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2009 SURVEY OF NEW YORK STATE TAX CERTIORARI, EMINENT DOMAIN AND REAL PROPERTY TAX EXEMPTION CASES

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Much transpired in 2009 in the fields of tax certiorari, eminent domain and real property tax exemptions. Specifically, the courts continue to explore the ramifications Kelo v. City of New London[1], the appropriate periods for the filing of tax assessment challenges, how to value newly constructed property, selective reassessment and how to value trade fixtures.

The Court Of Appeals

In Garth v. Board of Assessment Review for the Town of Richmond[2], a tax certiorari case in which the Court of Appeals concluded "that personal jurisdiction is not lacking in an RPTL article 7 proceeding where the petitioner omits the return date from the notice of petition". The court noted that setting a proper return date depends, in part, upon a given Judge's rules and that its decision only applied in situations "where petitioner is unable to designate a return date" and "we have no occasion to address the rules applicable to other types of special proceedings".

In Goldstein v. New York State Urban Development Corp.,[3] an eminent domain case involving the condemnation of private property to make way for the construction of the massive Atlantic Yards project featuring a sports arena for the New Jersey Nets, a majority of the Court affirmed noting that "The land use improvement plan at issue is not

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[1] Kelo v. City of New London, 545 U.S. 469 (2005).

[2] Garth v. Board of Assessment Review for the Town of Richmond, 13 N.Y. 3d 176, 2009 WL 3294962 (2009).

[3] Goldstein v. New York State Urban Development Corp., __N.Y. 3d__, 2009 WL 4030939 (2009).

directed at the wholesale eradication of slums, but rather alleviating relatively mild conditions of urban blight...It does not seem plausible that the constitutionality of a project of this sort was meant to turn upon whether its occupancy was restricted to persons of low income".

In Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven,[4] the Court affirmed a decision[5] upholding the condemnation of a 39-acre parcel within the Town's Manorville Farmland Protection Area in order to prevent its development as a residential subdivision which served the public purpose of preserving the largest and most contiguous belt of productive agricultural land and the historic rural character of that portion of the Town. Although the claimant contended that Kelo v. City of New London[6] required a preexisting farmland preservation plan to justify the taking, the Court held that the public benefits of the taking were not incidental or pretextual in comparison with benefits to favored private entities.

In Hargett v. Town of Ticonderoga,[7] an eminent domain case in which the condemnee earlier established that the condemnor "exceeded his authority in seeking to condemn certain real property"[8], the Court held "We...conclude that reimbursement for attorney's fees and other costs incurred by a condemnee may be sought pursuant to EDPL 702(B) after it is determined...that the condemnor lacked authority to pursue the proposed acquisition".

And in Matter of Lackawanna Community Development Corp. v. Krakowski,[9] a real property tax exemption case, petitioner, a non-profit New York State Community Development Corporation, filed a petition challenging the revocation of an exemption for a parcel which had been leased to a for-profit corporation. The Court found that the municipality had met its burden in justifying the revocation since it established that the sole activity occurring on the parcel was the for-profit activities of the lessee and that such activities were not reasonably incident to the petitioner's non-profit and charitable purposes.

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[4] Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven, 12 N.Y. 3d 735, 876 N.Y.S. 2d 680 (2009).

[5] Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven, 47 A.D. 3d 267 (2d Dept. 2007).

[6] Kelo v. City of New London, 545 U.S. 469 (2005).

[7] Hargett v. Town of Ticonderoga, 13 N.Y. 3d 325, 918 N.E. 2d 933, 890 N.Y.S. 2d 421 (2009).

[8] Hargett v. Town of Ticonderoga, 35 A.D. 3d 1122 (3d Dept. 2006), lv. denied 8 N.Y. 3d 810 (2007).

[9] Matter of Lackawanna Community Development Corp. v. Krakowski, 12 N.Y. 3d 578, 2009 WL 1616500 (2009).

Kelo Anyone?

In addition to the Court of Appeals affirming the Second Department in Goldstein and Aspen and the Second Department's further reliance upon Kelo in Matter of 49 WB, LLC v. Village of Haverstraw,[10] the First Department recently discussed Kelo as well. In In re Parminder Kaur v. New York State Urban Development Corp.,[11] a majority rejected "the acquisition by condemnation... of approximately 17 acres in the Manhattanville area of West Harlem for the development of a new campus for Columbia University...It is recognized that Kelo...did not concern an area characterized as 'blighted'. However, the blight designation in the instant case is mere sophistry. It was utilized by (defendant) years after the scheme was hatched to justify the employment of eminent domain but this project has always primarily concerned a massive capital project for Columbia ...The time has come to...reject eminent domain takings solely based on underutilization. This concept...transforms the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal".

Timely Tax Assessment Challenges

It is well accepted that tax assessment challenges should be made promptly so that municipal governments may operate more efficiently [see e.g., Press v. County of Monroe[12]]. In two cases, Cloverleaf Realty of New York, Inc. v. Town of Wawayanda[13] and Level 3 Communications, LLC v. DeBellis,[14] the Courts dealt with untimely claims. In Cloverleaf, the Second Circuit Court of Appeals essentially revived a tax assessment challenge to "a special assessment roll to fund improvements to the water and sewer district that included the (subject) parcels"[15] which had been dismissed in New York State Supreme Court as untimely applying a four-month statute of limitations [CPLR

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[10] Matter of 49 WB, LLC v. Village of Haverstraw, 44 A.D. 3d 226 (2d Dept. 2007)(the court annulled a condemnation project concluding that the true reason for the Village's proposed condemnation of private property was to assist the developer of a geographically distinct, already-approved, and apparently desirable waterfront project in meeting its required obligations to provide affordable, private scattered-site housing and to reduce its costs in doing so).

[11] In re Parminder Kaur v. New York State Urban Development Corp., 2009 WL 4348472 (1st Dept. 2009).

[12] Press v. County of Monroe, 50 N.Y. 2d 695, 704, 431 N.Y.S. 2d 394 (1980)(four month statute of limitations in assessment disputes enforced).

[13] Cloverleaf Realty of New York, Inc. v. Town of Wawayanda, 572 F. 3d 92 (2d Cir. 2009).

[14] Level 3 Communications, LLC v. DeBellis, 2010 WL 189573 (2d Dept. 2010).

[15] Id. at 572 F. 3d 4.

217]. In Cloverleaf the Court of Appeals held in a subsequent federal action pursuant to 42 U.S.C. § 1983 "that dismissal of a claim solely for lack of timeliness in a New York state court does not preclude the same claim from being brought in another jurisdiction with a longer statute of limitations, including a federal court exercising its federal question jurisdiction". And in Level 3 the corporate taxpayer installed, with the City of Mount Vernon's permission, conduits and fiber optic cables for the transmission of "signals for the benefit of customers...with facilities located elsewhere". Level 3 obtained a determination from the State Board of Real Property Services that its fiber optic cables were "special franchise property" and should be assessed for the four years in dispute at relatively modest sums ranging from $11,805 to $20,348. The City of Mount Vernon Assessor did not agree and assessed the fiber optic cables as "ordinary real property with a value of $425,000 for each of the subject tax years". The Court held that the State Board had exclusive jurisdiction and that RPTL article 5 "articulates a procedure for the correction of certain types of (assessment errors) and a three year statute of limitations applied instead of the much shorter limitation periods provided for in RPTL Article 7 (30 days) or CPLR Article 78 (4 months)."

Valuation At Market

How should newly improved property [i.e., newly constructed residential homes] be valued[16]? At market using comparable sales methodology or the actual costs [i.e., equalized value] of improving the property? In Carroll v. Assessor of City of Rye[17] the petitioner commenced construction of a residence on waterfront acreage that had been improved only by the existence of a storage shed located near the site of the new construction. When completed in 2005 the newly constructed property was assessed at its market value. The petitioner argued that the property should only be assessed based on actual construction costs incurred which, of course, was far below market value. On appeal, the Court affirmed, finding that, while the cost of construction is a significant indicator of value, at least in the years soon after construction, evidence of comparable sales, relied upon by the assessor in arriving at the assessed value, is generally the preferred measure of a property's value for assessment purposes. However, in David Weiner et al. v. Board of Assessors, Town of Harrison[18] petitioners'

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[16] See e.g., Young v. Town of Bedford, 37 A.D. 3d 729 (2d Dept. 2007), aff'g 9 Misc. 3d 1107, 2005 N.Y. Slip. Op. 51444 (West. Sup. 2005).

[17] Carroll v. Assessor of City of Rye, 60 A.D.3d 943, 875 N.Y.S. 2d 558 (2nd Dept 2009), aff'g Carroll v. Assessor of City of Rye, 24 Misc. 3d 1208, 2007 WL 6687667 (N.Y. Sup. 2007).

[18] David Weiner et al. v. Board of Assessors, Town of Harrison, 22 Misc.3d 257 (West. Sup. 2008), aff'd 2010 NY Slip Op 00694 (2d Dept. 2010).

motion for partial summary judgement, based upon selective reassessment[19], was granted, the Court determining that where the original, 3,600 square foot house was demolished and removed except for the foundation and portions of two of the original walls, both of which walls were utilized and expanded in the construction of a new, 7,800 square foot home, the work done did not constitute new construction, but rather an improvement to an existing structure. Based on the absence of proof of the existence of a comprehensive, municipality-wide reassessment plan[20], the Court ordered a new assessment, in which the equalized value of the improvements is to be added to the prior assessment to arrive at the proper valuation for the tax years at issue.

Valuation of Properties - The Assemblage

Assemblage is the combining of two or more parcels, usually but not necessarily contiguous, into one ownership or use to produce a larger site, with greater utility and increased value.[21] In property valuation the whole is generally greater than the sum of its parts. Interestingly, two recent cases illustrate that in the fields of tax certiorari and condemnation, valuation analysis by the claimants and municipalities, may become diametrically inverse, depending upon the type of action involved. The key dynamic in this process is that property taken in eminent domain must be valued at its highest and best use, while there is no such requirement with the appraisal of property in tax certiorari. Thus, in Matter of Village of Port Chester,[22] an Article 5 EDPL condemnation proceeding, the Court determined that an assemblage of properties had been engineered by the claimants in order to create a footprint capable of accommodating a large retail store such as a CVS drugstore, and rejected the opinion of the Village's appraiser that each of the properties should be valued individually on an "as is" basis. A contrary result was reached, however, in The Matter Of the Application of Ferry Landing, LLC,[23] an RPTL Article 7 tax certiorari action. There, with the exception of two parcels, the Town and Village appraisers, in order to transform seven separate tax lots

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19 See e.g., Young v. Town of Bedford, 37 A.D. 3d 729 (2d Dept. 2007), aff'g 9 Misc. 3d 1107, 2005 N.Y. Slip. Op. 51444 (West. Sup. 2005); Carroll v. Assessor of City of Rye, 24 Misc. 3d 1208, 2007 WL 6687667 (N.Y. Sup. 2007).

20. See e.g., Bock v. Town/Village of Scarsdale, 11 Misc. 3d 1052, 2006 N.Y. Slip Op. 50178 (West. Sup. 2006).

21 See generally, *The Appraisal of Real Estate,* The Appraisal Institute, 12th Edition (2001), at pp. 197-198.

22 Matter of Village of Port Chester, 2010 NY Slip Op 50532(U) [West. Sup. 2010, J. LaCava].

23 Matter of Ferry Landing, *LLC*, 20 Misc 3d 1145(A), 873 N.Y.S. 2d 232(Table)[West. Sup. 2008, J. LaCava].

on which numerous physical improvements and uses had been located, during the years in issue, into one large parcel of vacant land ready for development, inappropriately valued the remaining five parcels "as though vacant and available for development to their highest and best use" instead of on an "as is" basis, recognizing their current income producing condition and use. The "highest and best use" analysis (which concomitantly maximized tax revenues) used by the municipalities in determining the assessed value of the subject parcels was rejected by the Court, which ordered reductions in assessed value for each of the tax years by each of the municipalities, and appropriate tax refunds, plus interest.

Other Valuation Issues

Matter of Village of Port Chester (supra) also includes a complex analysis of the valuation of the subject properties by the Court, which utilizes and intertwines the income capitalization and comparable sales methodologies proposed by both assessors and modifies adjustments appropriately. The decision also awards consequential damages for the diminution in value to certain of the lots caused by blocked rear exit capability resulting from the post-taking construction of a Walgreen's Pharmacy by the developer and the Village.

In TBS Realty Management LLC v. Village of Hillburn, et al,[24] petitioners established entitlement to summary judgment by showing that the recent sale price of the property was negotiated in an arms length transaction, and therefore constituted the best evidence of its value. Here, the uncontradicted proof that petitioner participated in an arms length transaction was evidenced by the fact petitioner had no business dealings with the principals of the former owner prior to the sale, that they had not met prior to the closing of title, that all negotiations were conducted through a real estate broker, that both parties were represented by separate counsel, and that no unusual financing arrangements were involved.

In Mavis Tire Supply Corp. v. Town of Ossining,[25] the Court determined post-trial that substantial defects existed with regard to both parties' appraisals. Although the Court approved of petitioner's use of both the comparative sales and income capitalization methods, petitioner's methodology was found to be unclear both in his method of reporting average sales and in his computation of lease values.

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[24] TBS Realty Management LLC v. Village of Hillburn, et al, 26 Misc.3d 1212(A)[Rockland Sup. 2009, J. LaCava].

[25] Mavis Tire Supply Corp. v. Town of Ossining, 25 Misc.3d 1231 (A)[Westchester Sup. 2009, J. LaCava].

Respondent's decision to utilize only the comparative sales approach, and its appraiser's determination to reject an income capitalization approach with regard to the subject ("owner occupied") income producing property, was also rejected. The Court also found other deficiencies in respondent's appraisal such as numerous instances in which the appraiser under-reported the size (i.e. square footage) of comparable properties, which had the effect of generally raising the values of those properties. As a result, the Court was required to make corrections and/or adjustments to both parties' calculations in determining final indicated market values for the tax years at issue.

In G & J Realty v. Village of Spring Valley, et al,[26] despite evidence that the area surrounding the subject premises suffered from deteriorating conditions, claimant failed to establish "condemnation blight" by demonstrating any acts, much less unreasonable ones, undertaken by the Village which diminished the value of the property, and/or by failing to document the value of the property before the taking, and the diminution in value subsequent to the taking. The Court undertook a valuation of this mixed commercial/office property by reconciliation of income capitalization and sales comparison methods, with weighting to the former, but consideration of the latter, due to the common purchase of properties such as the subject for an owner-occupied business. The Court accepted claimant's income values for part of the property, while modifying the values downward for the remainder of the premises, and accepted the use of market expenses, but rejected condemnor's appraiser's reliance on national expense guidelines poorly suited for comparison to the subject property. The Court likewise accepted claimant's market analysis, which, when applied to the subject, yielded values within 10% of its income analysis. The Court also considered additional indicia of market value, including the equalized value of the property for tax assessment purposes, and the value which would have been generated had condemnor's appraiser not inappropriately used a tax-weighted figure in his income analysis.

Finally, Central Hudson Gas & Electric Corporation v. Town of Newburgh, et al,[27] incorporates a detailed analysis of the valuation of a gas and electric utility company's properties, including electric transmission lines and pipelines, transfer stations and substations, land values, transmission towers, wood poles, including consideration of the feasibility of "in house" construction by petitioner's employees verses cost incurred by use of an outside contractor with overhead and profit. The decision also contrasts the different valuation and appraisal methodologies utilized by petitioner and respondents,

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[26] G & J Realty v. Village of Spring Valley, et al, (Supreme Court, Rockland County, J. LaCava, May 18, 2009).

[27] Central Hudson Gas & Electric Corporation v. Town of Newburgh, et al, (Supreme Court, Orange County, J. LaCava, December 23, 2008).

including analysis of depreciation methodologies, functional obsolescence, and net salvage value, and gives a good summary of the law in this area.

Special Assessments - Municipal Improvements

In Cloverleaf Realty of NY, Inc v. Town of Wawaywanda,[28] respondent's motion to dismiss petitioners' Article 78 action challenging special assessments by the Town for water and sewer improvements to their properties was denied. Town Law §202 and §202(b) govern the assessment method for financing municipal improvements and generally provide that special assessments be imposed on a benefit basis, or where such benefit basis is not designated, in the same manner as other Town charges, or as may be ordered by the Town Board [§202(3)]. By various resolutions the Town created new water and sewer districts and projected the cost per parcel for water and sewer, noting that residential properties were to be assessed based on size, and commercial parcels based on assessed value with additional charges based on metered usage. The resolutions each also ordered that the expenses of the sewer and water improvements "...shall be assessed, levied, and collected...in just proportion to the amount of the benefit..." determined by the Town Board to be conferred upon the properties. Since a benefit based assessment was intended, and the current system instead indicates a flat rate as to residential and ad valorem valuation as to commercial properties, the Court determined that petitioners stated a cognizable cause of action with respect to the respondent's failure to tax on a benefit based method.

Improper Service - School Districts

RPTL §708(3) requires timely service of a copy of the petition upon the Superintendent of the District encompassing the property; failure to so serve, absent good cause shown, results in dismissal of the petition (see Landesman v. Whitton[29]. The lack of prejudice alone cannot supply the "good cause shown" to excuse a lack or failure of service as opposed to untimely or otherwise improper service (see Landesman, supra; Commons at Bon Aire Condominium v. The Town of Ramapo[30].

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[28] Cloverleaf Realty, Inc. v. Town of Wawaywonda, 25 Misc.3d 1218 (A), 2009 NY Slip Op 52185(U)[Orange Sup. 2009, J. LaCava].

[29] Landesman v. Whitton, 13 Misc. 3d 1216(A), Dutchess Sup. 2006, J. Dickerson, aff'd. 46 A.D.3d 827 (2d Dept. 2007).

[30] Commons at Bon Aire Condominium v. The Town of Ramapo, et al, 2009 NY Slip Op 51737(U), 2009 WL 2385382 (TABLE) [Rockland Sup. 2009, J. LaCava].

In Bon Aire, petitions for the tax years 2003-2006, served on the wrong, albeit neighboring, school district(s), were dismissed due to the lack or failure of service, while service of petitions for tax years 2007 and 2008 at the school district's business office, rather than at the Superintendent's personal office, were excused based on the lack of prejudice and for good cause shown, in this case the public dissemination of an address for the District that may not accurately have reflected the location of the Superintendent's office. Interestingly, in In the Matter of Harris Bay Yacht Club, Inc. v. Town of Queensbury,[31] the Third Department granted leave to re-serve, denied dismissal, and in effect found good cause and excused a lack of service, for exactly the same type of geographical error, i.e., serving the Superintendent of the wrong school district, that resulted in the dismissal of petitions or certain of the petitions in Landesman and Commons at Bel Aire. Following the rationale and holding of Harris Bay, the Supreme Court in Copley Court Condominium v. The Town of Ossining[32] determined that service upon the Ossining rather than the Briarcliff Manor Superintendent was inadvertent and excusable since the two school districts were adjacent to each other and located in the same Town of Ossining. Since there was also a finding of no prejudice, and leave to re-serve the proper superintendent was sought, the respondent's motion to dismiss the petitions was denied and leave to re-serve the proper school district was granted. The decision also distinguished the seemingly inapposite Bon Aire (supra) by indicating that not only did the facts differ, but that the petitioners therein had not sought leave of the Court to re-serve the petitions upon the proper superintendent.

In Wyeth Holdings Corporation v. Assessor of Town of Orangetown,[33] the subject property was an industrial complex consisting of ten parcels, five of which were in the Pearl River School District, and five in the Nanuet District. Petitioner served only the Pearl River Superintendent after making a good faith effort (outlined in the decision) to determine the proper school district (of the four which served the Town). The Court held that the well-meaning, but imperfect steps taken to notice the proper district constituted good cause, which, when coupled with the lack of prejudice to respondent, excused the geographical error and improper notice. In so determining, Court rejected Nanuet's claim of prejudice based upon the severe financial implications of a possible adverse

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[31] In the Matter of Harris Bay Yacht Club, Inc. v. Town of Queensbury et al., 46 A.D.3d 1304 (3 Dept., 2007).

[32] Copley Court Condominium v. The Town of Ossining (Supreme Court, Westchester County, J. LaCava, September 10, 2009).

[33] Wyeth Holdings Corporation v. Assessor of Town of Orangetown, 25 Misc.3d 1002, 885 N.Y.S. 2d 890, 2009 NY Slip Op 29387 (Rockland Sup. 2009, J. LaCava).

ruling. Wyeth's motion to validate, *nunc pro tunc*, the prior erroneous service was granted.

Finally, in Consolidated Edison Company of New York, Inc. v. The Town of Pleasant Valley[34] a motion was brought by intervenor school district to dismiss 2004-2008 petitions for improper service. Here, when tax certiorari petitions were mailed to the Arlington Central School District, whether addressed to the superintendent (2006-2008 petitions) and initially forwarded to his office, or addressed to the School District (2004 & 2005), the petitions were uniformly forwarded to the District's Business Office for referral to counsel. Therefore, based on its custom and practice, the District did not designate the superintendent of schools as the person to receive tax certiorari petitions, but, rather, designated its business office. Despite the district's policy and lack of prejudice herein, the 2004 & 2005 petitions were dismissed for lack of a showing of good cause to excuse the improper service, but the Court noted, as it had in Wyeth Holdings, Inc. (supra), that even upon dismissal, petitioner may seek leave to recommence the action pursuant to CPLR § 205(a); service of the 2006-2008 petitions upon the Superintendent at the district office was excused based on the Court's holding in Bon Aire Condominium (supra).

Selective Reassessment

Taxpayer challenges to the selective reassessment of real property have been the subject of much litigation, particularly, in the Second and Third Departments[35]. Selective reassessment has been referred to as "reassessment upon sale"[36] and "improper assessment "[37] and generally involves discrimination and a violation of equal protection[38]. In Harris Bay Yacht Club, Inc. v. Town of Queensbury,[39] following a "Town-wide revaluation" in 2005 during which a yacht club was assessed at $3,514,000, the

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[34] Consolidated Edison Company of New York, Inc. v. The Town of Pleasant Valley, et al., (Supreme Court, Westchester County, J. LaCava, September 24, 2009).

[35] See Dickerson, Real Property Selective Reassessment: Annual Method Best?, New York Law Journal, Jan. 5, 2006, p. 4.

[36] Siegel, Reassessment on Sale, New York Law Journal, August 2, 2005, p. 16.

[37] Schwaner v. Town of Canandaigua, 17 A.D. 2d 1068, 1069, 794 N.Y.S. 2d 233 (4th Dept. 2005).

[38] See e.g., Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336, 344, 109 S. Ct. 633 (1989); Corvetti v. Town of Lake Pleasant, 227 A.D. 2d 821, 823, 642 N.Y.S. 2d 420 (3d Dept. 1996); Matter of Fred Chasalow v. Board of Assessors, 202 A.D. 2d 499, 609 N.Y.S. 2d 27 (2d Dept. 1994).

[39] Harris Bay Yacht Club, Inc. v. Town of Queensbury, 68 A.D. 3d 1374, 891 N.Y.S. 2d 210 (3d Dept. 2009).

property was reassessed one year later at $5,081,100. The taxpayer challenged the 2006 reassessment as selective in nature with which the court agreed stating "It is unconstitutional for a municipality to selectively reassess real property without a rationale basis...an equal protection violation will be found when the assessing body isolates a particular property for reassessment and is unable to justify the changes with some legally recognized factor such as improvements...or equal application to all properties of a similar character".

And in Barnett v. Assessor of the Town of Carmel[40] the taxpayer challenged the reassessment of his residential property from $150,000 to $240,000 without any improvements having been made during the subject period. The Court, relying upon, inter alia, Bock v. Town/Village of Scarsdale,[41] found selective reassessment in that "the Town has failed to come forward with any facts to (explain) the reason for the increase in the assessment...and whether or not the Town is following an equitable, comprehensive, written plan directed to the revaluation of all of the properties in the Town". In Leone Props., LLC v. Board of Assessors for the Town of Cornwall,[42] the Court found that the increased assessment changes to the subject property were selective since they were made without providing an explanation for the increases and failed to provide details for the methodology utilized by the assessor or that a comprehensive reassessment plan was in place for all similar properties in the Town. In essence, the assessor's "comprehensive plan", in effect for over six years and without any cognizant termination date, was found to be an effort to update inventory records rather than one designed to reassess all properties in the Town.

In Jason and Donna Levitz v. The Assessor of the Town of New Castle,[43] the subject residential property, although subdivided into two zoning lots (one containing a residence and the other only a tennis court) was assessed as a single tax lot at $393,000. At or about the time of the sale of the property to petitioners, the respondent assessor (pursuant to the request of the former owner submitted prior to the 2007 sale) converted the parcel into a two-tax-lot condition, reducing the assessment of the residential lot to $370,000, but raising the assessment of the tennis lot to $160,000 (based upon his determination of its increased value in its now buildable status). This

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[40] Barnett v. Assessor of the Town of Carmel, 2009 WL 5412779 (Putnam Sup. 2009, J. LaCava).

[41] Bock v. Town/Village of Scarsdale, 11 Misc. 3d 1052(A), 414 N.Y.S. 2d 889 (West. Sup. 2006).

[42] Leone Props., LLC v. Board of Assessors for the Town of Cornwall, 24 Misc. 3d 1218(A), 2009 NY Slip Op 51511(U) (Orange Sup. 2009, J. LaCava).

explanation, however, was found to be factually incorrect, since for over 30 years the tennis 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 nor was it now more valuable, after the split, than before, occasioning the instant finding of selective reassessment in the valuing of the tennis parcel not for its current improvement, but for its building potential.

Trade Fixtures: Inconsistent Use

In Matter of West Bushwick Urban Renewal Area[44] the Court rejected a claim for compensation for the taking of trade fixtures consisting, primarily, of "fencing, gating, paving, curb cuts and a sidewalk for a parking lot" noting that "it is undisputed that the improvements on claimant's property must be removed for the highest and best use of the properties to be realized. Thus, the improvements are inconsistent with the properties' highest and best use as mixed commercial and residential properties...the claimants are not entitled to recover compensation for the trade fixtures".

Real Property Tax Exemptions

In Congregation Rabbinical College of Tartikov v. Town of Ramapo,[45] a non-profit religious corporation, sought the renewal of a religious exemption (pursuant to RPTL §420-a) for property on which a religious summer camp was operated for the benefit of petitioner, by an unaffiliated, for-profit contractor. The Trial Court held that while a for-profit concession may be operated for the benefit of a non-profit property owner, such operation must be incidental to the owner's non-profit use of the premises. Since the only use of the premises was the for-profit day camp, the exemption was denied. The Appellate Division reversed noting that "The crucial issue in determining whether property is tax exempt...is whether the primary or principal use of the property is a tax exempt purpose of its owner. The fact that the property is leased or licensed to other parties, or the fact that the owner derives some profit from the use of the property, does not defeat a tax exemption...Here...the plaintiff was closely involved in the operation of the religious summer camp, as evidenced by its approval of the camp's personnel,

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[43] Jason and Donna Levitz v. The Assessor of the Town of New Castle (Supreme Court, Westchester County, J. LaCava, September 10, 2009).

[44] Matter of West Bushwick Urban Renewal Area, 888 N.Y.S. 2d 525, 2009 WL 3381544 (2d. Dept. 2009).

[45] Congregation Rabbinical College of Tartikov v. Town of Ramapo, 23 Misc. 3d 1117 (Rockland Sup. 2009).

religious curriculum and purveyors of Kosher food. The operation of the religious camp was in furtherance of the principal use of the property for the plaintiff's corporate purposes"[46].

In Southwinds Retirement Home v. The City of Middletown, et al,[47] petitioner challenged revocations of previously enjoyed charitable tax exemptions to two properties, the "warehouse parcel" and the "retirement home" parcel, which were located directly across the street from each other. In the former, SUNY Empire State College leased a portion of the premises, and petitioner used the remainder to "warehouse" items for its own use. In the latter, portions of the retirement home premises were leased variously as an adult day care center, a dining hall occasionally used for lunch and dinner purposes by other non-profit organizations, and a beauty parlor, 80% of whose clientele were residents of Southwinds. The court granted the exemptions, finding that all leases with the exception of the beauty parlor were to other non-profit institutions (eligible themselves for exemption pursuant to RPTL 420-a [2]), and that the small beauty parlor, though a for-profit business, provided services (to the retirement home's residents) that were reasonably incidental to the owner's charitable purposes pursued on the premises.

In Matter of Legion of Christ, Inc. v. Town of Mt Pleasant,[48] the Court found that Petitioner, a not-for-profit religious corporation, was entitled to a real property tax exemption pursuant to RPTL 420-a(1) for privately owned premises that it purchased and leased to affiliated, financially interdependent religious organizations that used the premises exclusively for religious purposes to further the tax-exempt activities and intrinsic religious mission of their founding religious order. Additionally, even if the associated religious corporations were not determined to be a single organization for tax purposes, petitioner would still be entitled to a full tax exemption for the property under RPTL 420-a (2) since the amounts paid by the corporate lessee and sub-lessees for the religious use of the premises did not exceed the amounts of the carrying, maintenance, and depreciation charges incurred by petitioner on the property for the tax assessment years at issue.

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[46] Congregation Rabbinical College of Tartikov v. Town of Ramapo, 2010 NY Slip Op 03267 (2d Dept. 2010).

[47] Southwinds Retirement Home v. The City of Middletown, et al, *23 Misc. 3d 1138(A)*, 2009 NY Slip Op 51180(U) (Orange Sup. 2009).

[48] Matter of Legion of Christ, Inc. v. Town of Mt. Pleasant, 24 Misc. 3d 706, 2009 NY Slip Op 29176 (West. Sup. 2009).

Finally, in St. Francis Hospital v. Kathleen Taber, Assessor, Town of Poughkeepsie, et al,[49] petitioner's motion for summary judgement seeking a partial tax exemption (32% of the subject parcel)pursuant to RPTL 420-a was granted. The Court found that the leasing by the hospital of medical office accommodations at the medical office complex to its staff physicians, subject to its control and supervision, was reasonably incident to the non-profit hospital's primary activities.

[49] St. Francis Hospital v. Kathleen Taber, Assessor, Town of Poughkeepsie, et al., (Supreme Court, Dutchess County, J. LaCava, September 25, 2009).