SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of ALFRED AND SONDRA MARKIN, GEORGE AND ANN BERGERMAN, FRED LOWELL, ROBERT AND MARILYN TIMBERGER, AUDREY MORAN, JOAN AND ROOSEVELT DAY, STEWART KAISER, RICHARD AND LINDA ESPOSITO, CAROL AND HORACE GIBBS, RALPH AND CHERYL BERK, AND MARCIA SIEGEL,

Petitioners,

-against-

THE ASSESSOR OF THE TOWN OF ORANGETOWN,

Respondent.

For a Judgement under Article 78 of the Civil Practice Law and Rules

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DECISION & ORDER
Index No:7422-04

DICKERSON, J.

WELCOME STRANGER

The Petitioners, either singly or as married couples, own one of eleven separate town-house style houses in the Paradise Landing Home Owner's Association [" Paradise "], located in the Town of Orangetown, Rockland County, New York. The builder completed all of the subject properties by late 1996 or early 1997. The subject properties initially

sold in 1996-98, and several have sold again [e.g., the Berks, the Espositos and Marcia Siegel are not original owners of the property]. The sale prices of the town houses were in the range of $300,000 to $700,000 with some of the Petitioners making post purchase improvements in the range of $5,000 to $20,000.[1] The 1997/1998 assessments imposed by the Town of Orangetown Assessor, Brian Kenney, [" the Assessor "] were in the range of $257,900 to $335,000 and the 1999 assessments were and the current 2004 assessments are in the range of $346,600 to $420,900.[2]

The Article 78 Petition: Selective Reassessment

The Petitioners filed a Notice of Petition pursuant to C.P.L.R. Article 78 challenging " the 1999 assessment increases-and subsequently fixed upon the 2004 Town of Orangetown Assessment Roll...(as among other things violative of) the petitioners' equal protection rights "[3] . The Petitioners allege that the Assessor " fixed assessments upon each Petitioner's single family dwelling... in May 1999 that was higher than each such assessment initially fixed in either 1997 or 1998 ...by between $20,000 to $107,000 despite there having been few improvements [range $5,000 to $20,000]...and since the Town of Orangetown did not carry out a general revaluation of all properties...in any years between 1997 and 2004...each Petitioner's tax burden as determined by their 2004 assessment will be higher than it should be and will be a discriminatory tax burden not imposed on

similarly situated properties "[4]. It is further alleged that " by subjecting Petitioners... to the policy...of selectively reassessing recently built homes... based primarily on the Assessor's belief that the market values of said homes had increased[5], while not reassessing all other properties in the Town or all other properties similar to the subject properties in the town, the Assessor has acted arbitrarily and capriciously, and violated petitioners' equal protection rights."[6]

The Motion to Dismiss: The Proper Remedy

In response the Assessor seeks to dismiss the Petition pursuant to C.P.L.R. § 7804 (f) on the grounds that Petitioners' proper remedy, if any, is under R.P.T.L. Article 7 and not C.P.L.R. Article 78 [See e.g., Kaufman 42nd Street Co. v. Board of Assessors of Atlantic Beach, 273 A.D. 2d 239, 240, 709 N.Y.S. 2d 445 (2d Dept. 2000)(" ' Ordinarily, challenges to assessments on the grounds that they are illegal, irregular, excessive or unequal are to be made in a certiorari proceeding under RPTL article 7 ' "); Rubin v. Board of Assessors of Town of Shandaken, 175 A.D. 2d 494, 495, 572 N.Y.S. 2d 950 (3d Dept. 1991)(" Respondents maintain that petitioners incorrectly pursued their challenge to their tax assessment by way of a CPLR article 78 proceeding. We agree. "); Krugman v. Board of Assessors of the Village of Atlantic Beach, 141 A.D. 2d 175, 179-180, 533 N.Y.S. 2d 495 (2d Dept. 1988)(" Generally, a taxpayer who challenges his property

assessment is relegated to a tax certiorari proceeding brought under the provisions of RPTL article 7 for review of his assessment ").

Specifically, the Assessor claims that Petitioners allege, in general terms only, that their equal protection constitutional rights were violated, e.g., Petitioners allege that the assessments were " illegal and discriminatory because a higher tax burden is placed upon the owners of such real property than upon all other owners of the property in the Town of Orangetown."[7] The Assessor contends that RPTL " Article 7 covers assessments that are ' unlawful ' and the aforesaid alleged unlawfulness in this case does not give rise to a constitutional 'illegality'...."[8]. Petitioners are also accused of failing to timely file individual grievances under R.P.T.L. Article 7 and using a C.P.L.R Article 78 proceeding " as a vehicle to contest assessment for the years 1999, 2000, 2001, 2002 and 2003 when said assessments have been unchallenged "[9]. And lastly, the Assessor claims " that the assessments fixed upon each of the Petitioners' single family dwellings in 1999 was higher than such assessment fixed upon said dwellings in 1997 and 1998 because the 1999 assessments was the first year that reflected a final and complete assessment "[10].

The Proper Remedy: R.P.T.L. Article 7 or Collateral Attack?

What is the proper remedy available to Petitioners? Must Petitioners proceed by way of R.P.T.L. Article 7 or may they

collaterally attack the Assessor's methods by way of a C.P.L.R. Article 78 proceeding? [See e.g., In the Matter of M. Kaufman 42nd Street Co. v Board of Assessors of Atlantic Beach, 273 A.D. 2d 239, 240, 709 N.Y.S. 2d 445 (2nd Dept. 2000) quoting from Matter of Board of Mgrs. of Greens of N. Hills Condominium v. Board of Assessors of the County of Nassau, 202 A.D. 2d 417, 419, 608 N.Y.S. 2d 694 (2nd Dept. 1994)("'Ordinarily, challenges to assessments on the grounds that they are illegal, irregular, excessive or unequal are to be made in a certiorari proceeding under RPTL Article 7... However, where the challenge is based upon the method employed in the assessment of several properties rather than the overvaluation or undervaluation of specific properties, a taxpayer may forgo the statutory certiorari procedure and mount a collateral attack on the taxing authority's action through either a declaratory judgement action or a proceeding pursuant to CPLR Article 78... In reviewing a taxpayer's claim to determine whether this exception to the statutory procedure based upon the taxing authority's methodology has been demonstrated, mere allegations, unsupported by evidentiary matter, that the attack is on the methods employed rather than individual evaluations, are not enough to relieve plaintiffs of the obligation to pursue their relief via the provisions of Article 7 of the Real Property Tax Law '"); Matter of Charles Krugman v. Board of Assessors of the Village of Atlantic Beach, 141 A.D. 2d 175, 180, 533 N.Y.S. 2d 495 (2nd Dept 1988)(" However, certain exceptions to the exclusive jurisdiction of RPTL article 7 exist. It is well recognized

that where the jurisdiction of the taxing authority is challenged or the tax itself is claimed to be unconstitutional, one is not required to pursue a remedy under RPTL article 7...the taxpayer may properly forego the statutory certiorari procedure and mount a collateral attack on the taxing authority's action if the challenge is to the method employed in the assessment involving several properties rather than the overvaluation or undervaluation of specific properties ")]. It is clear that C.P.L.R. Article 78 is available to the Petitioners if they can offer sufficient proof to demonstrate that their challenge to the assessment of the subject real properties in Paradise is based upon the Assessor's reassessment methodology.

The Selective Reassessment Of Real Property

Petitioners contend that the Assessor's determination to increase their assessments was based upon a policy of " selective reassessment " "since such determinations put petitioners in a class of recent buyers of property or a minority class of selected property owners who alone were subject to property assessment increases..."[11].

The policy of selective reassessment has been found by New York Courts to be a violation of the equal protection clause of both the United States Constitution and the New York State Constitution [See e.g., Matter of Charles Krugman v. Board of Assessors of the Village of Atlantic Beach, 141 A.D. 2d 175, 184, 533 N.Y.S. 2d 495 (2nd Dept 1988)

(" The respondents' practice of selective reassessment of only those properties in the village which were sold during the prior year contravenes statutory and constitutional mandates. In order to achieve uniformity and ensure that each property owner is paying an equitable share of the total tax burden the assessors, at a minimum, were required to review all property on the tax rolls in order to assess the properties at a uniform percentage of their market value. The respondents' disparate treatment of new property owners on the one hand and long term property owners on the other has the effect of permitting property owners who have been longstanding recipients of public amenities to bear the least amount of their cost. We can conceive of no legitimate governmental purpose to be served by perpetuating this differential treatment nor do the respondents suggest any such rational basis in their opposing papers. It would appear that the sole purpose of the different classes is to serve administrative convenience by relieving the village of the burden of conducting a total review of the tax roll and instead permitting a piecemeal approach to reassessments. This approach lacks any rational basis in law and results in invidious discrimination between owners of similarly situated property. Thus, the respondents' method of reassessment violates the equal protection clause of both the United States Constitution (U.S. Const. 14th amend.) and the New York State Constitution (N.Y. Const., art. I, § 11)"); Feigert v. Assessor of the Town of Bedford, 204 A.D. 2d 543, 544, 614 N.Y.S. 2d 200 (2d Dept. 1994)(" The petitioners herein have offered substantial

proof that the 1991 assessment of their property is based directly upon the resale of the property in 1983...Accordingly, the Supreme Court properly determined that the 1991 assessment of the petitioners' property was invalid "); 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. (There was no town-wide reassessment of all similarly situated properties.). This valuation technique is unconstitutional because it is a selective reassessment which denies equal protection guarantees ")].

Petitioners Have Not Claimed Unequal Or Excessive Assessments

In Matter of Aluminum Co. v. Massena, 238 A.D. 2d 858, 656 N.Y.S. 2d 555 (3rd Dept 1997) the court found that the Petitioner should have pursued its remedy by way of R.P.T.L. Article 7 stating that its real objective was to reduce its assessment based on market value considerations [" This is evidenced by petitioner's comments throughout the record that the figure contained in the March 1996 notice was higher than the true value of its Massena properties. That type of challenge

is reserved for an RPTL Article 7 proceeding "]. In contrast, Petitioners herein contend that they have not alleged that their assessments are unequal, excessive, or unlawful. They further state that none of the Petitioners has made any claim for assessment reduction based upon their property's " true value ".

Petitioners Have Carried Their Burden

Petitioners allege that the Assessor's policy regarding the Petitioners' assessments and the 1997, 1998 and 1999 assessment rolls could be described as a policy of " selective reassessment ", since reassessment of properties based upon the rising market values of such properties without the town carrying out a town-wide reassessment of all properties is in violation of New York State law and in violation of equal protection provisions of the Constitution of the United States and of New York State. Petitioners contend that the Assessor did not carry out an even-handed, comprehensive general revaluation of properties in the Town of Orangetown or of all properties similar to the subject properties in the Town of Orangetown in assessment years 1997, 1998, or 1999. They state that as a result of increases to each Petitioner's property's 1999 assessment, the amounts of each Petitioner's 1999 assessment and 2004 assessment is discriminatory[12]. " The increase to each of the subject properties' 1999 assessment was imposed as a result of a policy in 1999 pursuant to which the assessments of numerous houses

in the subjects' neighborhood were increased in 1999 over the 1997 or 1998 levels despite the fact that the 1997 or 1998 assessments had been fixed after the underlying houses had been completed or nearly completed."

The Decision

The only issue presently before the Court is whether Petitioners offered sufficient proof to demonstrate that their challenge to the assessment of the subject properties was based upon an allegation that the Assessor's method of reassessing property values was erroneous and, thus, " the activity challenged should properly be reviewed by way of a collateral proceeding "[13].

It is the decision of this Court that Petitioners' Article 78 Petition has set forth sufficient evidence to bring this matter within the narrow exception to the rule that challenges to tax assessments must be brought pursuant to R.P.T.L. Article 7. As a consequence the Respondent's motion to dismiss is denied and the Respondent will be permitted to file an Answer pursuant to C.P.L.R. § 7804(f).

This constitutes the decision and order of this Court.

Dated: March 28, 2005
White Plains, N.Y.

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HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

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ENDNOTES

1. See Affidavits of Fred Lowell sworn to October 26, 2004, Robert Timberger sworn to October 28, 2004, Audrey Moran sworn to October 28, 2004, Joan Day sworn to October 28, 2004, Stewart Kaiser sworn to October 25, 2004 [" the Kaiser Aff "], Richard Esposito sworn to October 28, 2004, Horace Gibbs sworn to October 28, 2004, Ralph Berk sworn to October 28, 2004, Marcia Siegel sworn to October 28, 2004, Alfred Markum sworn to October 26, 2004 and Ann Costello Bergerman sworn to October 28, 2004.

2. See Schedule B to the Verified Petition dated October 25, 2004 [" Petition "]. See also Exhibits A [the Residential Property Cards] and B [1999 Notices of Change of Assessment].

3. Notice of Petition dated October 29, 2004.

4. Petition at para. 1.

5. The factual basis for this assertion consists of (1) the claim that the Assessor did not indicate on each Petitioners' property card the basis for the 1999 assessment increase (2) statements in the Kaiser Aff [" When I asked the Assessor why he had increased my 1999 assessment, he told me the reason was that the assessment of the new homes in Piermont Landing...were being increased due to higher market values "] and (3), within the " Photo-Notes " Section of Berks' property card in Exhibit A to the Petition is a hand written statement " as of 3/1/99 new AV reflects mkt per BK file ".

6. Petition at para. 127.

7. Petition at para. 122.

8. Affidavit of Richard I. Goldsand sworn to January 26, 2005 at para. 2 [" Goldsand Aff. "].

9. Goldsand Aff. at para. 3.

10. Affidavit of Brian Kenney sworn to December 29, 2004 [" the Kenney Aff. "].

11. Petitioner's Memorandum of Law dated October 24, 2004 at p. 6.

12. Petition at paras. 117-120.

13. Matter of Charles Krugman v. Board of Assessors of the Village of Atlantic Beach, 141 A.D. 2d 175, 180, 533 N.Y.S. 2d 495 (2nd Dept 1988).