TAX CERTIORARI NEWSLETTER

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TOWN'S APPRAISAL OF PROPERTY REJECTED; NEARLY $5.5 MILLION REDUCTION IN ASSESSMENTS GRANTED

Matter of BAJ LP v. Assessor, Town of Goshen 5257/02 Decided June 3, 2008.

In 1992, BAJ proposed the construction of a residential development of 142 townhouses to the village of Goshen Planning Board. Though the town of Goshen approved the initial plans, by 2004, they had issued their SEQRA findings, a site plan and conditional use permit for only 116 townhouse units. However, the petitioner filed timely challenges to the assessments, and therefore taxes levied, on the instant property, claiming that because a significant amount of the property is wetlands and development had only been partially approved, valuation could only be done by the sales comparison method. Petitioner's expert compared the land to 4 similar cases, but the respondent's experts maintained assessments should be made based on amount of units the property could hold. The court ruled for the petitioner, stating that their evidence was based on "sound theory and objective data" and that the respondent's appraiser failed to make comparisons of the current status of the property as a single, mixed-use parcel. The assessment rolls were ordered to be corrected with a reduction of nearly $5.5 million.

LIPA EXEMPT FROM TAXES, ASSESSMENTS LEVIED PURSUANT TO PUBLIC AUTHORITIES LAW §1020-P

Long Island Power Authority v. Anderson, 015325/2007, Decided July 22, 2008, Supreme Court, Justice Warshawsky.

PLAINTIFF Long Island Power Authority (LIPA) moved for summary judgment in its action against defendant seeking a declaratory judgment exempting it from imposition of commercial sewer use assessments, fees and charges against the subject property. Defendants counterclaimed, alleging LIPA owed it money as a result of the assessments. The court found LIPA was exempt from taxes and assessments pursuant to Public Authorities Law §1020-p. It noted LIPA was required to make disbursements known as PILOT (payments in lieu) of taxes to municipalities negatively impacted by the removal of local properties from the tax rolls during LIPA's acquisition of the assets of LILCO in the 1990s. The court noted the property at issue was never owned by LILCO, but was a defunct mental hospital, such that even PILOTS were not required. It ruled the assessment levied upon LIPA by the sewer district fell within the category of taxes and assessments from which LIPA was exempt, hence the assessments were invalid. Judgment was granted in LIPA's favor.

NYPA'S ACQUISITION OF PROPERTY FOR POWER PLANT EXCEEDED EMINENT DOMAIN POWER, SET ASIDE

Matter of Steel Los III, L.P. v. Power Authority of the State of New York, Decided September 15, 2008.

Steel Los, III, L.P. ("Petitioner") challenged the New York Power Authority's ("NYPA") condemnation of its property to build a power plant as exceeding NYPA's power under the eminent domain statute. NYPA considered the condemnation of Petitioner's property to construct a 79.9 megawatt generating facility as vital to deal with the projected increase in demand for electricity on Long Island during the summer of 2005. As such, when the Petitioner

refused to sell its property, NYPA took the property via condemnation under EDPL §206(d) which permits such an action without public comment in emergent situations. In deciding the Petitioner's challenge, the court noted that NYPA planned from the outset to acquire the Petitioner's property. The court noted that while the plan for acquisition was clear, the need for it was not. The court found there was no public need for complete ownership and found NYPA's explanation of the emergency taking to be unconvincing. As such, the unauthorized acquisition was set aside.

COURT GRANTS PETITIONER'S MOTION TO RESTORE 1996-97 TAX PROCEEDING TO TRIAL-READY CALENDAR

Transtechnology Corp. v. Board of Assessors, 012256/96, Decided July 7, 2008.

Due to an excess of tax certiorari cases in Nassau County in the early nineties, the process for cases being judged was changed such that many cases were marked off the ready trial calendar. These cases could then be restored to the ready trial calendar upon the filing by the Petitioner of an appraisal, which happened in this case.

The respondents argued that the motion was made more than three years after the initial removal from the calendar. The court dismissed, this argument finding that there was no such rule. Pursuant to CPLR §3404, all that would be needed after the one year mark had passed, to restore a case, was to overcome the rebuttable presumption that the case was actually abandoned. Under the circumstances, it was evident that that the petitioner had not intended to abandon, as the petitioner had sought to engage respondents in settlement discussions between 2000 and 2007. The court granted the motion to restore the proceeding for the tax year 1996-97.

ROOSEVELT FIELD MALL NOT ENTITLED TO REDUCTION IN TAX ASSESMENTS FOR 2005-'06 – 2007-'08

Retail Property Trust v. Board of Assessors, 404067/2005, Decided July 25, 2008.

This case involved the review of the assessments on several lots which comprise a portion of the Roosevelt Field Shopping Center Mall located in Nassau County. The court agreed with both parties that the income capitalization approach to value was the most appropriate methodology for the valuation of the subject income producing property. The main concern of the court was the overall difference in the choice of capitalization rates between the parties which were 2.5 percent apart. The court considered many factors, such as the quality of the shopping center, the relatively low risk to an investor and the liquidity of the investment. The court adopted equity rates of 7.25 percent, 7.5 percent and 7.75 percent for the years under review. Based on these rates, the court concluded that the petitioner Retail Property Trust was not entitled to a reduction of the assessment for any of the three tax years under review and dismissed the petitions.

REAL PROPERTY: TOWN PROPERLY EXERCISED EMINENT DOMAIN POWER TO CONDEMN FARMLAND TO PRESERVE RURAL CHARACTER

Matter of Aspen Creek Estates Ltd. v. Town of Brookhaven, Decided December 4, 2007.

In December 2007, the Appellate Division, Second Department upheld the Town's decision to exercise its power of eminent domain to condemn property. The subject of this condemnation proceeding is a 39-acre parcel of farmland which the petitioner Aspen Creek Estates, Ltd., purchased for residential development. The property is located in a portion of the Town of Brookhaven known as the "Manorville Farmland Protection Area," which is an approximately 500-acre working farm belt that is a high priority preservation target for the Town.

Prior to initiating the condemnation action, the Town sought to acquire the property through a negotiated sale, both from previous owners, and the current owners, Aspen Creek. They were unsuccessful, after which, the Town began the process of acquiring the property and development rights through condemnation.

After hearings conducted pursuant to the Eminent Domain Procedure Law, the Town Board approved the condemnation of the property. In approving the condemnation, the Board declared that the property was being acquired, among other things, to preserve open space, scenic vistas and agricultural resources, protect and promote continuation of agriculture in the Town, ensure the continued sale of fresh, locally grown produce, and prevent conflicts between residential homeowners and adjacent farmers. Aspen Creek challenged the condemnation as a violation of the State's Eminent Domain Procedure Law by stating that the condemnation did not serve a public purpose and that the Town's true intent was to take the subject property to lease to private farmers.

The Second Department rejected both of Aspen Creek's claims, concluding that that the Town had clearly conferred a benefit upon the public, since it enables residents of the Town to enjoy locally grown produce and scenic views. There was no factual support to the allegation that the Town

wanted to bestow a private benefit on certain individuals. Appellate Division was upheld by the New York Court of Appeals on February 17, 2009.

TAX CERTIORARI – PRIVATE, NOT-FOR-PROFIT GOLF COURSE AND COUNTRY CLUB

Mill River Club v. Board of Assessors, NYLJ, Jan. 2, 2008, p.26, col.1, App. Div., 2nd Dept.

This appeal involved tax certiorari proceedings challenging assessments for the tax years 1997-1998 through 2005-2006 of four adjacent parcels of land located in upper Brookville, Nassau County, operated by the owner as a "golf course and country club." The experts agreed that the revenue the subject property could generate should be calculated by defining the property as a public or semi-private, for-profit golf course, which is how future income potential of a nonprofit golf course may be measured.

However, when the experts converted the estimated revenue into a market rent less administrative expense, their numbers "differed widely." The trial court adopted the county's approach, with some small changes, and decided that the petitioner had been under assessed for the tax years 1997-98 through 2002-03, but granted the petitions for the tax years 2003-04 through 2005-2006, thought the reductions were "modest." The petitioner either adopted or did not contest several factual findings made by the trial court, and the Appellate Division affirmed the trial court's decision.

CONDOMINIUM – TAX CERTIORARI – COURT ORDERS $60 MILLION ASSESSMENT REDUCTION RELATING TO TRUMP PARC CONDOMINIUM

In the Matter of the Application Trump Parc Condominium v. Tax Commission of the City of New York, Sup. Ct., N.Y. Co., Decided Nov. 14, 2007.

Petitioner challenged real estate tax assessments for the years 1994-95 through 2006-07 levied on the petitioner's condominium located at 106 Central Park South. There has long been controversy over how condominiums should be appraised in such cases, and they are generally assessed as hypothetical rental buildings, ignoring the sale prices of the units. In this case, rental values were assigned based on factors such as varying views and terraces, by using a similar building in the area as a comparison. The result is net operating income, which is "capitalized into value by dividing it by a capitalization rate, comprised of a base cap rate to which is added an effective tax rate to account for the property tax expense." Using these rent estimates, the petitioner's experts, compiled them into reconstructed rent rolls.

The respondent's experts, however, estimated monthly rent per room based on a small sample of the condominium subleases. The court found that such subleases were not comparable and too the petitioner's expert's estimates were more accurate. Accordingly, the court reduced the assessments by $60,316,043.

COURT ADOPTS MULTI-FACETED APPRAISAL APPROACH IN VALUING A MIXED USE BUILDING

Bertlesmann Property, Inc. v. Tax Commission, 206245/1995, Decided November 27, 2007

This tax certiorari proceeding examines the assessed values of a mixed-use building in Manhattan, which is divided into five condominium "units," each with a separate tax lot, for nine tax years. The five condominium units are used as follows: garage, theater, retail space (occupying two of the five lots), and office space, primarily occupied by the building owner. Both parties' experts adopted the income capitalization approach to valuation, agreeing it was the most appropriate for an office building which was seventy percent owner occupied. In valuing the office component, the court adopted the respondent's appraiser's comparable leases. Although the overall number of comparables were less than those relied upon by Petitioner's appraiser, the Petitioner's abundance of comparables were more suspect than the paucity of those relied on by Respondents and needed far less adjustments. In valuing the theater component, both experts agreed that the theater was severely disadvantaged by its inconvenient location resulting in a very negative market impact. Based upon this, the court concludes that the actual rents reported were best reflective of market value, however much below the value of comparable theater leases. Both experts agreed that the actual income reported for the garage component fairly reflected the market value. With respect to the retail component, the court adopted an average of the comparable rents found by respondent's expert and the actual rents found by petitioner's expert. As for the retail space, the Petitioner's expert relied on actual leases and when space was vacant, upon estimated rents based on actuals. The respondent's expert offered comparables. The court adopted an average of the comparables and of the actuals. After arriving at a value for the building, pursuant to RPL section 339-y[1](b) the court determined the value of each lot making sure that the aggregate of the assessments of the units did not exceed the total valuation of the property.

INDUSTRIAL DEVELOPMENT AGENCY – PROPERTY EXEMPT FROM AD VALOREM LEVIES

Matter of AG-II Acquisition Corp. v. Board of Assessors, NYLJ, Aug. 11, 2008.

Petitioner had purchased an industrial building and entered into an agreement with a town industrial development agency (IDA), pursuant to which the IDA acquired the title to the property and leased the property back to the petitioner. The IDA was tax exempt so that petitioner would not have to pay taxes, but instead agreed to make PILOT payments to the IDA.

Though the IDA is tax exempt, RPTL 412-a requires that the IDA apply for a real property tax exemption from the office of the assessor, which the IDA did. However, the application was left unsigned by the assessor. The application also had a specific section that "allows for special assessments and special ad valorem levies for which the parcel is liable," was left blank. A year after the agreement had been signed, the assessor advised the IDA that the property was not indeed exempt from special ad valorem levies. The petitioner argued that special district levies are taxes, regardless of what they are called, and property taxes are exempt pursuant to General Municipal Law 874-1. They also argued that the special district tax changes the contract and therefore is illegal.

The Board of Assessors (BOA) asserted that its claim for special levies on IDAs is not a new policy, but rather an enforcement of existing law. They also said that both the IDA and the petitioner had misunderstood the relevant New York Law and then misapplied it in their agreement.

GMC 874(1) exempts the IDA from paying taxes or assessments on properties it acquires and special district levies seem to fall within this tax exemption. The court also stated that the assessor had waived the right to claim special levies when he left the area in the application blank. Even if he had not done so, the precedent set over the past forty years affirmed that special levies are, de facto, exempted. Accordingly, the court ruled in favor of the petitioner, declaring that he was not responsible for the special district levies, that the assessor's determination was illegal and that ad valorem levies could not be charged.

TAX CERTIORARI: FAILURE TO FILE INCOME AND EXPENSE STATEMENTS

In the Matter of Eastgate Corporate Park, LLC v. Assessor, Board of Assessment Review of the Town of Goshen, et al., Decided September 30, 2008.

In six related tax certiorari proceedings, the petitioner appealed from an order of the Supreme Court, Orange County dated November 28, 2006. The petitioner had failed to comply with the mandatory language of 22 NYCRR 202.59(b) and (d)(1) by completely failing to file the required income and expense statements, and further by failing to timely serve those statements on the respondents before filing the notes of issue. The petitioner also did not make a showing of good cause to excuse the errors, and did not make any attempt to correct the defects within the strictly-enforced four-year period set forth in RPTL 718(2)(d). Accordingly, contrary to the petitioner's contention, the Supreme Court properly granted the respondent's motion to vacate the notes of issue and dismiss the proceedings, though Judge J. Spolzino dissented and voted to reverse the order appealed from and remit the matter to the Supreme Court for a new determination.

Representing petitioners, municipalities and school districts, we prosecute and defend real property assessments on large utility, industrial, and commercial facilities. Through a unique involvement in the appraisal of power generating facilities, the firm has close ties with a network of nationally recognized utility appraisers and engineering experts. Our attorneys have made numerous presentations on this specialized area of practice to both attorneys and appraisers.

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