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 ORANGE

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In the Matter of the Application for a Review under Article 7 of the Real Property Tax Law of a Tax Assessment by SOUTHWINDS RETIREMENT HOME, INC.,

DECISION/ORDER/ JUDGMENT

Petitioners,

Index No:

-against -

5286/02
5287/02

THE CITY OF MIDDLETOWN, BONNIE BERNASKI AS COMMISSIONER OF ASSESSMENT FOR THE CITY OF MIDDLETOWN, AND THE BOARD OF ASSESSMENT REVIEW FOR THE CITY OF MIDDLETOWN, COUNTY OF ORANGE,

Respondents.

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LaCAVA, J.

The trial of this Real Property Tax Law (RPTL) Articles 4 and 7 Action, challenging the revocation by the City of Middletown (City) of the real property tax exemption enjoyed by petitioner Southwinds Retirement Home, Inc., (Southwinds), for the Tax Assessment Year 2002, for the premises designated on the City tax map as Section 40, Block 9, Lot 1, and known as and located at 50-58 Fulton Street, Middletown, New York (the warehouse parcel or subject warehouse property), and for the premises designated on the City tax map as Section 40, Block 6, Lot 1, and known as and located at 60-78 Fulton Street, Middletown, New York (the retirement home parcel or subject retirement home property) took place before the Court

pursuant to Stipulated Facts and Exhibits submitted on or about and before January 15, 2009. In addition, the following post-trial papers numbered 1 to 24 were considered in connection with the trial of this matter:

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BACKROUND

Petitioner is a not-for-profit corporation founded 125 years ago (under the name Ladies Home Society of Orange County) as a charitable corporation for the operation of a retirement home for the aged. The subject properties consist of 2 parcels: the warehouse parcel, a former warehouse on an approximately 1.6 acre sized plot, was purchased by petitioner in 1999; and the retirement home parcel, located on a plot approximately 4.6 acres in size directly across from the warehouse parcel on Fulton Street. The latter, acquired in 1990, was a former hotel/motel/catering complex. The warehouse enjoys an improved area of over 20,000 square feet, of which approximately 4,000 square feet was leased to The State University of New York's Empire State College in the tax year at issue, with the remainder devoted, according to petitioner, to storage in support of the retirement home. The retirement home

parcel contains some 84,000 square feet of improved space, of which, in the tax year at issue, 3,738 square feet was leased by an associated not-for-profit corporation, Homemaker Service of Orange County, Inc. (Homemaker), for the operation of an adult day care facility. In addition, 520 square feet was leased to Rhonda Dundish to operate a hairdressing salon, and the 1,827 square foot main dining hall was periodically leased to several not-for-profit institutions for luncheon and dinner meetings.

For many years, and during the period immediately prior to the tax year at issue, the parcels were in possession of tax exemptions from the City, with petitioner operating as a charitable provider to the community of, *inter alia*, nursing and medical services, rehabilitative care, social services, and congregate dining. During 2002, and prior to the taxable status date for that year, petitioner duly filed applications with respondent to continue the total exemption from property taxes on the subject premises pursuant to RPTL 420-a. The only use of both parcels continued to be the charitable operation of a retirement home, except as herein noted. Shortly thereafter, the City entirely revoked the previously-held charitable exemption for the warehouse parcel for the 2002 tax year, deeming the College rental at market rate and the remainder storage (though of equipment for the nursing home) not to be charitable uses. The City also partially revoked the charitable exemption for the retirement home parcel for the same tax year, ruling that the adult day care, hairdressing, and dining uses were also at market rate and, in any event, not charitable. Petitioners appealed to the City Board of Assessment Review, and thereafter, upon failing to regain their exempt status, commenced the instant action, seeking a determination that the assessment was unlawful and the revocation was improper.

As stated above, the matter was tried before the Court on the basis of submitted Stipulated Facts, Exhibits, and post-trial memoranda.

FINDINGS OF FACTS

The record discloses that Southwinds is a not-for-profit corporation founded 125 years ago, under the name Ladies Home Society of Orange County, and operated as a charitable corporation for the purpose of providing of a retirement home for the aged. The parcel at 50-58 Fulton Street, a former warehouse, was purchased by petitioner in 1999, and between that time and the tax year 2002 was on the exempt rolls of the City. During that time, the property was also operated under a PILOT agreement (not at issue in this matter) with the City's Industrial Development Agency. In late 2001,

Southwinds converted 4,015 square feet of this premise into classroom and associated educational space, and entered into a lease with the State University of New York to operate a campus of Empire State College on the premises. The remaining space, exceeding 16,000 square feet, was designated by petitioner for use as storage for equipment utilized in the operation of the retirement home facility operated across Fulton Street, and was so used by them.

The Court further finds that the retirement home parcel, directly across the street at 60-78 Fulton Street, was formerly a hotel/motel/restaurant complex, and was acquired by Southwinds in 1990. From that time until tax year 2002, this parcel was also on the exempt rolls of the City, and it too was operated under a PILOT agreement (likewise not at issue in this matter) with the City's Industrial Development Agency. By 2002, some 3,738 square feet had been leased by the associated not-for-profit corporation Homemaker for the latter to operate an adult day-care facility. Further, some 520 feet had been leased to Dundish for the latter to operate a hair salon, and finally the 1,827 square foot main dining hall had been routinely leased to several not-for-profit institutions, including Christian Women; Gideons; Rotary; Kiwanis; and New Jerusalem Bible Church, for these groups to conduct luncheon and/or dinner meetings.

In early 2002, and immediately prior to the filing by petitioner of its requests for renewed exemptions, respondent assessor delivered a letter to petitioner requesting information "required in order to maintain" their tax exempt status, including the degree to which Southwinds was subsidizing its residents; the rates paid by residents; the source of funds used to subsidize residents; donor lists; and other information. Petitioner filed applications to continue the total exemption, and complied with the above requests, as well as follow-up demands by respondent assessor, which included providing a detailed summary of the pay status of residents and the leasehold uses of both parcels. The application also asserted that the charitable uses of both parcels, to wit: the operation of a retirement home, continued, except for the noted uses in the warehouse parcel, and any alterations and construction associated with those changes. The assessor soon thereafter entirely revoked the charitable exemption for the warehouse parcel, and partially revoked the charitable exemption for the retirement home parcel, for the 2002 tax year, ruling that the uses were not tax-exempt. Petitioners appealed to the City Board of Assessment Review, complying with duplicative information requests. The appeal was denied due to the properties' "income producing" status.

Based on the affidavit of Carol M. Cunningham, Comptroller for Southwinds, the Court finds that an audit of the income and expenses of the two subject parcels for the tax year 2002 was conducted, and

that Ms. Cunningham's audit disclosed that the amount of rent from Empire State College, and Homemaker were $46,035, and $32,912, respectively, and that the sum of the allocated carrying charges associated with each lease exceeded the rent received under those leases by $13,013.72 and $4,140.09, respectively. The Court also credits the testimony of the assessor that she made two unauthorized inspections of the premises, one of which was on an unknown date, and that on each of those dates she observed construction to be taking place, but did not observe stored equipment in the warehouse parcel.

CONCLUSIONS OF LAW

The Burden of Proof

Charitable corporations incorporated under Section 402 of the Not-For-Profit Corporation Law are organizations eligible for tax exemptions. (*Cf. Waltz v. Tax Commission of City of New York*, 24 N.Y.2d 30 [1969]). It appears undisputed that petitioner is such a corporation, and that, in addition, it is similarly recognized by the Internal Revenue Service as a not-for-profit religious corporations by their IRC 501 (c) 3 designation.

This Court has frequently held that, while the burden of proof lies with a petitioner who seeks an initial property tax exemption (*See People ex rel. Watchtower Bible & Tract Soc. v. Haring*, 8 N.Y.2d 350 [1960]), where a petitioner is the subject of a revocation of an existing tax exemption, the burden of proof is on the municipality to justify the revocation. (*See New York Botanical Garden v. Assessors of Washington*, 55 N.Y.2d 328 [1982]; *Watchtower Bible & Tract Soc. v. Lewisohn*, 35 N.Y.2d 92 [1974].) Neither party disputes this[1]. Thus, here the burden of proof is on the Town to establish that the revocation of the exemption previously granted to petitioner was proper.

Southwinds argues further, however, that the quantum of proof necessary for respondent to meet its burden is "clear and convincing

[1] Respondent not only concedes that it has the burden issue by failing to address the issue, but also fails to even properly dispute the application of the "clear and convincing" standard to its burden, except to say only "This incredible argument simply ignores crucial facts" and then to put forth, in a footnote, that "this is not the case to seriously analyze which standard should apply...."

evidence." To be sure, as petitioner correctly argues, a line of cases in fact do impose that standard of proof upon **taxpayers** seeking to avail themselves of an exemption. (*See, inter alia, People ex rel. Watchtower Bible & Tract Soc. v. Mastin*, 191 Misc. 899, 905 [Supreme Court, Tompkins County, 1948], which stated–

> It is well established that the exemption statutes should be strictly construed and that the burden is upon the property owner to establish the right to exemption by clear and convincing proof....)

While petitioner seeks from such cases to persuade the Court that such a required standard should, in all fairness, apply not only to petitioners seeking exemptions, but also to respondents seeking to justify their revocation, it fails to cite a single case supporting this argument. While it raises a point of genuine interest, and while respondent simply fails to deal with the argument in any legitimate way, it matters little since, in any event, as set forth in greater detail below, respondent has wholly failed to meet its burden, however framed or constituted, of showing that it was justified in denying Southwinds' application for continued exemptions on the two properties.

The Exhaustion of Remedies

In the course of addressing petitioner's current submission, detailed below, of audit results regarding the SUNY lease of the warehouse parcel, and the several leases of the retirement home parcel, the City asserts that the inclusion of this information **now**, rather than previously, violates the doctrine of exhaustion of administrative remedies. However, this argument fails in several respects. While generally termed a tax certiorari proceeding, Article 7 actions are clearly delineated not as traditional certiorari (i.e. quasi-appellate or appellate) proceedings, but trials *de novo* on the issue of valuation or exemption. ("A proceeding under RPTL article 7 is in the nature of 'a trial *de novo* to decide whether the total assessment of the property is correct and if it is not to correct it'"--*Town of Pleasant Valley v. New York State Bd. of Real Property Services,* 253 A.D.2d 8 [2nd Dept. 1999], citing *Matter of Katz Buffalo Realty v Anderson*, 25 A.D.2d 809 [4th Dept. 1966].) Thus, it is to be expected that the proof at trial might differ from that presented in an admittedly informal administrative proceeding such as one before an assessor or a Board of Assessment Review.

Further, while there are certainly statutory requirements to be met in a petitioner's administrative challenge under RPTL Article

7, such requirements are general with respect to the proof necessary to establish entitlement to an exemption and, upon denial, a challenge before the Board. (*See Sterling Estates, Inc. v. Board of Assessors of Nassau County*, 66 N.Y.2d 122 [1985]--

> The responsibility rests upon the assessors to investigate and establish a proper roll, but once it is complete it is presumed to be accurate and free of error. If the taxpayer contends otherwise, then the burden is upon him to explain why his property is unfairly valued so that corrections can be made. The review and adjustment process, if adjustment is appropriate, permits the assessors to close the tax roll and establish the tax rate with some confidence that the revenues produced by the levy will be sufficient to meet budget requirements. To facilitate their determination of protests and correction of the roll, the assessors may require the taxpayer to testify before them and submit evidence of value (Real Property Tax Law § 525 [2]; *Matter of Grossman v Board of Trustees*, 44 AD2d 259, 263). Manifestly, this administrative review procedure is not intended to be an idle exercise. It is designed to seriously address claimed inequities and adjust them amicably if it is possible to do so. If the procedure is to work at all, and it is important that it should to limit litigation in these post-*Hellerstein* days of widespread revaluation (*see, Matter of Hellerstein v Assessor of Town of Islip*, 37 NY2d 1), it is essential that sufficient facts detailing the taxpayer's complaint be presented to the assessors so that realistic efforts at adjustment can be made. Not incidentally, the grievance process also permits the municipality to determine the nature of the taxpayer's claim and narrow the area of dispute if the claim does result in litigation (*cf.* General Municipal Law § 50-e....)

In any event, it is clear here, contrary to respondent's argument, that, during the administrative challenge phase of this matter, Southwinds was asked for, and submitted, sufficient facts to both put respondent on notice as to the gravamen of its complaint, and provide specific details of its financial contentions regarding the several leases at issue here. The two-page document,

submitted by the petitioner to the City, and now complained of by them, in fact contains a description of the lessees of the dining hall, as well as the revenue generated thereby and by the adult day care lease; the rental income from the warehouse parcel lease; and a clear statement to the Board that it was the denial of the renewed exemption as to both parcels that was being grieved. Notably, neither the January 2, 2002 letter which preceded this submission, or the March 28, 2002 letter which followed it, requested from Southwinds any additional or more detailed information (i.e. carrying charges.) Nor was there any response, from the assessor or by the Board to this submission; rather, the assessor simply deemed the uses non-exempt, while the Board eventually sustained the denial of the exemption based simply on a "change of use." Consequently, the Court, to the extent necessary in this trial *de novo*, finds as a matter of law that petitioner properly exhausted its administrative remedies by both adequately responding to the specific demands by respondent for certain information relative to Southwinds' exemption renewal application, and also by Southwind's proper description of its claims to the City assessor in the documents filed in support of its exemption renewal application.

The Charitable Exemption

RPTL §420-a (1) provides that

> 1. (a) Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

Additionally, RPTL § 420-a (2) provides that

> 2. If any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt; provided, however, that such real property shall be fully exempt from taxation although it or a portion thereof is used (a) for purposes which are

> exempt pursuant to this section or sections four hundred twenty-b, four hundred twenty-two, four hundred twenty-four, four hundred twenty-six, four hundred twenty-eight, four hundred thirty or four hundred fifty of this chapter by another corporation which owns real property exempt from taxation pursuant to such sections or whose real property if it owned any would be exempt from taxation pursuant to such sections, ...and provided further that such real property shall be exempt from taxation only so long as it or a portion thereof, as the case may be, is devoted to such exempt purposes and so long as any moneys paid for such use do not exceed the amount of the carrying, maintenance and depreciation charges of the property or portion thereof, as the case may be.

Finally, RPTL § 420-a (3) provides that

> 3. Such real property from which no revenue is derived shall be exempt though not in actual use therefor by reason of the absence of suitable buildings or improvements thereon if (a) the construction of such buildings or improvements is in progress or is in good faith contemplated by such corporation or association or (b) such real property is held by such corporation or association upon condition that the title thereto shall revert in case any building not intended and suitable for one or more such purposes shall be erected upon such premises or some part thereof.

Thus, the burden of proof is upon the City here to demonstrate, pursuant to RPTL § 420-a (1), that:

> 1. The real property at issue here is not owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes; or
>
> 2. The owning corporation did not use the real property exclusively for carrying out thereupon one or more of such purposes.

There has been no evidence presented by the respondent that the premises is not owned by Southwinds, a not-for profit corporation organized and conducted exclusively for charitable purposes, including the moral or mental improvement of men, women or children, and hence the Court finds that the City has failed to meet its burden on that issue.

Further, where it is alleged that the property was leased to another charitable institution, the burden of proof is upon the City to demonstrate, pursuant to RPTL § 420-a (2), that:

> The real property at issue, while not so used by the corporation, is not leased or otherwise used by another corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes; or the property (or a portion of it) is not devoted to such exempt purposes; or the moneys paid for the use of the property exceed the amount of the carrying, maintenance and depreciation charges of the property or portion thereof.

The Warehouse Parcel

1. The SUNY-Empire College Lease

The Court holds initially that as a matter of law Southwinds may avail itself of the exemption provided for pursuant to RPTL §420-a (2) for the portion of the warehouse parcel leased to the State University of New York (SUNY), since the City has failed to demonstrate that the use to which the SUNY portion of the premises has been put is not exclusively for educational purposes, and that the corporation or institution leasing that portion of the property (SUNY – Empire State College) is not a New York State Agency operated for educational purposes. Indeed the record establishes both.

The Court further holds that the City has failed to demonstrate that the income from the SUNY lease exceeds the carrying, maintenance and depreciation charges of the property as set forth under RPTL §420-a (2). The petitioner, as set forth above, in an affidavit from their comptroller, Carol M. Cunningham, details an audit which clearly shows that the amount of rent for the SUNY

portion ($46,035.00) in 2002 was well exceeded (by over $13,000.00) by the allocated carrying, maintenance and depreciation charges of that portion of the property.

The City, as also set forth above, has factually contested these figures unsuccessfully, by, among other things, contending that Southwinds has provided respondent with three separate rent figures at various times, apparently without appreciating that, even if the Court accepts the highest of those rent figures, the yearly rent would **still** not exceed the allocated carrying charges for the SUNY leasehold by over $8,000.00. However, the City also asserts, in an affidavit from the assessor, that petitioner's inclusion of interest and amortization expenses, and expense allocation, are erroneous. Notably, the Court is nowhere advised of the assessor's qualifications or expertise to render opinions as to accounting, auditing, or fiscal matters; such an expression by an apparent non-expert must be dismissed out of hand.

The Court notes, too, that Counsel for The New York State Office of Real Property Services has offered the opinion that interest expenses are undoubtedly included as carrying charges. (*See* 10 Opn. SBRPS No. 88 [August 30, 1999].) While amortization, per the same opinion, may not be so included, here the allocated amortization amounts to just over $2,600.00, an amount that, even if it was deemed to be $0 (i.e., there was no amortization expense), would still fail to lower the total carrying charges below the amount of rental income. (*Supra*.) And, while petitioner affirms that the depreciation allocation was compiled by an analysis of assets related to the SUNY rental portion, and was conducted according to Generally Accepted Accounting Principles (GAAP), respondent merely asserts a different suggested depreciation amount, with no explanation whatsoever of who calculated it or how it was arrived at.

While respondent assessor seeks to address these perceived shortfalls in petitioner's accounting, she essentially concedes that the sole reason that she denied an exemption for the SUNY portion of the premises is that the lease was in excess of what she describes as market rate. However, as petitioner properly argues, the Court of Appeals categorically rejected this very assessor's methodology, and the significance of a market rate analysis, in determining whether a property should become exempt or continue to maintain an exemption, in *Adult Home at Erie Station v. Assessor, City of Middletown*, 10 N.Y.3d 205, 215 (2008), where they stated

> The courts below erred in concluding that, because RECAP receives fair market value for its properties, the properties are not distinguishable from a commercial apartment

> complex. The distinction is that apartments in commercial complexes are not provided solely to people struggling against alcoholism, drug addiction and the like on condition that they participate in programs designed to help them. That these people (or the government agencies that support them) pay market rents, and that RECAP may even benefit economically from its rental income, does not change the result. The issue is not whether RECAP benefits, but whether the property is "used exclusively" for RECAP's charitable purposes. RECAP could lose its exemption under RPTL 420-a (1) (b) if the economic benefit went to its officers or employees personally, but an economic benefit to a charitable organization does not by itself extinguish a tax exemption. The question is how the property is used, not whether it is profitable.

In assailing Cunningham's audit, respondent assessor also argues, in a manner similar to that advanced on the issue of exhaustion of remedies, that petitioner is at fault for having failed to provide this documentation to the assessor when requested by her in 2002. While it may possibly (though not assuredly) be true that providing additional information in 2002 may have affected her determination as to the exemptions at issue here, recall, as set forth above, that neither the respondent assessor nor the Board, though advised of existing leases to other parties (including several that were non-profit) had asked for this information. Further, the City is once again reminded that at this stage, the trial of this matter, such a complaint is essentially of no relevance. At this time, while they may and do properly contest issues raised by petitioners in the latter's papers and their proof, the City cannot carry the day by arguing that they were unaware of the expenses incurred by Southwinds, since the City, and not petitioners, have the unquestioned burden of proof, here by showing that the carrying charges did not exceed the rent charged herein. Their failure to either specifically demand the information in the exemption application review process[2], or to seek discovery of the

[2] Clearly, based on the nature of the information requests which **preceded** petitioner's renewal applications, but also followed it, respondent assessor sought early in 2002 to investigate Southwinds' relationship with its patients and, if possible, to revoke the exemptions based on their "market income", and the degree to which they subsidized their patients,

rental and expense figures prior to trial, at the very least has now left them simply unable to meet their burden of proof on the issue. In short, the City has failed to meet its burden of demonstrating that the rent received by Southwinds exceeded the carrying charges for the SUNY portion of the warehouse property.

2. The Remainder of the Warehouse Property

Since the remainder of the warehouse parcel was retained by Southwinds for its use in conjunction with the retirement parcel (dealt with in more detail below), application of RPTL § 420-a (1) rather than (2) is appropriate here. Consequently, the issue is whether the City has demonstrated that petitioner has not used the remainder of the warehouse parcel exclusively for carrying out one or more of its non-profit purposes.

Southwinds argues, and the Court has so found, that the non-SUNY use of the parcel in tax year 2002 was (and, indeed, still is) for the occasional storage of equipment used in the operation of its retirement home across the street, including beds, wheelchairs, commodes, furniture, and other items. Respondent has sought to contest this use factually by alleging two unauthorized[3] visits onto the premises (one of them undated) in which no storage was observed; the City has also argued that petitioner's 2002 application failed to indicate this use (or change of use), and that a use such as for storage or keeping the space vacant was not exclusively in furtherance of petitioner's not-for-profit purposes.

Respondent argues in particular that RPTL 420-a (3), *Legion of Christ v Town of Mt. Pleasant*, 1 N.Y.3d 406 (2004–*Legion I*), and *Congregation K'hal Torath Chaim v. Town of Ramapo*, 72 A.D.2d 804 (2nd Dept. 1979--cited in *Legion I*), are controlling on the instant matter regarding whether space kept vacant voids a tax exemption.

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in the same manner as she had already done with the Adult Home at Erie Station in 2001 and 2002, and would do with RECAP in subsequent years.

[3] This Court has ruled in *Schlesinger v. Town of Ramapo*, (Supreme Court, Rockland County, Dickerson, J., January 24, 2006), that an entry upon a premises by an assessor, for the purpose of gaining information to prepare an assessment, without the permission of the owner, or a court order, is an unauthorized search as contemplated under the United States and New York State Constitutions. *(See also Camara v. Municipal Court*, 387 U.S. 523 [1967].) Hence, any information gleaned from such an unauthorized entry is, at the very least, suspect.

In *Legion I*, the Legion of Christ Roman Catholic religious order had sought to build an educational facility on an undeveloped portion of its headquarters complex. Despite many preparations for the development, the municipality denied the sought exemption, citing 420-a (3), the failure of the Legion to apply for a special use permit for the planned facility, and therefore that the future use was not "in good faith contemplated." The Court of Appeals held that the failure to apply for the permit was just one factor among many to be considered in the determination as to whether the changes were in "good-faith contemplated" under 420-a (3). Similarly, *Congregation K'hal Torath Chaim* involved a denial of an exemption where, despite a general intent to build student and faculty residences on undeveloped land, no specific plan to achieve the general goal had been formulated by the owners.

Respondent's reliance on these cases is misplaced, however. First, 420-a (3), by its very terms, and both cited cases, involve **undeveloped** land; indeed, as Legion I notes,

> Property must not be allowed to lie idle indefinitely at the expense of the locality and its citizens. This "landbanking" has the effect of diminishing the tax base of a locality and increasing the tax burden for schools and other municipal operations.

1 N.Y.3d, 413. The instant case, to the contrary, involves land already fully developed, subject to a variety of uses under the petitioner's general corporate purposes. The question here is not whether land may be left fallow indefinitely, but what specific use, consistent with non-profit status, developed land may be put to.

Further, counsel for the City egregiously misquotes the language in *Legion* I in support of his argument--the phrase "concrete and definite plans to renovate and use existing buildings for exempt uses..." no-where appears in *Legion I*, although "concrete and definite plans **for utilizing and adopting the property** for exempt uses" does. *Legion I*, again, simply does not refer to developed, but rather undeveloped, land. Finally, neither case, despite the City's argument, actually speaks to a requirement that "concrete and definite plans" need be presented to the assessor; rather, all *Legion I* says is that an applicant must simply have such plans.

The entire argument by respondent, however--that a property cannot be, at times, vacant, or that portions of a developed premises may not be used for storage, is simply erroneous. "In determining whether the real property of a corporation is used

exclusively for the exempt purpose, the word 'exclusive' has been held to connote 'principal' or 'primary'." (*Erie Station, supra*, 208.) While the use of an exempt premises solely for storage, or for storage for **outsiders**, may raise an issue as to principal or primary exempt use, the use by petitioners of a portion of its property, otherwise completely devoted to an exempt use, to store equipment employed in the operation of its own not-for profit activities, is essentially unremarkable. Indeed, it would be surprising if any large institution, particularly one such as this, resident, as it is, in a former hotel/motel, containing little storage space, did not at times find itself requiring the dedication of some portion of its premises (including the warehouse parcel across the street) to the storage of items of past and for future use, or the need to keep some areas temporarily vacant for other compatible uses. Storage is, in fact, here no less incidental and auxiliary to the not-for-profit operations of the corporation on the premises than, for example, providing office space for administration of the business, a cafeteria and rest rooms for its employees, or countless other facilities.

In *Congregation Emanu-el of New York v. New York*, 150 Misc. 657 (Supreme Court, N.Y. County, 1934), *aff'd* no op. 243 A.D. 692 (1st Dept. 1935), a portion of a building owned a religious corporation was used only on an occasional basis by the corporation; at other times, while it was available for use, it was not being actively used. The Court stated

> Nor can I adopt the city's construction of the requirement that the property be "used exclusively for carrying out thereupon one or more of such purposes." The phrase has reference not to the space occupied but the *use* to which the property, as a whole, is put or made available. If a portion of the property actually be used for "one or more of the purposes of the incorporation" (*People ex rel. Y. M. A. v. Sayles*, 32 App. Div. 197; *affd.*, 157 N. Y. 677), and the remainder be temporarily unoccupied, the building, as a whole, "is used exclusively for carrying out thereupon one or more of such purposes."
>
> *****
>
> A church or synagogue or school does not shed its exempt character during the summer because of idleness. Constant daily use is not contemplated or compelled. When used, the use must be for the purpose which the law

> recognizes as earning exemption. The property here was available for, and susceptible to, use for plaintiff's purposes; potentially, if not actually, it was in use.
>
> Were the upper floors utilized for the storage of the plaintiff's files or books, or otherwise ostensibly availed of, such application would meet the city's objection. Yet, it would encourage subterfuges and stratagems and convert the law into a farce to compel pretended use merely to escape the extreme construction urged by the city.

150 Misc., 659, emphasis in original.

More recently, in *YWCA v. Wagner*, 96 Misc.2d 361, 369 [Supreme Court, Monroe County, 1978], an assessor deprived a YWCA of its tax exemption, where it closed one floor of a residential building during a period of decreased need for apartments in one of its buildings. The Court restored the exemption, holding that

> Petitioners should not be penalized by a forfeiture of part of their exemption for their act of good business sense in temporarily closing off an entire floor...A pertinent analogy may be instructive on this point. What the respondent proposes is analogous to holding that a church which loses parishioners due to cynical times should lose its exemption pro rata according to the number of empty pews. Even should the church, as a matter of convenience, close off the back pews, no municipality would be permitted to tax the church property pro rata.

(*See also People ex rel. Buffalo Burial Park Association v. Stilwell*, 190 N.Y. 284 [1907]--cemetery does not lose tax exemption simply because some of its grave plots are unused; *Religious Education Association v. City of New York*, 123 Misc. 2d 786, 791 [Supreme Court, Kings County 1983]--exemption sustained where "Plaintiff's property was used as part of an ongoing educational institution though not operating at full capacity"; *YWCA v. New York*, 137 Misc. 321 [Supreme Court, Kings County, 1928], *aff'd* no op. 227 A.D.742 [2nd Dept. 1929], *aff'd* no op. 254 N.Y. 558 [1930]--use of one building to generate heat for two exempt buildings does not defeat exemption for properties; *c.f. St. Luke's Hospital v. Boyland*, 12 N.Y.2d 135 [1962]--rental of apartments reasonably

incident to operation of hospital.

Thus, the Court finds as a matter of law that it is irrelevant whether petitioner sought to use a portion of the warehouse property for storage, but did not; or so sought, and did use the premises for storage. In either instance, such uses are and were incidental to the normal tax exempt use to which petitioner put the premises. The Court further finds that respondent has failed to meet its burden to show that either or both of such incidental uses were not taking place at the warehouse premises, and thus, together with the exempt educational use by SUNY - Empire College, the exemption for that parcel should not have been revoked.

The Retirement Home Parcel

1. The Homemaker and Dining Hall Leases

The Court holds as a matter of law that Southwinds may also avail itself of the exemption provided for pursuant to RPTL § 420-a (2) for the 3,738 square feet of the retirement home premises which was leased by the petitioner to the associated not-for-profit corporation Homemaker for an adult day care facility, since the respondent City has failed to demonstrate that the use to which the Homemaker portions of the premises have been put is not those associated with a retirement home, and that Homemaker is not a not-for profit corporation operated for charitable (adult non-residential care) purposes. In fact, the only proof in the record on this subject is that Homemaker is a non-profit corporation providing adult day-care services, or using office space to administer said care, in its Southwinds leasehold. The Court also holds, as a matter of law, that Southwinds may likewise avail itself of the exemption provided for pursuant to that same section for the 1,827 square feet of the main dining hall which was leased to various not-for-profit institutions on an occasional basis for luncheon and dinner meetings, since the respondent City has failed to demonstrate that the corporations, institutions, or associations leasing the dining hall (known charitable, religious, and fraternal organizations) are not not-for profit corporations, or that they did not operate the hall during their tenancies in a manner and for purposes consistent with their own not-for-profit natures. Here too, the only proof in the record is that these non-profit corporations or associations occasionally lease petitioner's dining hall for the purpose of lunch and/or dinner meetings.

The Court further holds that the respondent has failed to demonstrate that the income from the Homemaker lease exceeds the carrying, maintenance and depreciation charges of the property as set forth under RPTL § 420-a (2). The petitioner, as set forth previously, provided an affidavit from their comptroller, Carol M.

Cunningham, which details an audit showing that the amount of rent for the portions leased to Homemaker for adult care and office use ($32,912.00) in 2002 was exceeded, by some $4,100.00, by the allocated carrying, maintenance and depreciation charges of those portions of the property.

The City, as further set forth above, attacks these figures unsuccessfully on a factual basis, by, among other things, arguing that Southwinds previously provided respondent with rent figures at a different rate ($3,772.00 monthly in its prior submission, as compared to the $3,742.67 stated in the affidavit.) This is clearly a *de minimis* variance, and either of these figures would still have left the income received by Southwinds well below the level of the carrying charges. In addition, the City's assessor makes the same expert conclusions as those mentioned above relating to the SUNY lease, which opinion is foundationally suspect and thus rejected here as well.

In essence, as with the SUNY lease, the assessor denied the exemption for the Homemaker portion of the premises based on her opinion that the lease was at in excess of market rate, which basis, as set forth previously, was rejected by the Court of Appeals in *Erie Station*, supra. Thus, as with the SUNY lease, the City has failed to meet its burden of demonstrating that the rent received by Southwinds for the Homemaker portion exceeded the carrying charges for that portion of the retirement home property, and therefore the exemption for this portion of the premises should not have been revoked.

The Court further holds that the respondent has failed to demonstrate that the income from the dining hall leases exceeded the carrying, maintenance and depreciation charges of the property. While the Cunningham audit mentioned above details the amount of rent for the portions leased to the other lessees of the premises, it is only in the various appendices and exhibits that the rental amount for the hall is disclosed ($48,000.00 in 2002.) However, the allocated carrying, maintenance and depreciation charges of that portion of the property is not disclosed. Nevertheless, in the first instance the burden is on the City and the City alone to demonstrate that the carrying charges do not exceed the rent charged. Having failed to present any evidence whatsoever relating to the leaseholds, except on the rental amount per square foot and its relation to the market rate, respondent has simply failed to meet its burden on the issue.

In any event, the Court notes that the record does demonstrate that the rental use of the hall is extremely minor (65 hours per month, or less than 10% of the potential hours available for rental

in the month) and that, as set forth above, the use is apparently limited to non-profit groups for dining or administrative purposes. Thus, for the City's failure to meet their burden, this exemption too should not have been revoked by respondent.

2. The Beauty Parlor Lease

The Court holds as a matter of law that Southwinds may not avail itself of the exemption provided-for pursuant to RPTL § 420-a (2) for the 520 square feet which was leased to Rhonda Dundish for a hairdressing salon, since there is no evidence in the record at all that the lease was to a not-for-profit corporation. Indeed, the record appears to demonstrate to the contrary, that the lease is to a profit making concern. However, as relates to this lease, Petitioner may be entitled to an exemption pursuant to RPTL §420-a (1), since Dundish is providing services consistent with Southwinds exempt use. The issue here then becomes whether the respondent has met its burden of proving that the portion of real property at issue here, leased as a beauty parlor, is not owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, which, as already noted above, they have failed to do; or that the owning corporation did not use the real property exclusively for carrying out thereupon one or more of such purposes.

It appears undisputed in the record that the services provided by the hairdresser Dundish are limited to those normally provided by hair stylists and beauticians, and that no more than 20% of these services are provided to persons not otherwise resident at Southwinds. Petitioner argues that these services are reasonably incident to Southwinds' main purpose, affording dignity and enrichment to its elderly residents. Respondent assessor appears to have decided to revoke the exemption solely due to its public advertising, and that the rent charged was allegedly at a market rate (the latter, of course, as set forth above, rejected in *Erie Station* as a determining factor.)

The case of *Pace College v. Boyland*, 4 N.Y.2d 528 (1958) gives support to petitioner's argument that a for-profit contractor such as Dundish may operate a concession for a non-profit institution, and the non-profit may still be entitled to an exemption, so long as the concession is "reasonably incident" to the non-profit's primary activities. In *Pace*, Pace College had contracted-out operation of its student cafeteria at its New York City campus to a commercial food service. The Court held that the cafeteria was part of the operation of Pace College, and that the

furnishing of meals to students, faculty and

> staff on college premises is recognized as entering into their use for educational purposes, nor does it customarily disturb full tax exemption....The reason on account of which part of appellant's tax exemption has been withdrawn is not that it conducts a cafeteria, but that it does so through Horn & Hardart. We think that Pace College is not the less operating this cafeteria for its own educational purposes within the meaning of the Tax Law for the reason that it is done by a means of a commercial restaurant operator, than was the case when the college farmed out this operation to a professional caterer at a commission of 2% on gross sales of food. This is not renting space to some disassociated enterprise, it is part of the conventional operation of a private school, college, hospital or other benevolent institution.
> 4 N.Y.2d, 532-33.

Notably, in *Pace*, and like the instant case, the property leased to the concession was an integral part of the exempt's operation, taking place along side of, and together with, the other, clearly educational (or here, charitable) functions occurring on the premises. Thus the operation of a cafeteria on that property, whether by College employees, or by a private, for-profit contractor for the College, was necessarily incident to the other, academic functions taking place on the same property.

While *Pace* involved use of a concession **only** by school students, faculty, and administrators, other cases have permitted exemptions where the use was not exclusive to members or residents. In *Temple Grove Seminary v. Cramer*, 98 N.Y. 121 [1885], a school was permitted an exemption for the lease of a portion of the premises for boarding for non-students during vacation periods, since this lease was incidental to the educational use which occurred during the remainder of the school year. Similarly, in *Harvey School v. Bedford*, 34 A.D.2d 965 [2nd Dept. 1970], a private school was granted an exemption for the school skating rink, even though outsiders were permitted to use the rink, for a small fee covering only expenses, during non-school hours, as this use too was reasonably incidental to the school related skating which occurred at other times.

In addition, in *In the Matter of the Shrine of Our Lady of Martyrs of Auriesville v. Town of Glen*, 40 A.D.2d 75 [3rd Dept 1972], *aff'd* 33 N.Y.2d 713 [1973], use of part of a premises, for a cafeteria and a parking lot open entirely to the general public, was found to be incidental to the religious use (a shrine and other

worship facilities) on the remainder of property. And, most recently, the Second Department in *Sephardic Congregation of S. Monsey v. Town of Ramapo* , 47 A.D.3d 915 [2nd Dept 2008] held that the residential use of a premises was reasonably incidental to the religious purposes also carried out therein.

While *YWCA v. New York* (217 A.D. 406 [1st Dept. 1926], aff'd 245 N.Y. 562 [1927], might seem contradictory, the premises there included a cafeteria that was not only not open just to its members or residents, but in fact it served a decided majority of its meals at a profit to the general public. The Court properly held there that the profit-making nature of the restaurant, open not just to members of the charitable organization but to the general public as well, and whose business was mostly from the general public, was not incidental to the owner's charitable use, and thus a full tax exemption for the premises was not warranted. Here, in contrast, not only is any for-profit, public use by Dundish not the majority use, but it is very much the minority use, only 20% of the premises.

In sum, here petitioner, a non-profit corporation operating a senior residence, entered into an agreement with a for-profit corporation for the purpose of the latter operating a small (520 square feet, or barely over 20 feet by 20 feet) hair salon, the vast majority of the patrons of which are residents of the non-profit corporation's retirement home. The use, the providing of beautician services, is completely in accord with the purposes of the home's founding and operation, and, based on this and the minor part it plays in the operation of the premises, the Court finds as a matter of law that respondent has failed to demonstrate that this use is not reasonably incidental to the owner's charitable purposes pursued on the premises. Thus, the City should not have revoked the portion of the petitioner's exemption attributable to the beauty parlor use.

CONCLUSION

The Court finds that, as a matter of law, respondent did not meet its burden of showing, whether by a fair preponderance of the evidence or by a higher standard of proof, regarding the larger portion of the warehouse parcel, and the beauty parlor portion of the retirement home parcel, that the owning corporation did not use the real property exclusively for carrying out thereupon one or more of its religious purposes, and therefore that the respondent's revocation of the exemption was proper. The Court also finds that, as a matter of law, respondent did not meet its burden of showing, whether by a fair preponderance of the evidence or by a higher standard of proof, regarding the SUNY portion of the warehouse parcel, and the remainder of the retirement home parcel, that the real property at issue, while not so used by the owning corporation, was not leased or otherwise used by another corporation or

association organized or conducted exclusively for charitable, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes; or that the moneys paid for the use of the property exceeded the amount of the carrying, maintenance and depreciation charges of the property or portion thereof, and therefore that the respondent's revocation of the exemption was proper.

Upon the foregoing papers, and the trial held before this Court on submitted Stipulated Facts, Exhibits, and post-trial memoranda, it is hereby

ORDERED, that the petition by petitioner for an Order granting their petition seeking the grant of a charitable exemption pursuant to RPTL §§ 420-a, for the tax year 2002, is hereby granted; and it is further

ORDERED, that respondent City shall grant the tax exemption sought by petitioner pursuant to RPTL § 420-a, for the parcel designated on the City tax map as Section 40, Block 9, Lot 1, and known as and located at 50-58 Fulton Street, Middletown, New York, and for the premises designated on the City tax map as Section 40, Block 6, Lot 1, and known as and located at 60-78 Fulton Street, Middletown, New York, for the tax assessment year at issue in the instant petition, namely 2002; 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
June 9, 2009

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

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