SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

NYACK PLAZA HOUSING ASSOC.
by Huff Wilkes, L.L.P., Agent,

Petitioner,

-against-

The Town of ORANGETOWN, its ASSESSOR,
and BOARD OF ASSESSMENT REVIEW

Respondents,

-and-

NYACK UNION FREE SCHOOL DISTRICT,

Intervenor.

For a Review Under Article 7 of the RPTL.

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DECISION & ORDER

Index No: 11425-02
10763-03
10520-04

DICKERSON, J.

THE NEED FOR CLASS ASSESSMENT RATIOS

An issue of considerable importance to Assessors throughout New York State and the taxing authorities they represent is the need for class assessment ratios, particularly, regarding commercial properties. This issue has been set forth in the comprehensive and

scholarly article, Proposed Amendments to Real Property Tax Law: An Argument for the Establishment of a Commercial Assessment Ratio[1], written by Town of Orangetown Assessor, Brian J. Kenney [" Assessor Kenney "], one of the Respondents herein. Assessor Kenney is of the opinion that utilization of a single assessment ratio applicable to all property in the Town of Orangetown and similar taxing authorities creates " artificially " high values for commercial properties resulting in an excessive number of tax certiorari proceedings brought pursuant to Article 7 of the Real Property Tax Law [" R.P.T.L. "]. Stated simply, Assessor Kenney would like his New York State Senator to propose legislation[2] and/or this Court to " rewrite " existing law so as to permit the assessment of properties in the Town of Orangetown utilizing " class ratios " that would separate commercial properties from residential properties for assessment purposes [in contrast to the utilization of a uniform percentage of values as provided by R.P.T.L. § 305(2)]. For the reasons set forth below the issues raised by Assessor Kenney are best resolved through legislation rather than litigation.

The Subject Property

The Petitioner, Nyack Plaza Housing Assoc. [" Nyack Plaza "] is the owner of a partially subsidized senior housing complex situated on two tax parcels located in the Village of Nyack and the Town of Orangetown. The subject property is comprised of an eight-building complex that contains a five-story senior center and seven three-story family housing units spread over approximately 5.85 acres. The subject property has a total of 169 units including 91 senior apartments and 12 handicapped accessible units. The Town of Orangetown [" the Respondents[3] "] designated one of the tax lots as number 66.38-1-58 upon which they placed a total assessment of $2,621,200 for the tax years 2002, 2003 and 2004. The other tax lot is designated as number 66.38-1-61 upon which Respondents placed a total assessment of $4,783,000 for the tax years 2002, 2003 and 2004.

The Notice To Admit Ratios

In this R.P.T.L. Article 7 proceeding the Petitioner served Respondents and the Intervenor with a Notice To Admit Ratio[4] for tax years 2002, 2003 and 2004 pursuant to Civil Practice Law and Rules [" C.P.L.R. "] § 3123(a). Pursuant to R.P.T.L. § 305(2), the Petitioner sought admission of the following uniform percentages of value: 63.54% for 2002, 57.50% for 2003 and 54.25% for 2004, based

upon and equal to the official and final established Equalization Rate[5] published by the New York State Office of Real Property Services [" ORPS "] for the Town of Orangetown, said Equalization Rates having been unchallenged by the Respondents[6].

Respondents Admit To " Higher " Ratios

In response to the Petitioner's Notice To Admit Ratios the Respondents denied each ratio and instead admitted to ratios 30 to 40 percent higher, i.e., 87.67% for 2002, 76.79% for 2003 and 76.20% for 2004[7]. According to the Petitioner such " higher " ratios contradicted those ratios appearing in Respondent Town of Orangetown's tax bills for years 2002, 2003 and 2004[8].

Petitioner's Motion In Limine

The Respondents have proposed to introduce at trial evidence of an assessment class ratio for commercial properties, which is currently not permitted under the law, as opposed to introducing a homestead tax class ratio for commercial properties pursuant to R.P.T.L. Article 19. The Petitioner contends that such a proposal would mean that " the introduction of a class assessment ratio would require special preparation of expert reports and testimony on a basis not heretofore permitted in a non-special assessing unit "[9].

Before preparing such " expert reports and testimony ", the Petitioner has chosen to make the instant Motion In Limine asking this Court to determine whether the Respondents may present evidence in support of its position that it may legally assess properties according to multiple assessment ratios, depending on property classifications, rather than utilizing a " uniform percentage of value " pursuant to R.P.T.L. § 305(2). The Petitioner requests that the Court limit the proof at trial by prohibiting the Respondents from introducing class assessment ratios which they claim should be applied to the Town of Orangetown.

The Respondents' Position

The Respondents opposition to the Petitioner's Motion In Limine involves an analysis and interpretation of R.P.T.L. §§ 305(2)[10], 1801(a)[11], 1802(1)[12], 1901(5)[13], 1903[14] and 1202[15]. It is Respondents' position that these provisions of the R.P.T.L. should be read so as to permit assessment by property class even in non-special assessing units, such as the Town of Orangetown.

The Respondents assert that in order to correctly identify the value of each class of property, R.P.T.L. § 1202(1)(c) directs the State Board to determine the class equalization rates for both Article 18 special assessing units and Article 19 approved assessing units. The Respondents assert that these class rates are used in the

calculation of proportion formulas to determine the overall " equalized value " of each class, and each class's share of the tax liability to be charged to its own class of properties. Therefore, class equalization rates are primarily issued in order to determine what the class assessment equates to in overall " equalized value " and is then used directly in determining tax liability [" class equalization rates should be used as a guideline in determining an overall ' equalized value ' for court purposes "[16]]. The Respondents analogize their view to both R.P.T.L. § 738 where the residential assessment ratio is to be used as a guideline in determining value in small claims assessment review and to R.P.T.L. § 720(3) where class equalization rates in special assessing units under Article 18 are to be used as a guideline in determining value.

The Respondents contend that " when ' overall ' or ' composite ' equalization rates are utilized for court purposes in order to determine proper assessment levels, this overall rate undermines the aim of (R.P.T.L.) Article 19 by assigning an artificial ' equalized ' and ' overall ' value that is not the basis for determining the actual tax liability of a given property "[17].

The Respondents argue that the State Equalization Rate is a calculation of property values completed or updated each year by ORPS that ultimately results in a composite or overall rate which is a combined calculation that does not correctly identify a proper ratio for separate property types in valuation proceedings [one

equalization formula for calculating assessment values for both commercial and residential property types is " inadequate and incorrect and defies the intention of (R.P.T.L.) Article 19 while being inconsistent with (R.P.T.L.) Article 12 "[18]].

The Respondents assert that since residential sales are valued based only upon market sales, and commercial properties are valued by calculating proper and appropriate income streams [See e.g., Reckson Operating Partnership v. Town of Greenburgh, 2 Misc. 3d 1005(A), 2004 WL 556580 (West. Sup. 2004) (" a buyer of income producing property purchases an income stream ")] as well as available sales. " [T]he use of an overall equalization rate that mixes residential sales, available commercial sales and appraisals of income producing commercial properties does not result in a proper and appropriate ratio for a single type or class of property, as in this case, commercial or non-homestead properties "[19].

It is the Respondents' view that the State Equalization Rate as stated in the Notice To Admit Ratio is neither the most accurate nor the most appropriate indication for valuing the commercial properties at issue [" the proper ratio for this and other non-homestead home properties is the non-homestead class equalization rate, a rate specifically calculated only for the commercial segment of the assessment role "[20]].

DISCUSSION

R.P.T.L. § 305(2) provides that " all real property in each assessing unit shall be assessed at a uniform percentage of value (fractional assessment)...". There is only one exception to this statute, which exception is for " special assessing units " as set forth in R.P.T.L. Article 18. R.P.T.L. § 1802 provides the classification system that Respondents seek to apply to themselves, and R.P.T.L. § 1801(a) expressly limits the application of R.P.T.L. § 1802 to " special assessing units ", which are defined as assessing units with a population of one million or more. With special assessing units there is a specific exception to R.P.T.L. § 305(2), permitting assessment of differing classes of properties at different ratios of assessment to market value. It is undisputed that the Town of Orangetown is not a special assessing unit and as such is not permitted to assess its various classes of properties at different ratios. Nonetheless the Respondents seek to read R.P.T.L. Article 18 as extending beyond its express scope of coverage to include the municipalities covered by R.P.T.L. Article 19. The Legislature made it clear that R.P.T.L. Article 19 is different and apart from the provisions that apply to " special assessing units " as covered by R.P.T.L. Article 18. Apparently, the Legislature did not see fit to provide towns the size of Orangetown with the option of assessing its various classes of properties at different ratios. Had the

Legislature intended otherwise, presumably it would have said so [See e.g., Alonzo v. New York City Dept. of Probation, 72 N.Y. 2d 662, 665-666, 536 N.Y.S. 2d 26 (1988)(" Where a statute describes the particular situation in which it is to apply and no qualifying exception is added, ' an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded ' ")].

A Single Uniform Percentage Of Value

The Town of Orangetown, as is true for every other non-special assessing unit in the State, is required to assess all properties within its boundaries, whether commercial, residential, vacant land or utility, at a single, " uniform " overall percentage of value.

The Proper Forum Is The State Legislature

The Respondents are asking this Court to rewrite the law instead of applying it. The proper forum for the repeal of an established constitutional statute is the State Legislature, and Assessor Kenney acknowledges this fact by his letter to State Senator Morahan[21] [See e.g., Tilles Investment C. v. Gulotta, 288 A.D. 2d 303, 304-305, 733 N.Y.S. 2d 438 (2d Dept. 2001)(where the wisdom of classes legislated in a special assessment unit was questioned, it was not

“...for the courts to judge ‘ the wisdom, fairness or logic of legislative choices ‘ [citations omitted]. Nor does it authorize ‘ the judiciary [to] sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made is areas that neither affect fundamental rights nor proceed along suspect lines “)].

Accordingly, the Petitioner’s Motion In Limine seeking to limit the proof at trial by excluding evidence of class assessment ratios is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 18, 2005
White Plains, N.Y.

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HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

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ENDNOTES

1. Kenney, Proposed Amendments to Real Property Tax Law: An Argument for the Establishment of a Commercial Assessment Ratio, IA. Journal, Vol. 46, No. 2, July 2004, p. 4. See also Letter of Brian Kenney to State Senator Thomas P. Morahan dated January 29, 2003 as Exhibit C to Affidavit of David C. Wilkes sworn to October 6, 2004 [" Wilkes Aff. I "]; the Amicus Curiae Memorandum of Law dated October 19, 2004 and submitted by Siegel Fenchel & Paddy, P.C.; Morris & Siegel, Proof of Inequality: A Shifting Sea of Sand, 59 New York State Bar Journal 26 (November 1987); Morris & Siegel, Proof of Inequality: the Stratified Random Survey, 59 New York State Bar Journal 39 (December 1987); Wilkes, Dealing With Valuation Perils in Amendments to the Property Tax Law, New York Law Journal, February 3, 1999, p. A1.

2. See Letter of Brian Kenney to State Senator Thomas P. Morahan dated January 29, 2003 [" the Morahan Ltr. "] as Exhibit C to Affidavit of David C. Wilkes sworn to October 6, 2004.

3. The Respondents also include Assessor Brian Kenney and the Board of Assessment Review for the Town of Orangetown. The Nyack Union Free School District has appeared as an Intervenor.

4. See e.g. Exhibit A to Wilkes Aff. I [" Please take notice that the...Respondents are hereby required...to admit that 54.25% is the ratio that the assessed valuation of the real property of the Town of Orangetown bears to its full value as of the 2004 assessment roll "].

5. See Wilkes Aff. I at Ex. B; Reply Affidavit of David C. Wilkes sworn to January 18, 2005 [" Wilkes Aff. II "] at Exs. F & G.

6. See Wilkes Aff. I at para. 7 [" Despite notice and an opportunity to challenge the validity of the foregoing ratios pursuant to (R.P.T.L. Article 12) respondent Town took no action to dispute the ratios in the 2002, 2003 or 2004 years at issue, and allowed each such rate to be finalized by ORPS "].

7. Affidavit of Brian Kenney sworn to December 7, 2004 [" Kenney Aff. I "] at pp. 5-6 ["...the state equalization rate as stated in the Notice to Admit Ratio is neither the most accurate nor appropriate indication for valuing the commercial properties at issue. The proper ratio for this and other non-homestead properties is the non-homestead class equalization rate, a rate specifically calculated only for the commercial segment of the assessment roll. The New York State Non-Homestead Class Equalization rates for 2002, 2003 and 2004 and as applied by the Town of Orangetown are 87.67%, 76.79% and 76.20%, respectively "] and at Ex. C.

8. See Wilkes Aff. I at Ex. E; Wilkes Aff. II at Ex. F.

9. Wilkes Aff. I at p. 5.

10. R.P.T.L. § 305(2), entitled Assessment methods and standards, states " All real property in each assessing unit shall be assessed at a uniform percentage of value (fractional assessment) except that, if the administrative code of a city with a population of one million or more permitted, prior to January first, nineteen hundred eighty-one, a classified assessment standard, such standard shall govern unless such city by local law shall elect to be governed by the provisions of this section ".

11. R.P.T.L. § 1801(a) defines a " special assessing unit " as " an assessing unit with a population of one million or more ".

12. R.P.T.L. § 1802(1), entitled Classification of real property in a special assessment unit, explains how all real property in a special assessing unit " shall be classified " dividing the classess into Class one, two, three and four.

13. R.P.T.L. § 1901(5) defines an approved assessing unit as " an assessing unit certified by the state board as having completed a revaluation which is in accordance with the board's rules and regulations or an update ".

14. R.P.T.L. § 1903 discusses homestead base population and non-homestead base population. Pursuant to this statute, an approved assessing unit may segregate real property into two classes. The first class is homestead properties, which are owner-occupied one, two or three family residences, and the second class is non-homestead properties, which encompass all others. This ' Homestead Provision ' as it is known, is a tax and assessment forumla that calculates ' base ' and ' adjusted base ' properties " with the aim of diminishing the effect of large assessment(s) amd therefore tax shifts as a result of a property revaluation. Each class of property, homestead and non-homestead, is calculated as to the tax liability each is responsible for before the revaluation took place, which is then used to preserve each class' tax share in the subsequent years ".

15. R.P.T.L. § 1202 deals with the establishment of state equalization rates, class ratios and class equalization rates. R.P.T.L. § 1202(1)(c) states that " In the case of special assessing units as defined in section eighteen hundred one of this chapter and approved assessing units and eligible non-assessing unit villages which have adopted the provisions of section nineteen hundred three of this chapter as defined in section nineteen hundred one of this chapter, the state board shall further ascertain, for the purposes of section eighteen hundred three-a and subdivision three of section nineteen hundred three of this chapter, the percentage of full value at which taxable real property in each class and each class in each portion has been assessed, which percentage as finally determined as provided in this article shall be the class equalization rate for such class or such class in such portion ".

16. Kenney Aff. I at p. 3.

17. Kenney Aff. I at p. 4.

18. Kenney Aff. I at p. 5.

19. Kenney Aff. I at p. 5.

20. Kenney Aff. I at p. 6.

21. See Morahan Ltr. (“ Conclusion & Suggested Amendments to RPTL ...additions to RPTL 738 could include...we should initiate a change in Real Property Tax Law 305, 1200 and 1202 to amend the method...RPTL 305(2) should be amended to read...However, perhaps the language should be strengthened...RPTL 1202(1a) can be amended to allow...Please consider these changes and suggested amendments to the (R.P.T.L.) “).