

**Matter of DePaulis Enters. V Ltd. v Town of  
Clarkstown**

2014 NY Slip Op 33469(U)

November 17, 2014

Supreme Court, Rockland County

Docket Number: 6390/09

Judge: Margaret Garvey

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
In the Matter of the Application of  
DEPAULIS ENTERPRISES V LTD,

*Petitioner,*

**DECISION AND ORDER**

*-against-*

TOWN OF CLARKSTOWN, (Municipal Corporation)  
its ASSESSOR AND BOARD OF ASSESSMENT REVIEW,

Index Nos: 6390/09  
6737/10  
4968/11

*Respondents.*

(Motion #'s 1, 2 and 3)

**FOR A REVIEW UNDER ARTICLE 7 OF THE RPTL**  
-----X

Margaret Garvey, J.S.C.

The following papers, numbered 1 to 7, were considered in connection with the Notice of Motion (#1) filed by Petitioner seeking an Order granting partial summary judgment striking Respondents' trial appraisal, or alternatively, for an Order directing an Examination Before Trial (hereinafter "EBT") of the Town's assessor, and for such other and further relief as this Court deems just and proper; and were also considered in connection with the Notice of Cross-Motion (#2) filed by the Town of Clarkstown Respondents seeking an Order granting summary judgment in favor of the Respondents and dismissing the action, and for such other further relief as this Court may find just and proper under the circumstances; and were also considered in connection with the Notice of Motion (#3) filed by Petitioner seeking an Order granting summary judgment in favor of Petitioner and vacating the increased assessments, and for such other and further relief as this Court deems just and proper:

**PAPERS**

**NUMBERED**

- NOTICE OF MOTION (#1)/AFFIRMATION OF MARK F. GOODFRIEND, ESQ. DATED JUNE 16, 2014/EXHIBITS (A-H) 1
- NOTICE OF CROSS-MOTION (#2)/AFFIRMATION OF PAUL K. SCHOFIELD, ESQ. DATED JUNE 24, 2014 IN OPPOSITION TO PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF RESPONDENTS' CROSS-MOTION FOR SUMMARY JUDGMENT/AFFIDAVIT OF CATHY CONKLIN DATED JUNE 24, 2014/ EXHIBITS (A-D) 2

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REPLY AFFIRMATION OF MARK F. GOODFRIEND, ESQ. DATED JULY 16, 2014/EXHIBITS (I-N)	4
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Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Petitioner commenced the instant tax certiorari proceedings as follows: (1) a Notice of Petition and Petition under Index No. 6390/09 was filed with the Rockland County Clerk's office on July 6, 2009; (2) a Notice of Petition and Petition under Index No. 6737/10 was filed with the Rockland County Clerk's office on July 13, 2010; and (3) a Notice of Petition and Petition under Index No. 4968/11 was filed with the Rockland County Clerk's office on July 1, 2011.

The subject property consists of eight (8) tax lots of vacant and unimproved land, all located in the Town of Clarkstown. On June 17, 2008, the Town of Clarkstown re-zoned the subject tax lots to Active Adult Residential District (hereinafter "AAR"). Based on that change in zoning, the Town assessor increased the property's assessment. Specifically, in 2008, the 100% overall value of the whole property (all 8 lots) was approximately \$1,653,000, and in 2009, the 100% overall value of the property was approximately \$7,519,000 (an increase of approximately \$5,866,000).

Petitioner filed the first Notice of Motion (#1) on June 17, 2014, seeking an Order

granting partial summary judgment in favor of Petitioner and striking Respondents' trial appraisal, or alternatively for an Order directing an EBT of the Town's assessor. Specifically, Petitioner argues that Respondents' trial appraisal should be stricken on the grounds that the methodology used by the Respondents' appraiser was not permissible. It is undisputed that the Respondents' appraiser determined an overall value, while Petitioner's appraiser determined incremental value to be added to the existing assessment. Petitioner further argued that if the Court denied its application for partial summary judgment, then an EBT of the assessor would be necessary because her explanation for the assessment is inconsistent with the amounts on the assessment roll and the numbers she arrived at are mathematically inconsistent.

Respondents filed the Notice of Cross-Motion (#2) on June 24, 2014, seeking an Order dismissing the action pursuant to Civil Practice Law and Rules §§ 3211 and 3212. Respondents argue that the assessor reassessed all property that was designated in the AAR zone in a fair and reasonable and non-discriminatory manner. Respondents argue that the reassessment was applied even-handedly to all similarly situated properties. Respondents note that Petitioner does not set forth any specific examples of gross disparity in the assessed value of any alleged comparable property. Respondents argue that the Town did not act in bad faith and did not single out Petitioner for selective enforcement of tax laws that were equally applied to all similarly situated taxpayers in the AAR zone. Regarding Petitioner's request for an EBT of the assessor, Respondents object. Further, Respondents note that the land values included in Petitioners' appraisal are greater than the assessor's market value, so there is no issue concerning valuation because even Petitioner's Trial Appraisal reveals that the property is not over-assessed.

Respondents also submit an affidavit of the Town's assessor, who states that she developed a comprehensive, non-discriminatory plan for reassessment based upon the market value of any improvements determined by referring to a number of listed factors (including the zone change that occurred in this case). The assessor states that she raised the assessments

for every property that received an AAR zone change (newly created zone), and lists four other taxpayers who received increased assessments based on an AAR zone change during the relevant times.

Regarding the process of assessment review, the assessor states:

9. The Town of Clarkstown conducted a town-wide reassessment in 1985. The Town of Clarkstown's Assessor's Office has developed and implemented a comprehensive non-discriminatory plan for reassessment of real property based upon the market value of improvements determined by referring to all filed building permit and reviewing building plans and specifications filed with the Building Department, cost estimates submitted and other documents evidencing cost, rent rolls and income and expense statements, sale and property record card data, site/building inspections are performed and photographs taken and, where applicable, review of zoning board of appeals decisions, Town Board resolutions authorizing any zone changes and special permits, Planning Board records, reviewing multiple listing data, the Valuation documentation from the 1985 revaluation conducted by Robert J. Finnegan & Associates (an established assessment firm that performed the 1985 revaluation), information from neighbors, appraisers and title searchers, information from surveys and discussions with Town officials. Since I have been the assessor for the Town, I review all of this information before making changes in the assessment of real property.

...

12. This zone change fundamentally changed the subject property's classification. I then developed a comprehensive plan for reassessment of the subject property and all other similarly situated properties.

13. As a result of my review, I determined that it was necessary to raise the assessment of the subject property and every other property which received the AAR zone change so that these property owners would pay their fair and equitable share of taxes. There is no particular statutory methodology for determining the value of vacant land as long as the method undertaken results in a fair and equitable value of the property involved so that all the property owners contribute equitably to the public fisc.

14. Since the AAR was first created in 2007 and the Petitioner was first to receive the zone change, I did not have any AAR properties to use as comparable sales in reassessing the property. In reassessing the property, I used the existing land documentation from the 1985 revaluation and my knowledge from multifamily high density developments located in Congers in the Town of Clarkstown near the subject property. I also used the documentation from the 1985 revaluation to determine the value for the rezoned LS property.

15. The revised assessment of the subject property reflecting the AAR and LS zone resulted in a total assessed value for all eight (8) lots of \$2,124,000 for the 2009, 2010 and 2011 tax years. When the equalization rate is applied to the total of assessed value of the subject property for years 2009, 2010 and 2011, it yields a market value of \$7,518,584, \$6,963,934 and \$6,586,047, respectively. The correct assessment data and market value using the equalization rates for each individual lot is shown on page 27 of Respondents' Trial Appraisal prepared by Valuation Plus that is annexed hereto as

Exhibit "C."

16. As I indicated at the time of the increase of the assessment for the subject property, I also re-assessed all properties that were granted a zone change to AAR as they were granted.

Petitioner then filed its second Notice of Motion (#3) on July 10, 2014 seeking an Order granting summary judgment in favor of Petitioner and vacating the increased assessment, arguing that the subsequent submission of an additional summary judgment motion was based largely upon admissions made by the assessor in her affidavit submitted with the cross-motion. Petitioner argues that the Town selectively reassessed the subject property by making up a new property classification representing a separate and narrow class of similarly situated properties (AAR zone), while disregarding all other vacant lots. Petitioner notes that the property classification on the tax bill remains 311 (residential vacant land) and 330 (vacant land in a commercial area), and the assessor has conceded that there as no reassessment of all 311's or all 330's, just the four other properties with the AAR zone change. Petitioner also notes in further motion papers that the AAR zone is not a property classification recognized state-wide, rather it was implemented in the Town of Clarkstown as a floating zone for up to 800 units (Petitioner's property was approved for 320 units). Petitioner argues that if the Court finds that Respondents engaged in selective reassessment, then the assessment must be reduced to the 2008 figures.

In further motion papers, Respondents submitted an additional affidavit of the assessor, who states:

5. In paragraph 9 of my previous affidavit, I described the process of assessment review conducted by the Town of Clarkstown. I wish to clarify that as part of this process I examine both improved and unimproved property and such a plan has been in place since I have worked for the Town. Over the years, I have revalued many properties. If I learn that a parcel of vacant land has been affected with new zoning classifications or other governmental land use approval, then I will always analyze the impact of the change of the zoning classification or land use approval on the assessed valuation of the property. In the present case, the zone change fundamentally changed the subject property's classification and that alters my highest and best use analysis. Consequently,

the assessments for the 2009 roll and subsequent years were altered to reflect the new legal development potential. I did review land values in other existing high-density residential complexes and/or other similarly situated land values before determining the value for the subject property (and apparently, I was quite successful in this regard given that the respective appraisals for the subject property are in agreement).

During my tenure as the assessor, I wish to make clear that I have reviewed the assessments of every property which has received a zone change not just those properties which were rezoned AAR. This policy of reviewing zone changes has been consistently applied to any property which received a zone change. This is simply the standard way that assessors value real estate in accordance with Real Property Tax Law and ORPTS. In addition, such action promotes assessment equity in the Town. The opinions of Counsel for ORPTS and ORPTS' Valuation Standard provide guidance on how to value unused vacant land. See 10 Op of Counsel SBRPS No. 45 that is annexed hereto as Exhibit "E"; 11 Op of Counsel SBRPS No. 16 that is annexed hereto as Exhibit "G." These opinions and standards provide that the subject property, unimproved vacant land, must be valued at its highest and best use with no limitation for incremental value.

6. During my tenure as the assessor, I have always considered a zone change or change in use as a reason to cause an analysis to determine if the change had an impact on the value of the property. A zone change is not a mere "paper change" as petitioner claims, but rather affects the condition of the property and affects the value of said property.

It is a fundamental change because it changes the legal and probable use of the property. Before the zone change took place, the subject property was zoned LIO (Light Industrial Office). After the zone change, the AAR designation provided for the cluster development of up to 320 units and, therefore, permits an entirely different potential use. The AAR zone also provides that the zone change cannot be rescinded by the Town unless the project is not built within 2 years after final site plan approval. It should also be noted that parts of two (2) of the subject properties were subsequently rezoned to LS Shopping at the request of the applicant. A copy of the Clarkstown zoning provisions for the AAR zone is annexed hereto as Exhibit "H". A copy of the Clarkstown Town Code General Use Regulations for LIO Use Tables is annexed hereto as Exhibit "I." Clarkstown Town Code General Use Regulations for LS Use Tables are annexed hereto as Exhibit "J."

The ultimate purpose of valuation of property in a tax certiorari proceeding is to arrive at a fair and realistic value of the property involved so that all property owners contribute equitably to the public fisc. [*Allied Corp. v. Town of Camillus*, 590 N.Y.S.2d 417 (1992)]. "For purposes of real property tax assessments, property must be valued based upon its current use, not its highest and best use, except in the case of vacant land which is idle and put to no use whatsoever. In such latter case, the property may be valued on the basis of its highest and best use." [*Cooney Realty Co. v. Assessor of Town of Greenburgh*, 873 N.Y.S.2d 232, (Sup. Ct.

West. Cty 208) citing Adult Home at Erie Station v. City of Middletown, 801 N.Y.S.2d 776 (Sup. Ct. Orange Cty 2005) and Volume 10 Opinions of Counsel SBRPS No. 25, p. 3; see also, Sun Plaza Enterprises, Corp. v. Tax Com'n. of City of New York, 304 A.D.2d 763 (2d Dept. 2003)]

However, in the Second Department, in the absence of a Town wide revaluation program, real property may only be reassessed based upon the value of improvements. [Stern v. Assessor of the City of Rye, 268 A.D.2d 482 (2d Dept. 2000); AKW Holdings LLC v. Assessor of Town of Clarkstown, 819 N.Y.S.2d 208 (Sup. Ct. Rockland Cty 2006)].

Selective reassessment has been found to be a violation of the equal protection clause of both the United States Constitution and the New York State Constitution by the United States Supreme Court, as well as New York courts. [AKW Holdings LLC v. Assessor of Town of Clarkstown, 12 Misc.3d 1106(A) (Sup. Ct. Rockland Cty 2006) citing Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 344 (1989) and Nash v. Assessor of Town of Southampton, 168 A.D.2d 102 (2d Dept. 1991)]. Selective reassessment takes many forms and has also been referred to as "reassessment upon sale" or "improper assessment": (1) reassessment upon sale at market rate, (2) high coefficients of dispersion, (3) condominium conversions, (4) reassessments based on more than value of improvements, and (5) cases where the issue of selective reassessment has been raised but no equal protection violations have been found or the case is remanded for trial. [AKW Holdings LLC v. Assessor of Town of Clarkstown, 12 Misc.3d 1106(A) (Sup. Ct. Rockland Cty 2006)].

A municipal assessor who seeks to reassess individual properties, rather than the entire tax roll in a municipality, must be prepared to explain and justify the changes and should be prepared to offer proof of the assessment methodology in general so as to successfully withstand any challenge. [Matter of Carroll v. Assessor of the City of Rye, N.Y., 37 Misc.3d 1225(A) (Sup. Ct. West. Cty 2012)]. Further, any such reassessment should be conducted pursuant to a comprehensive written plan to insure that any such reassessments are applied even-handedly to all similarly-situated properties. [Matter of Carroll v. Assessor of the City of

Rye, N.Y., 37 Misc.3d 1225(A) (Sup. Ct. West. Cty 2012)].

In this matter, the relevant facts are not in dispute. The subject property received a zone change in June of 2008 to the AAR zone (and partially the LS zone). As a result of that zone change, the Town assessor reassessed the subject property. According to the assessor, the zone change resulted in a fundamental change to the property, and she *then developed* a comprehensive plan which was evenly applied to all properties that received the AAR zone change (total of five properties in the Town of Clarkstown). (Emphasis added). There has been no showing by Respondents of any equitable comprehensive written plan that was applied in this case, and Respondents concede that there was no town-wide revaluation in 2009, nor were all of the vacant properties in the 311/330 classifications reassessed in 2009.

While Respondents argue that the assessor's plan was evenly applied to all similarly situated properties, the facts before the Court show that the assessor carved out a separate sub-category of the overall vacant properties in the Town of Clarkstown to create a subclass of properties that comprised of tax lots owned by only five taxpayers. The Court does not find that the application of the reassessment to only four other taxpayers, where there were hundreds of other vacant parcels that were not reassessed, equates to an application to all similarly situated properties.

On the record before the Court, the Court finds that Petitioner has met its burden of proving its prima facie entitlement to judgment as a matter of law on the issue of selective reassessment. In opposition, Respondents failed to rebut said showing, and failed to raise any genuine issues of material facts that would require a trial on the issue. Since the Respondents failed to rebut Petitioner's showing of its prima facie entitlement to judgment as a matter of law on the issue of selective reassessment by proffering admissible evidence that the reassessments were lawful pursuant to an equitable comprehensive written plan evenly applied to all similarly situated properties, summary judgment is granted to Petitioner. [Stern v. Assessor of City of

Rye, 268 A.D.2d 482 (2d Dept. 2000)].

Accordingly, it is hereby

**ORDERED** that the Notice of Motion (#1) filed by Petitioner seeking an award of partial summary judgment and an Order striking Respondents' Trial Appraisal, or alternatively, an Order directing an EBT of the Town's assessor, is denied; and it is further

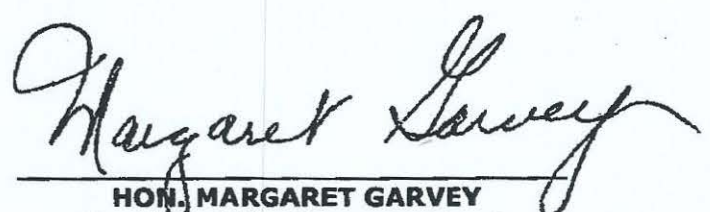
**ORDERED** that the Notice of Cross-Motion (#2) filed by Respondents seeking an award of summary judgment dismissing the action is denied; and it is further

**ORDERED** that the Notice of Motion (#3) filed by Petitioner seeking an award of summary judgment in favor of Petitioner on the grounds of selective reassessment is granted - the increased assessments in the 2009 tax year, the 2010 tax year, and the 2011 tax year are vacated - and the assessments shall be returned to the 2008 assessment for the relevant years; and it is further

**ORDERED** that in light of the Court's ruling, this matter is marked disposed.

The foregoing constitutes the Decision and Order of this Court on Motion #'s 1, 2 and 3 on Index No's. 6390/09, 6737/10, and 4968/11.

Dated: New City, New York  
November 17, 2014

  
**HON. MARGARET GARVEY**  
Justice of the Supreme Court

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