence, and not new

construction."

Remediation

• **And Condemnation Blight.** In *Atkin v. Board of Assessors of Town of Greece*,³⁸ the owner of contaminated property once used to manufacture oceangoing ships and cranes during World War II and B-52 aircraft parts in the 1950s challenged the assessments thereon. The court found that the total environmental remediation clean-up costs exceeded the value of the subject parcel thus "fixing the assessments at Zero Dollars . . . for each of the subject years."

In *DeLaus v. State of New York*,³⁹ an eminent domain proceeding, the court valued a parcel upon which a Howard Johnson's restaurant was originally built. Citing *City of Buffalo v. Clement Co.*,⁴⁰ the court reduced the value because of condemnation blight ["the subject value was diminished by the cloud of condemnation from Oct. 1, 1998 (the date when a newspaper article . . . was published) to the date of de jure taking . . . May 25, 2000 (in) the sum of \$558,300"].

In *Village of Spring Valley v. N.B.W. Enterprises Ltd.*,⁴¹ the court noted that although the subject property "suffered from deteriorating conditions . . . claimant failed to demonstrate any acts . . . undertaken by the Village which diminished the value of the property."

Tax Exemptions

The courts granted tax exemptions to an HMO [*Health Insurance Plan of Greater New York v. Board of Assessors of Town of Babylon*⁴² (RPTL 486-a; "property owned by a not-for-profit corporation operating as an HMO, subject to the provisions of Public Health Law article 44 . . . was used exclusively for that purpose")], synagogue and residence [*Sephardic Congregation of South Monsey v. Town of Ramapo*⁴³ (RPTL 420-a; "notwithstanding that more than one-half of the premises is used by (the) rabbi . . . and his family for personal use, given the comprehensive nature of (the rabbi's) duties for the congregation, nearly all of which occur on the premises, the residential use of the subject property is necessary and reasonably incidental")], pre-school Jewish day school and afternoon Hebrew school [*Ohr Menachem of Great Neck v. Board of Assessors*⁴⁴ (RPTL 420-a; "rejection of the application did not have a rational basis and . . . (was) arbitrary")], a parsonage [*Faith Mission Christian Fellowship Church Inc. v. Assessor of the Town of Clarkstown*⁴⁵ (RPTL 462; residence of officiating clergyman)], a proposed Westchester University [*Legion of Christ v. Town of Mount Pleasant*⁴⁶ (RPTL 420-a(1),(3); Legion of Christ proposes to build Westchester University)] and a cultural center [*Otrada Inc. v. Assessor, Town of Ramapo*⁴⁷ (RPTL 420-a; "purposes include the preservation of the language and cultural tradition of Americans of Russian origin . . . that the plaintiff derived rental income from residents is insufficient to defeat its tax-exempt status")].

And the courts denied tax exemptions to a Buddhist community [*World Buddhist Ch'An Jing Center Inc. v. Schoeberl*⁴⁸ (RPTL 420-a; "petitioner acquired a 102-acre parcel of land . . . which contains buildings and housing for its leader and approximately 25 monks, nuns and

disciples"]], a building containing a warehouse, office and light manufacturing space leased to a for-profit corporation [*Matter of Lackawanna Community Development Corporation v. Assessor of the City of Lackawanna*⁴⁹ (RPTL 420-a)], an apartment building [*TAP Inc. v. Dimitriadis*⁵⁰ (RPTL 420-a; "The provision of housing to low-income persons may constitute a charitable activity . . . testimony that the rents charged for its apartments are capped, at least some apartments are rented at reduced rates and the rental income is less than could otherwise be realized and is insufficient to meet its expenses")] and for a rabbi's residence [*Congregation Or Yosef v. Town of Ramapo*⁵¹ (RPTL 420-a; "The plaintiff renovated the property's upper level as a residence . . . for its rabbi . . . his wife and their 10 children and applied to the town for a building permit to renovate the property's basement into a Mikvah (ritual bath) and playroom. The permit application did not mention that the property was to be used in whole or in part as a synagogue or a religious school . . . the plaintiff's use of the premises in violation of the town zoning law prohibited it from receiving a property tax exemption")].

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Endnotes:

1. *Consolidated Edison Co. of New York v. City of New York*, 33 AD3d 915, 823 NYS2d 451 (2d Dept. 2006), aff'd 8 NY3d 591, 869 N.E. 2d 634, 838 NYS2d 458 (2007).
2. For discussions of the valuation of electric generating plants in a post-deregulation environment see *Astoria Gas Turbine Power LLC v. Tax Commission of the City of New York*, 7 NY3d 451, 857 NE2d 510, 824 NYS2d 189 (2006).
3. *Pall Corp. v. Board of Assessors*, 41 AD3d 722 (2d Dept. 2007), aff'd 10 NY3d 445, 2008 WL 1817274 (2008).
4. *Steel Los III/Goya Foods Inc. v. Board of Assessors*, 35 AD3d 482 (2d Dept. 2006), aff'd 10 NY3d 445, 2008 WL 1817274 (2008).
5. *McCurdy v. State of New York*, 37 AD3d 779 (2d Dept. 2007), mod'd 10 NY3d 234, 885 NE2d 185 (2008).
6. *Adult Home at Erie Station Inc. v. Assessor of City of Newburgh*, 36 AD3d 699, 828 NYS2d 459 (2d Dept. 2007), aff'd 10 NY3d 205, 886 N.E. 2d 137, 856 NYS2d 515 (2008).
7. *Regional Economic Community Action Program Inc. v. Bernaski*, 40 AD3d 1000 (2d Dept. 2007), rev'd 10 NY3d 205, 886 NE2d 137, 856 NYS2d 515(2008).
8. *United Church Residences of Freedonia v. Newell*, 43 AD3d 1403 (4th Dept. 2007), rev'd NY3d, 2008 WL 2519809 (2008).

9. *Matter of 49 WB, LLC v. Village of Haverstraw*, 44 AD3d 226 (2d Dept. 2007).
10. *Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven*, 47 AD3d 267 (2d Dept. 2007).
11. *Johnson v. Kelly*, 45 AD3d 687 (2d Dept. 2007).
12. *Niagara Mohawk Power Corp. v. Town of Moreau Assessor*, 46 AD3d 1147 (3d Dept. 2007).
13. *Central Hudson Gas & Electric Corp. v. Assessor of the Town of Newburgh*, Index No: 4903/01, Decision March 2, 2007 (West. Sup. J. LaCava).
14. *VGR Associates LLC v. Assessor of the Town of New Windsor*, 13 Misc3d 1218 (Orange Sup. 2006).
15. See *Senpike Mall Company v. Town of New Hartford*, 136 AD2d 19, 23, 525 NYS2d 104 (4th Dept. 1988).
16. *VGR Associates LLC v. Assessor of the Town of New Windsor*, AD3d, 857 NYS2d 666 (2d Dept. 2008).
17. *Mill River Club v. Board of Assessors*, AD3d, 2007 WL 4463990 (2d Dept. 2007).
18. See e.g., *Matter of Senpike Mall Co. v. Assessor of Town of New Hartford*, 136 AD3d 19, 525 NYS2d 104 (4th Dept. 1988).
19. *Prospect Owners Corp. v. Tax Commission of the City of New York*, 12 Misc. 3d 1177 (N.Y. Sup. 2006), *aff'd* 41 AD3d 221 (1st Dept. 2007).
20. See e.g., *In re River House-Bronxville v. Gallaway*, 100 AD2d 970 (2d Dept. 1984).
21. The income approach was also used in *Mutual of America Life Ins. Co. v. Tax Commission*, NYLJ, Dec. 19, 2007, p. 29, col. 1 (N.Y. Sup.).
22. See e.g., *Village of Irvington v. Sokolik*, 13 Misc3d 1220 (West. Sup. 2006) (adjustments regarding vacant land included steep slopes, Hudson River view, frontage, access, local use ordinances, need to obtain variances, utilities, size, zoning).
23. The courts have used the comparable sales approach in *Village of Spring Valley v. N.B.W. Enterprises Ltd.*, 19 Misc3d 1108 (West. Sup. 2007).
24. *Park Place Realty LLC v. Assessor of the Village of Bronxville*, 13 Misc3d 1233 (West. Sup. 2006), *aff'd* 50 AD3d 689 (2d Dept. 2008).

25. See e.g., *Mirant New York Inc. v. Town of Stony Point Assessor*, 13 Misc3d 1204 (Rockland Sup. 2006).
26. *Eckerd Corp. v. Assessor of the City of Watervliet*, 44 AD3d 1239 (3d Dept. 2007).
27. *CCM Associates of Clifton Park, LLC v. Board of Assessment Review*, 49 AD3d 941 (3d Dept. 2008).
28. *Wilson v. Dziedzic*, 13 Misc3d 242(A).
29. *Joan Dale Young v. The Town of Bedford*, 9 Misc3d 1107(A), *aff'd* 37 AD3d 729 (2d Dept. 2007).
30. *Stern v. Assessor of the City of Rye*, 268 AD2d 482, 483, 702 NYS2d 482 (2d Dept. 2000).
31. *Markim v. Assessor of the Town of Orangetown*, 11 Misc3d 1063(A).
32. *MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw*, Misc3d, 2006 WL 398305.
33. Not all courts agree with this approach. See *James Montgomery v. Board of Assessment Review of the Town of Union*, 30 AD3d 747 (3d Dept. 2006).
34. *Stern v. Assessor of the City of Rye*, 268 AD2d 482, 483-484 (2d Dept. 2000).
35. *Weiner v. Board of Assessors of the Town of Harrison*, Index No: 17864/06, June 18, 2008, J. LaCava, West. Sup. 2008, NYLJ, Oct. 16, 2008, p. 21, col. 3.
36. *Bock v. Scarsdale*, 11 Misc3d 1052A (West. Sup. 2006).
37. *Carroll v. City of Rye*, Index No: 16738/03, March 28, 2007, J. LaCava, West. Sup. 2007.
38. *Atkin v. Board of Assessors of Town of Greece*, 19 Misc3d 1125 (Monroe Sup. 2007), *aff'd* 50 AD3d 1496 (4th Dept. 2008).
39. *DeLaus v. State of New York*, 19 Misc3d 1133 (Ct. Cl. 2008).
40. *City of Buffalo v. Clement Co.*, 34 AD2d 24 (4th Dept. 1970), *mod'd* 28 NY2d 241 (1971).
41. *Village of Spring Valley v. N.B.W. Enterprises Ltd.*, 19 Misc3d 1108 (West. Sup. 2007) (mixed commercial/office property).
42. *Health Insurance Plan of Greater New York v. Board of Assessors of Town of Babylon*,

44 AD3d 1044 (2d Dept. 2007).

43. Sephardic Congregation of South Monsey v. Town of Ramapo, 47 AD3d 915 (2d Dept. 2008).

44. Ohr Menachem of Great Neck v. Board of Assessors, 48 AD3d 688 (2d Dept. 2008).

45. Faith Mission Christian Fellowship Church Inc. v. Assessor of the Town of Clarkstown, Index No. 4774/04, Decision Sept. 25, 2007 (West. Sup. J. LaCava).

46. Legion of Christ v. Town of Mount Pleasant, Index No. 16649/04, Decision July 10, 2007 (West. Sup. J. LaCava).

47. Otrada Inc. v. Assessor, Town of Ramapo, 41 AD3d 678 (2d Dept. 2007).

48. World Buddhist Ch'An Jing Center Inc. v. Schoeberl, 45 AD3d 947 (3d Dept. 2007).

49. Matter of Lackawanna Community Development Corp. v. Assessor of the City of Lackawanna, 50 AD3d 1469 (4th Dept. 2008).

50. TAP Inc. v. Dimitriadis, 49 AD3d 947 (3d Dept. 2008).

51. Congregation Or Yosef v. Town of Ramapo, 48 AD3d 731 (2d Dept. 2008).