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 WESTCHESTER
----------X
In the Matter of the Application of
JASON and DONNA LEVITZ,

DECISION/ORDER

Petitioners,

-against -

Index No:
21665/08

THE ASSESSOR OF THE TOWN OF NEW CASTLE and THE TOWN OF NEW CASTLE,

Motion Date:
6/24/09

Respondents.

To Review a Certain Real Property Assessment for the year 2008 under Article 7 of the Real Property Tax Law
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LaCAVA, J.

The following papers numbered 1 to 4 were considered in connection with this motion by petitioners Jason and Donna Levitz (Levitz) seeking summary judgment from respondent Town of New Castle (Town):

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVIT/EXHIBITS	1
PETITIONER'S MEMORANDUM OF LAW	2
AFFIRMATION IN OPPOSITION/AFFIDAVIT/EXHIBIT	3
REPLY AFFIRMATION/EXHIBIT	4

In this Article 7 Tax Certiorari proceeding, petitioners seek an Order granting summary judgment on its petition challenging the

reassessment by respondent Town of a portion of the subject premises. The parcel is a residential plot, known on the tax map of the Town as Lot # 101-13-2-24, and is also known as and located at 5 Haights Cross Road, Chappaqua, Town of New Castle. Petitioners are the fee simple owners of the parcel, having purchased same in June 2007 from the prior owner, Dorothy L. Zeifer (Zeifer). The assessed value prior to the sale was $393,000.00 The subject parcel had been subdivided into two **zoning** lots in September 1975 (one, containing a residence, designated as lot #24, and the other, containing only a tennis court, designated as lot #21), but soon thereafter, and for an extended period prior to the 2007 sale, the subject parcel was a single **tax** lot.

In 2006 Zeifer requested the restoration of the single tax parcel into its two-tax-lot condition, which respondent assessor did at about of the time of the 2007 sale. At that time, he also reduced the residential parcel (then designated Lot # 101-13-2-24) to $370,000.00, but assessed the tennis court parcel (new Lot #101-13-2-21) at $160,000.00, which assessed values when totaled were well in excess of the assessment prior to the split. While the Town timely notified Levitz of the increase in assessment, grievance day was the day after their closing on the sale, and they were unable to appear to protest the increase. They duly protested the retention of the assessment for tax year 2008, however, and upon denial of their protest, filed the instant action[1].

Petitioners' Motion for Summary Judgment

Petitioners now moves for summary judgment, asserting that there are no questions of fact regarding the fact that the Town selectively reassessed their property. The Town opposes the motion, arguing the existence of facts suitable for resolution at trial, including, in particular, on the issue that the prior owner requested the split and thus prompted the reassessment.

Upon a summary judgment motion, the movant bears the initial burden of presenting evidence, in competent form, establishing entitlement to judgment as a matter of law, and tendering sufficient evidence to eliminate any material issues of fact from the case" (*Way v. George Grantling Chemung Contracting Corp.*, 289

[1] The Court also notes that petitioners have subsequently sought and been granted a re-merger of the two parcels into one, and that the assessor has placed an assessed value of $393,000.00 (the pre-split assessment) on the newly-rejoined property.

A.D.2d 790, 793 [3rd Dept., 2001].) Unless and until that initial burden is met, there is no need for the non-movant to come forward with "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*; *see also Rodriguez v Goldstein*, 182 A.D.2d 396, 397 [1st Dept., 1992]). In a proceeding pursuant to Article 7 of the Real Property Tax Law, summary judgment is properly granted when there is no genuine issue of material fact and the petitioner is entitled to judgment as a matter of law on the issue of their entitlement to an reduction in the challenged assessment. (*Cf. See Sailors' Snug Harbor in City of New York v. Tax Commission of City of New York*, 26 N.Y.2d 444, 449 [1970]).

In *Celardo v. Bell* (222 A.D.2d 547 [2d Dept., 1995]), the Court stated:

> It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Issue finding, rather than issue determination, is the court's function (*Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957) . If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied (*Museums at Stony Brook v Village of Pachogue Fire Dept.*, 146 A.D.2d 572 (1989) …

Here, the petitioners allege that the Assessor's policy regarding the petitioners' assessments could be described as a policy of "selective reassessment" (specifically, "welcome stranger") since reassessment of their property (and apparently their property alone) occurred upon the sale (and, coincidentally, upon the division of the single tax plot into two), and despite the fact that the division merely brought the tax status of the parcel into line with its zoning status (*i.e.*, the fact that the tennis court parcel already constituted a buildable lot.)

This Court has consistently held that "[W]henever 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..."; "the assessor should be prepared to offer proof of his

assessment methodology in general so as to successfully withstand any...challenge.") (10 ORPS Opinions of Counsel SBRPS 60; see *MGD Holdings Haverstraw v. Assessor of Town of Haverstraw*, 8 Misc3d 1013 (A) [Supreme Court, Rockland County, 2005].)

Here, the Town assessor's sole explanation for the reassessment is that he deemed the separate parcel a new building lot, and marketable as such, and therefore of correspondingly higher value than its previous status (as he described it) as "excess" to the residential parcel. Initially, as set forth above, this explanation is factually incorrect, since for over 30 years (since 1975) the tennis court parcel already had zoning status as a separate building lot, despite its attachment as a merged tax lot to the residential parcel. The 2007 split had no effect on this status; the tennis court parcel was, prior to June 2007, as well as subsequently, already a buildable lot. Thus, it was not worth a new building lot or more after the split than before.

Further, and more importantly, the assessor simply conceded in his explanation that the parcel, while improved with a tennis court already, was valued not for its current improvement but for its building potential. It is, of course, a fundamental tenet of tax assessment policy that property is assessed in its current condition as of its taxable status date. (*See* RPTL §§301, 302; see also *BCA-White Plains Lanes v. Glaser*, 91 A.D.2d 633, 635 [2nd Dept. 1982]--"Property is assessed for tax purposes according to its condition on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future (*Matter of Kalski v Fitzgerald*, 25 AD2d 573, 574; 58 NY Jur, Taxation, §§ 203, 281; *see also*, *Matter of Allied Stores of N. Y. v Finance Administrator of City of N. Y.*, 76 AD2d 835)"; *see also Stillwell Equipment Corp. v. Assessors for Greenburgh*, 251 A.D.2d 672 [2nd Dept 1998]; *M*iriam Osborn Memorial Home Association v. Assessor of City of Rye, 15 Misc. 3d 1144A [Supreme Court, Westchester County, 2007]; 8 Op. Counsel SBEA No. 5.)

The Court thus finds, regarding petitioners' motion, that, at the outset, petitioners have met the initial burden, by demonstrating the reassessment of a portion of their property based simply on its re-division into two tax lots, without a town-wide reassessment, and thus showing entitlement to judgment as a matter of law. When viewing respondents' properly submitted proof in a light most favorable to them, and upon bestowing the benefit of every reasonable inference to them (*Boyce v. Vasquez*, 249 A.D.2d

724, 726 [3d Dept., 1998]), based on the assessor's admission to assessment directly contrary to statute and case law, material issues of fact do not exist as to whether or not the property was improperly reassessed.

Based on the foregoing, it is hereby

ORDERED, that the motion by petitioners for summary judgment against respondent is hereby granted; and it is further

ORDERED, that the petitioners' application to declare invalid and void the 2008 real property assessment upon the subject property is granted; and it is further

ORDERED, insofar as petitioners seek an Order compelling Respondents to roll back the subject 2008 assessment and to restore it to its 2006 level, such request is granted to the extent that the instant matter is remitted back to respondents for a new assessment for calendar year 2008, which assessment is to be determined by taking the 2006 assessment and dividing it between the tax lots at issue herein in a manner which the respondent assessor deems appropriate in exercise of his professional judgment, but which assessments when added together do not exceed the 2006 assessment; and it is further

ORDERED, that the assessment rolls are to be corrected accordingly, and overpayments of taxes, if any, are to be refunded with interest.

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

Dated: White Plains, New York
September 10, 2009

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

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