To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

RICHARD HANSEN and LEE ANN HANSEN,

DECISION/ORDER/ JUDGMENT

Petitioners,

For a Judicial Review under Article 7 of the Real Property Tax Law of Real Property Tax Assessments

Index No. 5230/08

- against -

TOWN OF RED HOOK, the Town Assessor, JEFF CHURCHILL, and the Board of Assessment Review, CARL F. DOWDEN, Chairperson,

Respondents.

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LaCAVA, J.

In this Real Property Tax Law (RPTL) Article 4 and 7 proceeding, challenging the denial by the Town of Red Hook (Town) of the partial real property tax exemption sought by petitioners Richard and Lee Ann Hansen (Hansen) for the Tax Assessment Year 2008, for the premises designated on the Town tax map as 134889-6372-00-962753, and known alternately as and located at Hapeman Road, Town of Red Hook, New York (the parcel or subject property), and previously challenging, *inter alia*, pursuant to CPLR Article 78, a local Conservation Easement Law and Conservation Easement Agreement, and conservation fees relating to development of the subject parcel, the following papers numbered 1 to 8 were considered in connection with respondent's motion to dismiss, and petitioner's cross-motion to dismiss respondent's motion:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVITS/EXHIBITS	1
MEMORANDUM OF LAW	2
CROSS MOTION/DECLARATION/AFFIRMATION/EXHIBITS	3

AFFIDAVIT IN OPPOSITION/EXHIBITS	4
PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION	5
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	6
LETTER FROM VICTOR M. MEYERS DATED AUGUST 20, 2010	7
LETTER/EXHIBITS FROM KENNETH MCCULLOCH, DATED 8/24/10	8

The subject property is an undeveloped 23 acre parcel owned by petitioners. Following enactment of a local Conservation Easement Law, petitioners voluntarily entered into a Conservation Easement Agreement, permitting dedication a portion of the subject parcel for conservation uses in return for a partial tax exemption of 75%. Subsequently, following an application from Hansen for the exemption, the town assessor denied the exemption, asserting the illegality of the Agreement and Law.

Petitioners then challenged the denial of the exemption, and the allegedly unlawful assessment, pursuant to RPTL Article 4 and 7, and joined that challenge with the CPLR Article 78 action. Respondents moved to dismiss the Article 7 claim, based on faulty service, and, in the alternative, for severance of that claim based on improper joinder; they also moved to dismiss the Article 78 claims. Petitioner opposed the dismissal of all claims, but did not oppose severance of the Article 7 Claim, and cross-moved for a declaratory judgment.

In a Decision/Judgment/Order dated March 27, 2009, the Court held:

> Based on the foregoing, it is hereby
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> **ORDERED**, that the motion by respondent, solely insofar as it relates to severance, is granted as unopposed; and it is further
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> **ORDERED**, that so much of the claims asserted by petitioner pursuant to CPLR Article 78, or which seek declaratory relief, are hereby severed from that aspect of the action which seeks RPTL Article 7 Relief, which latter claims shall remain before this Court as the Article 7 action, under the caption as below indicated; and, it is further
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> **********
>
> **ORDERED**, that the remainder of respondent's motion, and petitioner's cross-motion, are denied with leave to renew upon

severance and re-assignment of the Article 78 matter as heretofore set forth.

Subsequently, after severance and due filing of the severed Article 78 Action[1], and by leave of Court as set forth above, respondent again moved to dismiss the Article 7 claim, based on faulty service. In particular, respondent asserts in its moving papers that counsel for petitioner has filed with the Dutchess County Clerk an affidavit, dated August 11, 2008, in which he only asserts that he served the Town Clerk on August 8, 2008. Respondent further argues that counsel for petitioner also filed an affirmation, dated July 29, 2008, affirming (1) that he served the petition upon the Town of Red Hook on a different date (July 16, 2008) by serving the Town Clerk; and (2) that he served a "School Officer" as defined in Section 2 (13) of the New York State Education Law, namely "Diane" in the administrative offices of the Red Hook School District, on July 22, 2008. This latter affirmation is not date-stamped as received by the Dutchess County Clerk, and there is no evidence in the moving papers that it was ever received by said Clerk.

Counsel for petitioner asserts in response that he personally telephoned the School District offices on July 21, 2008, in order to locate the Office of the Superintendent to make personal delivery of the notice there, and that, once connected to the Superintendent's personal secretary, Karen Christiansen, he advised her of his wish to serve the Superintendent personally the following day at a particular time. Counsel was then told by Ms. Christiansen that the Superintendent was away on vacation, and that she (Ms. Christiansen) would also not be in the office at that time, but that counsel should deliver the notice to "Diane." Counsel further asserts that, the following day, he personally delivered as directed the notice to Diane, and asked that they be given to Karen for the Superintendent. On September 19, 2008, counsel again spoke to Karen Christiansen, and she conceded that she received the notice and gave it to the tax collector, in conformance with District practice; subsequently, counsel confirmed with the tax collector that she had the notice. Finally, he asserts that he was directed by Chambers for the Hon. Christine A. Sproat (who was then handling the prior Article 78 matter) that he should file the affidavit of service documenting the above procedure directly to Chambers, rather than with the Clerk of the Court.

[1] In a Decision and Order dated October 2, 2009, Supreme Court, Dutchess County (Brands, J.), dismissed the Article 78 Action.

The Respondent's Motion to Dismiss for Improper Service

R.P.T.L. §708(3) provides:

> ... one copy of the petition and notice shall be mailed within ten days from the date of service thereof as provided to the superintendent of schools of any school district within which any part of the real property on which the assessment to be reviewed is located and, in all instances, to the treasurer of any county in which any part of the real property is located, and to the clerk of a village which has enacted a local law as provided in subdivision three of section fourteen hundred two of this chapter if the assessment to be reviewed is on a parcel located within such village ... Proof of mailing one copy of the petition and notice to the superintendent of schools, the treasurer of the county and the clerk of the village which has enacted a local law as provided above shall be filed with the court within ten days of the mailing. Failure to comply with the provisions of this section shall result in the dismissal of the petition, unless excused for good cause shown.

Thus, RPTL §708(3) clearly requires timely notice of the action to affected school districts, by mailing one copy of the Notice of Petition and Petition to the Superintendent of the District or Districts encompassing the property; failure to so mail, absent good cause shown, results in dismissal of the petition. Notably, RPTL §708(3) is a **notice** statute, **not** a service statute, since by its terms those entities noticed do not become parties to the action simply by that notice. In *Landesman v Whitton*, 13 Misc. 3d 1216A (Supreme Court, Dutchess County, Dickerson, J., October 2, 2006), aff'd. 46 A.D.3d 827 (2nd Dept. 2007), the petitioner had mailed the petition to the Poughkeepsie School District, but not the Superintendent of the District directly. Respondents moved to dismiss, and petitioner sought to excuse the improper notice solely by asserting a lack of prejudice. This Court dismissed the petitions for failing to follow RPTL §708(3), and the Second Department affirmed, holding:

> The failure to mail the notice of petition and

> the petition to the Superintendent of Schools of the school district mandates dismissal of the proceedings, and the absence of prejudice cannot be considered good cause to excuse the defect (*see Matter of Orchard Heights, Inc. v Yancy*, 15 AD3d 854, 788 N.Y.S.2d 763; *Matter of Premier Self Storage of Lancaster v Fusco*, 12 AD3d 1135, 784 N.Y.S.2d 443).

46 A.D.3d, 828. Notably, on appeal the only argument made to the Court for the existence of good cause, was the absence of prejudice, which excuse the Second Department squarely rejected as sufficient cause. The Court in *Landesman* also cited to errant (i.e. failed) notice cases such as *Orchard Heights, Inc. v. Yancy, supra*, (4th Dept., 2004), and *Premier Self Storage v. Fusco, supra*, (4th Dept., 2004), which both involved service upon the Clerk of the Schools, rather than the Superintendent. In each case, the trial court dismissed, noting that lack of prejudice was no excuse.

Here, the petitioner opposes the motion to dismiss for errant notice, by asserting that, prior to personal delivery of the notice to the Superintendent, he called the District office, and was told by the Superintendent's personal secretary that he should deliver the papers to "Diane" since neither the Superintendent nor she would be present in the office. Counsel argues further that he then followed this exact procedure, even requesting that Diane give the papers to the secretary for the Superintendent, and that he followed up less than two months later by confirming with the secretary that the papers were received, and with the tax collector (where District policy dictates the notice go) that she had the notice. Petitioner argues that this procedure (and the affidavit of service recording this method and filed directly with the Court thereafter) complies with RPTL §708 (3).

Petitioner correctly points out that this Court has previously held that such a procedure complies with the statute. In *Matter of Commons at Bon Aire Condominium v. Town of Ramapo*, 24 Misc3d 1231A (Supreme Court, Rockland County, 2009), the Court stated:

> Petitioner has supplied Affidavits of Service for the petitions relating to these tax years, both of which note mail service upon the Superintendent of Schools at the RCSD, 45 Mountain Avenue, Hillburn, New York. Respondent does not deny that this is the proper address of the Superintendent, nor does the Superintendent himself deny this in his affidavit; the latter also asserts that

> petitioner failed to mail the petitions to him at his office, though failing to identify where that office is located, and that service (as opposed to receipt of the petitions) was made on the Business Office for the District. Based on the Affidavits of Service, the latter assertion would appear to be false--the petitions were clearly addressed, as RPTL §708(3) requires, to the Superintendent, and **not** the Business Office.
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> Notably, petitioner asserts, and respondent does not deny, that both the RCSD's own website, http://www.ramapocentral.org/, and the ORPS website, list 45 Mountain Avenue, Hillburn, New York, as the sole address for the District offices, without further differentiation regarding the Superintendent's personal office. Combined with the mailing of the petitions to the Superintendent, to the addresses provided to the public (via website) and to the New York State governmental agency responsible for real property tax matters, the Court finds that petitioner was in full compliance with R.P.T.L. §708(3) regarding tax years 2007 and 2008. (*Cf* CPLR §308 [2] [service proper where it includes a mailing to a party's last known address]).

In the matter at bar, rather than misdirect the notice based on inaccurate or misleading information contained in public databases, petitioner delivered the notice, **as directed via telephone by respondent's own employee**, which direction came from the Superintendent's own personal secretary, to another District employee, for delivery to the secretary when she was present, and then to the Superintendent when he returned from his vacation. Clearly, as in *Bon Aire*, petitioner was in full compliance with R.P.T.L. §708(3).

> In addition, as noted in *Bon Aire*,
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> In any event, the Court may also excuse a lack of compliance with R.P.T.L. §708(3) for good cause shown. In *Old Post Farm v. Alfred B. White et al.*, (Supreme Court, Dutchess County, LaCava, J., June 26, 2007), this Court held that

> what occurred was a failure by petitioner to **properly** serve the Superintendent, namely such service being (1) timely but initially addressed to someone other than the Superintendent, and (2) untimely but properly addressed to the Superintendent. In contrast, the defect in *Landesman* was the failure of the petitioner there to serve the Superintendent **at all**.
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> Consequently, in *Middletown*, and in the case at bar, the failure to **properly** serve (rather than the failure to serve **at all**) was and may be excused for good cause shown, in particular by the absence of prejudice. As was the case in *Bloomingdale's*, substantially no action has been taken in the proceeding prior to the untimely service: while denials have been entered, and an answer (albeit untimely)has been served, "no appraisals had been exchanged, and no negotiations had taken place." 294 A.D.2d, 571. In addition, respondent here has made no showing of prejudice, but, instead, merely makes a *pro forma* allegation that it occurred.

In *Bon Aire*, inadvertently due to the public information available, petitioner improperly noticed the Superintendent, by delivering the petitions in such a manner that it was received not by him but by the District Business office. Here, not only did the arguably improper notice result directly from the direction of a District employee, but petitioner took additional steps to insure eventual proper delivery to the Superintendent, and the petition was in time delivered as District policy dictated, to the tax collector.

Contrary to respondent's position, this is not a case like *Landesman, supra,* where the petitioner had served the Poughkeepsie School District, but **not** the Superintendent of the District directly. This Court dismissed the petitions for failing to follow

RPTL §708(3), and the Second Department affirmed, holding only that the "...**failure** to mail the notice of petition and the petition to the Superintendent of Schools of the school district mandates dismissal...." 46 A.D.3d, 828, emphasis added. Here there was no failure to notice, but merely an improper delivery of the notice; crucially, the improper delivery here was at the specific direction of a District employee.

Respondent has failed to articulate any prejudice from the improper notice, and, as with *Bon Aire*, no substantial action has taken place in the case. Furthermore, there is no doubt that the petition was delivered in a timely fashion (perhaps immediately, in fact) to the party in the District to whom such notices are sent–-the tax collector. The Court thus, and in the alternative, in the exercise of its discretion, finds that, in the absence of prejudice, and for good cause shown (the direction by a District official of the manner in which to notice the Superintendent), the failure to properly notice the Superintendent with the tax year 2008 petition is excused.

The Petitioner's Cross-Motion

Regarding petitioner's cross motion, the Court merely notes that there is no authority for a cross-motion to dismiss a motion (as opposed to a cross-motion affirmatively seeking some substantive relief), and that said cross-motion was in any event untimely, as it was not made returnable, either originally or currently, at the same time as the pending motion (*see* CPLR §2103 [e].)

Upon the foregoing papers, it is hereby

ORDERED, that the motion by respondent to dismiss for improper notice, is denied; and it is further

ORDERED, that the cross-motion by petitioner to dismiss respondent's motion, is denied.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
September 9, 2010

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HON. JOHN R. LA CAVA, J.S.C.

Kenneth J. McCulloch, Esq.
Attorney for Petitioners
111 John Street, Suite 1220
New York, New York 10038

Victor M. Meyers, Esq.
Rapport Meyers, LLP
Attorney for Respondents
436 Union Street
Hudson, New York 12534-2427