FILED AND ENTERED ON DATE

ROCKLAND COUNTY CLERK

NEW YORK STATE SUPREME COURT
ROCKLAND COUNTY

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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.

CRYSTAL HILL - SELECTIVE REASSESSMENT NO. 3

We have addressed the subject of selective reassessment on two prior occasions[1]. In this latest variation on a theme[2] the Petitioner, MGD Holdings Hav, LLC [" MGD "], owns an apartment complex located at 1101-9408 Crystal Hill Drive, Town of Haverstraw, Rockland County. Stated, simply, MGD claims " that the subject property's 2004 assessment of $1,343,000 resulted from an unjustified assessment increase in 2004

over the 2003 assessment fixed upon the subject property of $720,000 “[3] which “ unjustified “ assessment is characterized as “‘ selective ‘” in nature and “ improper as a denial of equal protection guarantees “[4].

The Summary Judgment Motion

MGD moves herein for summary judgment against the Assessor of the Town of Haverstraw [“ the Assessor “], the Board of Assessment Review of the Town of Haverstraw [“ BAR “] and the Town of Haverstraw [“ the Respondents “] pursuant to C.P.L.R. § 3212 seeking a finding “ that the 2004 assessment resulted from an improper and illegal increase in 2004 by the Respondents, resulting in the Petitioner being required to pay a disproportionate amount of property tax “. Petitioner demands that “ all property taxes paid as determined by the 2004 assessment in excess of the correct assessment be refunded by all taxing jurisdictions “[5].

Factual Background

MGD owns an apartment complex consisting of nine buildings containing “ 168 rentable apartments “, a clubhouse and a caretaker’s residence, all located at 1101-9408 Crystal Hill Drive, Town of Haverstraw [“ the subject property “], the construction of which began in 1999.

When Was The Project Completed?

There is some dispute as to when construction of MGD's apartment complex was actually completed. According to MGD the subject property " was mostly complete by January 2002 "[6] " there ha[ving] been virtually no new work on that project for over a year "[7] as of May 2003. However, the Respondents assert that the 2002 tax assessment " had been increased to the sum of 470,000 from 364,900, based upon the fact that the Premises had been further completed, but not yet fully constructed "[8] and that " After the property was fully assessed (upon completion of construction), (MGD) came to the Town in 2003, asking for relief "[9]. In response MGD claims that the Certificates of Occupancy[10] and the Assessor's property card[11] show " that construction was complete by early 2002 "[12].

The 2001 Assessment

The subject property was initially assessed in 2001 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 Occupancy[13].

The 2002 Assessment

In 2002 the assessment on the subject property was raised from $364,900 to $470,000 to which MGD did not object[14]. According to Respondents the increase in assessment was " based upon the fact that the Premises had been further completed, but not yet fully constructed "[15].

The 2003 Assessment

In 2003 the Assessor " 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]

Surprise! 2003 Assessment Reduction Requested

MGD was " surprised that the assessment went up so dramatically, especially considering there had been virtually no new work on that project for over a year "[21]. MGD sent a letter to the Assessor[22] seeking

a reduction in assessment based upon a " 10.3% vacancy rate for 2002. Economic vacancy was 17.7% factoring in concessions totaling $204,576 for the year " and MGD also filed a complaint with the BAR[23] which found that the " Applicant provided info which indicated that income & expenses warranted a lower valuation ". The BAR reduced the tentative assessment of $1,345,000 to $720,900.

Rationale For 2003 Assessment Reduction

The Respondent's rationale for the 2003 reduction was that " since the Premises was a brand new rental project, it had a very high vacancy rate and (the BAR) felt that it was unfair to apply the 5% rate...The BAR...opted to use the 17% vacancy rate requested by (MGD) ".[24] MGD's recollection of events is somewhat different. MGD claims that the Assessor agreed " to roll back the assessment to a level that would produce about $2,000 (tax) per unit. He also told me that the town was considering carrying out a general revaluation within the next few years, and that when the revaluation took place he would revisit the assessment of the MGD property, along with all other properties in the town. He advised me that until the time of such revaluation, the MGD property would not be increased "[25].

The 2004 Assessment

In 2004 the Assessor " increased the assessment from 720,900 back to the amount (he) originally found would be a fair and accurate assessment for the Premises in 2003, to wit, 1,345,000. In deciding to increase the assessment, it was with the understanding that there had been a major turnaround at the project and as of that date, the units had been nearly, fully rented...the project had become stabilized... after they struggled through the difficult year of rental vacancies in 2003...This was not a case of selective reassessment "[26].

Surprised Again!

MGD was " at a loss " upon being informed of the 2004 assessment increase to $1,345,000 claiming " There was no justification for this increase since there had been no substantial additional work done to the property after the C/O was issued in January 2002 on the last building completed. Our occupancy in the spring of 2004 was actually lower than it had been in the spring of 2003. Further, the 2004 increase was contrary to the assessor's indication the year before that the assessment would remain unchanged until there was a general revaluation "[27].

A Red Herring And More

MGD describes Respondents' rationale for the 2003 and 2004 assessments as a " red herring "[28], contrary to an " understanding "[29] that the Assessor would not reassess in 2004 unless there was a town wide revaluation, " implausible " [" conflict with the record and defies logic "[30]] since the BAR's nearly 50% reduction in the 2003 assessment does not correspond to using " a 17% vacancy rate rather than a 5% rate "[31], " inconsistent "[32], " muddier " [no evidence of a major turnaround in 2004[33]] and " begs the question "[34].

DISCUSSION

What Is Selective Reassessment?

This case raises once again the important issue of selective reassessment. 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. But what exactly is selective reassessment? Generally, selective reassessment involves discrimination and a violation of equal protection [See e.g., Corvetti v. Town of Lake Pleasant, 227 A.D. 2d 821, 823, 642 N.Y.S. 2d 420 (3d Dept. 1996)(" We reach the same conclusion with regard to plaintiffs' 42 USC § 1983 equal protection claim since their allegation

that ‘ it was the official policy of [defendants] to assess property pursuant to a ‘ welcome neighbor ‘ policy of arbitrarily increasing the assessments of new residents of the town...”); Matter of Fred Chasalow v. Board of Assessors, 202 A.D. 2d 499, 609 N.Y.S. 2d 27 (2d Dept. 1994)(“ It is well settled that in the area of real property taxation, rough equality, not complete uniformity, is all that is required...It has also been held that ‘ gross disparities ‘ in the taxation of similarly situated taxpayers can constitute a violation of the constitutional right to equal protection of the laws...if a classification between taxpayers is palpably arbitrary or involved an invidious discrimination, an equal protection violation will be found “); Nash v. Assessor of Town of Southampton, 168 A.D. 2d 102, 109, 571 N.Y.S. 2d 951 (2d Dept. 1991)(“ a tax classification will only violate constitutional equal protection guarantees ‘ if the distinction between the classes is ‘ palpably arbitrary ‘ or amounts to ‘ invidious discrimination ‘ “)].

Reassessments When Properties Sold

Specifically, there are cases which hold that reassessing individual properties at market rate when they are sold is selective reassessment [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 (2d 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)"); Matter of Stern v. City of Rye, 268 A.D. 2d 482, 483, 702 N.Y.S. 2d 100 (2d Dept. 2000)(" 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 Feldman v. Assessor of Town of Bedford, 236 A.D. 2d 399, 653 N.Y.S. 2d 28 (2d Dept. 1997)(“ The petitioner also claims that the challenged assessment was part of a systematic endeavor by the respondents to reassess only those properties in the town that were sold “); Matter of DeLeonardis v. City of Mount Vernon, 226 A.D. 2d 530, 532, 641 N.Y.S. 2d 83 (2d Dept. 1996)(“ Despite the respondents’ claim that the Assessor did not rely on the purchase price in determining the assessed value, the Assessor did not submit an affidavit in response to the petitioner’s allegation that the Assessor had in fact testified that he did so “); 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 “); Matter of Reszin Adams v. Welch, 272 A.D. 2d 642, 707 N.Y.S. 2d 691 (3d Dept. 2000)(“ The Commissioner...acknowledged that his assessment was merely based on a visual inspection of the exterior of the buildings at issue and a review of the average sales price of homes in the particular neighborhood...respondent’s ‘ selective reassessment ‘ was not rationally based and therefore was improper “); Matter of Averbach v. Board of Assessors, 176 A.D. 2d 1151, 575 N.Y.S. 2d 964 (3d Dept. 1991)(“ CPLR article 78 (proceeding charged that) assessments therein

were made pursuant to an illegal ‘ welcome stranger ‘ assessment procedure, wherein recently sold property was reassessed at a percentage of its sale price (generally 80%) while similarly situated property was not “); Matter of Markin v. The Town of Orangetown, 6 Misc. 3d 1042(A) (West. Sup. 2005) at fn 5 (“ The factual basis for this assertion consists of...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 Peirmont Landing...were being increased due to higher market values...”)].

High Coefficients Of Dispersion

There are cases which hold that a high coefficient of dispersion may be a sign of selective reassessment [See e.g., Waccabuc Construction Corp. v. Assessor of Town of Lewisboro, 166 A.D. 2d 523, 524, 560 N.Y.S. 2d 805 (2d Dept. 1990)(“ A high coefficient of dispersion indicates a high degree of variance with respect to the assessment ratios under consideration. A low coefficient of dispersion indicates a low degree of variance. In other words, a low coefficient of dispersion indicates that the parcels under consideration are being assessed at close to an equal rate (see 9 NYCRR 185-4.4) “); Matter of Fred Chasalow v. Board of Assessors, 202 A.D. 2d 499, 500, 609 N.Y.S. 2d 27 (2d Dept. 1994)].

Reassessments Based Upon Condominium Conversion

There are cases which hold that an increase in assessment based solely on the conversion of a 150 residential apartment complex to a condominium is selective reassessment [See e.g., Matter of Towne House Village Condominium, v. Assessor of the Town of Islip, 200 A.D. 2d 749, 607 N.Y.S. 2d 87 (2d Dept. 1994)(" Such an increase in assessment is prohibited by statute...there was no rational basis in law for reassessing only the subject property ")].

Reassessments Based Upon More Than Value Of Improvements

There are cases which hold that reassessments should be limited to the value of improvements [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)(although the Assessor's reassessment of residential property may have exceeded the actual value of several improvements thus warranting a new inspection and reassessment, " such conduct does not support a finding of ' selective

reassessment ‘ “); 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 “)][35].

No Equal Protection Violations Found Or Remand For Trial

In some cases involving allegations of selective reassessment the courts have found no equal protection violations or have remanded for further proceedings. Such cases have involved a delay in the implementation of a comprehensive reassessment program [See e.g., Nash v. Assessor of Town of Southampton, 168 A.D. 2d 102, 109, 571 N.Y.S. 2d 951 (2d Dept. 1991)(“ Whether the delay in the implementation of a comprehensive reassessment of all of the parcels in a taxing jurisdiction can result in equal protection violation...it cannot be said, on the present record, that the Town acted in bad faith...”)], the reassessment of 150 waterfront parcels because of “ the rapid rate of appreciation of property “ [See e.g., Mundinger v. Assessor of the

City of Rye, 187 A.D. 2d 594, 590 N.Y.S. 2d 122 (2d Dept. 1992)(" The reassessment program...would be justified...if waterfront residential property appreciated at a higher rate than nonwaterfront residential property ")], the use of two different methods of assessing Class I property [See e.g., Matter of Fred Chasalow v. Board of Assessors, 176 A.D. 2d 800, 803, 575 N.Y.S. 2d 129 (2d Dept. 1991)(" Indeed, it is well settled that a system of assessment which is challenged on the ground of inequality may nevertheless survive judicial scrutiny if the assessing authority demonstrates that the classification which results in unequal treatment bears a rational relation to the achievement of a legitimate governmental objective ")], the reclassification of Class II property to Class I property [See e.g., Matter of Acorn Ponds v. Board of Assessors, 197 A.D. 2d 620, 621, 603 N.Y.S. 2d 491 (2d Dept. 1993) (" There is no proof in the record that the failure to reassess all Class I property when the petitioner's property was reassessed resulted in disparate tax treatment of a constitutional dimension ")] and the method of dividing " the Town into four neighborhoods for valuation purposes " [See e.g., Matter of Akerman v. Assessor of Town of Hardenburg, 211 A.D. 2d 916, 917, 621 N.Y.S. 2d 154 (3d Dept. 1995) (petitioners have not established that the formulas used by respondents were improper or inequitable or that the assessments violate constitutional requirements ")].

The Assessor Has Provided An Explanation

The Respondents have provided an explanation for the increase in assessment from $720,000 in 2003 to $1,343,000 in 2004. Whether it passes constitutional muster remains to be seen and, clearly, requires the development of a record at trial. Nonetheless, the Respondents have provided a facially reasonable explanation 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...Nevertheeless, the assessor should be prepared to offer proof of his assessment methodology in general so as to successfully withstand any...challenge ").

Motion For Summary Judgment Denied

The petitioner carries a heavy burden[36] in challenging the 2004 tax assessment and, hence, its motion for summary judgment is denied since there are several factual disputes which must be resolved at trial, including but not limited to, When was the project completed? What were the circumstances under which the 2003 assessment was reduced? Did the Assessor promise not to reassess after 2003 until a town wide revaluation took place? Were the reduced 2003 assessment and the 2004

assessment justified as being based upon vacancy rates and a " project (being) stabilized " [See e.g., Nash v. Assessor of Town of Southampton, 168 A.D. 2d 102, 109, 571 N.Y.S. 2d 951 (2d Dept. 1991)(" A primary question is the nature and extent of the purported inequities...it cannot be said, on the present record, that the Town acted in bad faith in this case or that the plaintiffs were ' singled out for selective enforcement of tax laws that apply equally to all similarly situated taxpayers...A record must be developed and factual findings made..."); Mundinger v. Assessor of the City of Rye, 187 A.D. 2d 594, 590 N.Y.S. 2d 122 (2d Dept. 1992)(" the conflicting affidavits contained in the record create an issue of fact ")].

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, N.Y.
July 13, 2005

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HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

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ENDNOTES

1. Matter of Villemena v. City of Mount Vernon, 7 Misc. 3d 1020(A)(West. Sup. 2005); Matter of Markin v. The Assessor of the Town of Orangetown, 6 Misc. 3d 1042(A)(West. Sup. 2005).

2. See e.g., Office of Real Property Services [" ORPS "] 10 Opinions of Counsel SBRPS 60 (" We have previously expressed our opinion that a so-called piecemeal (or selective) revaluation program, in which specific parcels, various portions of an assessing unit, or certain types or classes of real property are revalued in different years, without regard to the relative uniformity of assessments of the properties in question violates the statutory standard of uniformity in assessments (...RPTL § 305; 9 Op. Counsel SBEA No. 18). That opinion and another in Volume 9 (No. 87) are both based on...Krugman v. Board of Assessors, 141 A.D. 2d 175, 533 N.Y.S. 2d 495 (2d Dept. 1988) (wherein the Assessor) admittedly followed a practice of ' reassessing only those properties which had been the subject of transfer or conveyance '...The court decided that this practice (which is sometimes referred to as ' welcome strange ' or ' welcome neighbor ' assessing) ' violates the statutory and constitutional requirements of uniformity and equality ' in assessing...The court did note that...the challengers must bear a heavy burden to show that there is no rational basis for the government's action ").

3. Albert Aff. at para. 5.

4. Albert Aff. at para. 21.

5. Petitioner's Notice Of Motion dated April 5, 2005.

6. See Affidavit of Christine McWalters sworn to March 21, 2005 [" McWalters Aff. "] at para. 2; Albert Aff. at para. 7.

7. McWalters Aff. at para. 5.

8. Affidavit in Opposition of David G. Adams sworn to May 17, 2005 [" Adams Aff. "] at para. 3.

9. Affirmation in Opposition of William M. Stein dated May 13, 2005 [" Stein Aff. "] at para. 6.

10. See Reply Affirmation of Joseph F. Albert dated June 7, 2005 [" Albert Reply Aff. "] at para. 4(" The fact that virtually

all work had ceased by early 2002 is amply supported by the Certificates of Occupancy [CO] issued by the Town Building Department for the subject, all found at (Albert Aff. at Ex. B (the last completion date being " 1/7/02 ")").

11. Albert Reply Aff. at para. 4 (" The Assessor's property card also faithfully notes the date of issuance of each CO (Albert Aff. At Ex. C (the last completion date being " 1-7-02 ")").

12. Albert Reply Aff. at para. 4.

13. McWalters Aff. at para. 3.

14. McWalters Aff. at para. 4.

15. Adams Aff. at para. 3.

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. McWalters Aff. at para 5.

22. Adams Aff. at Ex. C.

23. Adams Aff. at Ex. D.

24. Adams Aff. at paras. 10-11.

25. McWalters Aff. at para. 6.

26. Adams Aff. at paras. 12-15.

27. McWalters Aff. at para. 8.

28. Albert Reply Aff. at para. 5 (" The only legitimate question is: did the Assessor have the right to increase the subject's 2004 assessment? The answer must be no, since all construction activity has ceased two years before ").

29. Albert Reply Aff. at para. 5.

30. Albert Reply Aff. at para. 7.

31. Albert Reply Aff. at para. 7.

32. Albert Reply Aff. at para. 8.

33. Albert Reply Aff. at para. 9 (" Ms. McWalters states that the occupancy in the spring of 2004 was lower than that of the spring of 2003 ").

34. Albert Reply Aff. at para. 11.

35. This seems to be the position of MGD. See Albert Reply Aff. at para. 10 (" Mr. Adams did not have the right to increase it in a subsequent year without there being additional improvements made to the property, with the sole exception being the case of a town-wide general revaluation ").

36. See e.g., Matter of Akerman v. Assessor of the Town of Hardenburgh, 211 A.D. 2d 916, 917, 621 N.Y.S. 2d 154 (3d Dept. 1995); Matter of Charles 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); Waccabuc Construction Corp. v. Assessor of Town of Lewisboro, 166 A.D. 2d 523, 560 N.Y.S. 2d 805 (2d Dept. 1990).