

**2012 SURVEY OF NEW YORK CASE LAW: TAX CERTIORARI, EMINENT DOMAIN
AND REAL PROPERTY TAX EXEMPTIONS**

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Tax Certiorari Assessments

Procedural Issues

Matter of Board of Mgrs. of Century Condominium v. Board of Assessors, 96 A.D.3d 739 (2nd Dept. 2012)-Petitioner, a condominium manager, commenced RPTL Article 7 challenges to the assessment for its condominium complex for several tax years. However, several of the petitions failed to identify all of the condominium units in the complex; petitioner sought leave to amend the defective petitions, which motion was granted, and respondent appeared. The Court held that amendment was proper, where petitioner had, previously, correctly challenged assessment of all of the condominium units before Board of Assessment review, and in tax petitions for the same property for other tax years, but had inadvertently failed to challenge all of the same

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units in its RPTL Article 7 petitions for two of the tax years. Respondents would not be prejudiced by the amendment; in fact, their appraisal had appraised the property in its entirety.

Matter of Ontario Square v. Assessor, Town of Farmington, 2012 NY Slip Op 7547 (4th Dept, 2012)-Petitioner filed an RPTL Article 7 petition to challenge the real property tax assessment of the parcel at issue, but failed to timely serve the petition upon respondents. Respondents moved to dismiss, and petitioner responded by seeking additional time to serve. The trial court granted the motion and the 4th Department affirmed, finding that dismissal for failure of petitioner to timely serve under CPLR 306-b was appropriate. While RPTL §§ 704 and 708 set forth the general requirements for service and filing of a petition, they fail to specify the time for service of the petition upon the respondent, requiring reference to CPLR § 306-b. The latter section requires service within 15 days after the expiration of the applicable statute of limitations, in any special proceeding wherein the statute of limitations is less than four months. Here, pursuant to RPTL § 702, petitioner was required to commence the action by filing his petition within 30 days after the filing and completion of the assessment roll. Pursuant to CPLR 306-b then, he had 15 days thereafter to serve the petition upon the respondent. The trial court also properly held that the proper

remedy for failure to timely serve was to move (or in this case, to cross-move), for an extension of time to serve.

Discovery Issues

Matter of Aylward v City of Buffalo, 101 A.D.3d 1743 (4th Dept. 2012)-Petitioners commenced RPTL article 7 proceedings seeking review of their residential real property tax assessments. At trial, respondent sought to inspect their premises to prepare its defense, and the trial court required petitioners to move to preclude such inspections, which motions were denied. Petitioners appealed from the denial of their motions to preclude, contending the trial court should not have required them to move to preclude the inspections, but rather should have required respondents to move to permit the inspections. The appellate court reversed, finding that the trial Court should not have placed the burden on petitioner to move to preclude inspection, rather than requiring respondent to justify the inspection. In addition, the Court noted that where a respondent seeks an inspection of a premises, for which a tax challenge has been brought, the court must conduct a Fourth Amendment analysis which balances respondents' need for an interior inspection against the invasion of petitioners' privacy interest that such an inspection would entail.

Evidentiary Issues

Matter of Joy Bldrs., Inc. v. Conklin, 96 A.D.3d 939 (2nd Dept. 2012)-petitioner brought an RPTL Article 7 petition to challenge the tax assessment on a parcel. Upon petitioner's motion to dismiss, the trial court denied the motion and, after searching the record, granted summary judgment to the respondent. The appellate court agreed, summary judgment was properly denied on petitioner's motion for summary judgment, due to the failure of petitioner to meet its initial burden of demonstrating that the assessment improper. Further, the trial court properly searched the record to grant summary judgment to respondent, where respondent's moving papers showed conclusively that petitioner was unable to establish that the subject property, based on its use on the tax status date, was overvalued.

Matter of Matter of Rite Aid Corp. v Otis, 102 A.D.3d 124 (3rd Dept. 2012)-Petitioner is the lessee retail pharmacy.

Previously, a developer had built the nearly 14,000 square foot building on the property, and had sold the property in 2005 to an investor for approximately \$3.6 million. Petitioner subsequently brought RPTL Article 7 petitions to challenge the \$3.95 million

assessment for tax years 2008, 2009 and 2010. At trial, the parties stipulated that they would limit their proof to the 2008 proceeding and that the determined valuation would govern the 2009 and 2010 tax year proceedings. Supreme Court credited petitioner's expert appraisal proof, rather than the 2005 sale, and granted the petitions. Respondents appealed. The Court held that the trial determination of value was against the weight of the evidence, where it credited petitioner's appraisal over an arm's length sale of recent vintage of the subject, such sales being the best evidence of value.

Matter of Thomas v. Davis, 96 A.D.3d 1412 (4th Dept 2012)-petitioners commenced RPTL Article 7 proceedings to challenge the assessments of their mobile home park for several tax years. At trial, the court found that, although petitioners did demonstrate the existence of a valid and credible dispute regarding valuation of the multi-parcel property at issue, they nonetheless failed to meet their burden at trial. Petitioner appealed, and the Court affirmed. Petitioners' appraiser, it found, had employed both a market and an income approach, and arrived at reconciled values separate from those disclosed in the two methods, but he was unable to explain at trial how his reconciled values were arrived at. The Trial Court thus found that petitioners' appraiser violated Rule of Court 202.59 (g)

(2). The Court also found that the petitioners' appraiser had improperly rejected several recent parcel sales as best evidence of the value of those parcels. However, the Court also found that the trial court did err in failing to evaluate the entire record, namely the respondents' appraisals which constituted admissions against interest as to the values contained therein. The Court modified, reducing the assessments to the extent demonstrated at trial.

Exemptions

Procedural Issues

Matter of Foundation for Chapel of Sacred Mirrors, Ltd. v. Harkins, 98 A.D.3d 1044 (2nd Dept. 2012)-Petitioner not-for-profit entity, following purchase of the subject property, timely applied for a real property tax exemption for tax year 2009. Upon denial of the application, and a denial of the challenge to the assessment, petitioner sought relief under CPLR Article 78, and also pursuant to RPTL Article 7 alleged the assessment was excessive. Respondent moved to dismiss the Article 78 action. The trial court transferred, pursuant to CPLR § 7804 (g), the matter to the Appellate Division, which held that "unlawful" assessments subject to challenge pursuant to RPTL § 706 (1),

include, as here, an entry on the taxable portion of the assessment roll of the assessed valuation of real property, where the property is wholly exempt from taxation. While a taxpayer may only challenge an overassessment pursuant to RPTL Article 7, for the failure to grant an application for an exemption pursuant to RPTL § 420-a, an owner may seek judicial review pursuant to either RPTL Article 7 or CPLR Article 78.

Matter of Circulo Housing Development Fund Corp. v. Assessor of City of Long Beach, Nassau County, 96 A.D.3d 1053 (2nd Dept 2012)-petitioner, a not-for-profit corporation, filed applications for real property tax exemptions for two subject parcels, which applications were denied. Petitioner then brought an Article 7 petition to challenge the denials, which petition was dismissed on motion of the respondent, the trial court finding that the entity was not the owner of the parcels and thus lacked standing to bring the Article 7 petition. On appeal, the Second Department noted that, while any person aggrieved by an assessment may file an Article 7 petition challenging said assessment, pursuant to RPTL Article 5 only the owner of the property may file a complaint or grievance to gain an administrative review of the assessment. The taxpayer had demonstrated ownership of one of the parcels, and therefore that petition was improperly dismissed by the trial court. While the

taxpayer had failed to show, in its pre-RPTL Article 7 administrative complaint, that it was the actual owner of the other property at issue, the trial court did err in dismissing that Article 7 petition as well, since the entity did demonstrate that it was an aggrieved party and thus had standing. Nevertheless, that petition must be dismissed, due to the taxpayer's failure to demonstrate that the owner duly pursued a timely administrative challenge to the assessment, said challenge being a precondition to an Article 7 proceeding.

Matter of Long Is. Community Fellowship v. Assessor of Town of Islip, 95 A.D.3d 1128 (2nd Dept. 2012)-Petitioner timely filed an application with the local assessor seeking an exemption pursuant to RPTL § 420-a. Upon denial of that application, and the passage of the tax status date, petitioner filed an administrative challenge, asserting that it had actually intended to apply for an exemption pursuant to RPTL § 462 (the "parsonage" exemption), and included with its challenge an application for a parsonage exemption pursuant to RPTL § 462. The challenge was denied, and petitioner brought CPLR Article 78 and RPTL Article 7 petitions seeking relief. The trial court granted the Article 78 petition, finding that the municipality had violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). On appeal, the trial court was found to have erred in

finding a RLUIPA violation, since the taxpayer had been held to the same standard (a timely filed application) as other, non-religious taxpayers. Further, pursuant to RPTL § 462, an exemption from real property taxation may be granted only upon a timely application (namely, before the taxable status date) by the owner of the property on a form prescribed or approved by the Commissioner of Taxation and Finance. Petitioner had failed in both respects.

Matter of Zen Ctr. of Syracuse, Inc. v. Gamage, 94 A.D.3d 1490 (4th Dept. 2012)-Petitioner, the not-for-profit owner of a residential and dining facility for students of Zen Buddhism and visiting clergy, brought an Article 78 action seeking a declaratory judgment that it was entitled to an exemption pursuant to RPTL § 420-a for said facility, which judgment was granted. Respondent appealed, asserting that petitioner had failed to duly apply for said exemption, and that petitioner had failed to bring an RPTL Article 7 action to challenge the assessment. The Fourth Department held that there is no requirement that an application be filed to obtain an RPTL § 420-a exemption; a property owner seeking an exemption pursuant to that section may challenge the assessment pursuant to CPLR Article 78. In addition, a property owner also may challenge the denial of a mandatory exemption, pursuant to RPTL § 420-a, by

either an RPTL Article 7 action, or a CPLR Article 78 action. Here, petitioner had met its burden of establishing that the subject property was used exclusively in furtherance of its religious purpose.

Substantive Issues

Matter of W.O.R.C. Realty Corp. v. Board of Assessors, 100 A.D.3d 75 (2nd Dept. 2012)--Petitioner, a not-for-profit corporation, holds title to the subject property, some 239 acres of land with 283 seasonal cottages along with other improvements (including a marina), on behalf of the West Oak Recreation Club, its parent company, and the Club's 283 members, for the purpose of providing recreational facilities and a location for the social activities of the members. The Club members each own one of the 283 cottages on the property, but retain only a leasehold interest in the land upon which each cottage is situated. The cottages are purchased and sold only to Club members, or to those who successfully apply for Club membership. The Club collects dues from the members for providing staff, common maintenance, and amenities on the premises, and fees for the use of the boat slips at the marina, and the petitioner pays the real property taxes from collected membership dues. At trial, petitioner's appraiser employed the income capitalization method, considering

the property as if it were a rental apartment complex. His comparables were waterfront, water-view, or near-water cottages or small houses in Suffolk County. He also derived expenses from apartment complexes in Nassau County (since he was unable to gather expense data for Suffolk County properties.) Respondent's appraiser instead employed a market analysis, using 64 sales of cottages and small homes throughout the tax years at issue. He then arrived at a price per square foot value which he applied to the subject cottages. To this he added a value for the marina facilities, derived from an analysis of similar marina properties in Suffolk County. After respondent presented expert evidence that the ownership structure of the subject premises was most like a homeowner association, rather than a condominium or cooperative, petitioner presented rebuttal expert testimony that the subject was most like a cooperative. At trial, the court found that the petitioner's ownership of the property was more like cooperative ownership than a homeowners' association, and that it must be valued like other cooperatives as a rental apartment complex according to RPTL § 581; it then accepted petitioner's income approach and discounted cash flow analysis while rejecting respondent's comparable sales method. On appeal, the Court analyzed the expert proof on valuation at trial, and agreed that the operation of the property was more similar to that of a cooperative than a homeowners association. The Court

then found, as the trial court had, that RPTL § 581 required valuation as a rental complex, and it thus rejected respondent's market analysis and accepted petitioner's income capitalization method. As to the remoteness of the petitioner's income and expense comparables, the Second Department found that the trial court had properly weighed the expert testimony and was correct in accepting comparables that were not proximate to the subject. The Court also examined the allegedly below market rate marina comparables, and found their use supported by the expert testimony at trial. It thus concluded that the trial court was correct in finding that the subject was over-assessed, and that petitioner's values were adequately supported by the evidence.

Matter of Vassar Bros. Hosp. v. City of Poughkeepsie, 97 A.D.3d 756 (2nd Dept, 2012)-Petitioner not-for-profit hospital was the owner of a parcel containing an office building and a 699-car parking garage. Petitioner leased the building and the parking garage to a private entity, with the entity in turn sub-leasing the building to private physicians, and operating the parking garage. 250 parking spaces in the garage were allocated for use of the tenants, sub-tenants, and their visitors, with the remaining (449) spaces allocated for hospital employees and patients; however, of the 250 spaces, only 40 were reserved

exclusively for tenant and subtenant use, the remainder being available on a first-come, first-served basis. Subsequently the single building and garage parcel was divided by the municipality into two separate tax lots; while the building was fully assessed, the parking garage was accorded a full exemption. Petitioner challenged the assessment, and the valuation of the garage parcel, and moved for summary judgment; respondent cross-moved for summary judgment, seeking a determination that the garage was only partly exempt. The trial court granted the hospital's motion and denied the cross-motion. The Court, on appeal, held that property which is used principally or primarily for an exempt purpose is entitled to a full exemption, including those portions of the property that are put to uses which are reasonably incidental to, or in furtherance, of the tax exempt purpose. However, where portions of the property are not put to uses reasonably incidental to, or in furtherance of, the exempt purpose, only those portions of the property are taxable, and thus the property as a whole is only entitled to a partial exemption. Respondent, here seeking to revoke an exemption, had the burden to prove that the property is subject to taxation, which it met by showing that a portion of the parking garage parcel had been used by the private physician subtenants of the medical office building, which use of the garage is not reasonably incidental to, or in furtherance of, the exempt

purpose of the hospital. Thus the garage was found only entitled to a partial exemption.

Matter of Health Ins. Plan of Greater N.Y. v. Board of Assessors, 93 A.D.3d 795 (2nd Dept. 2012)-In a previous proceeding, the petitioner, a not-for-profit operating as an Health Maintenance Organization (HMO), had been determined to be eligible for a real property tax exemption for a prior tax year. Petitioners applied for the exemption on identical grounds, which application was denied by the respondents. Petitioner's motion for summary judgment was granted on the subsequent tax years, and respondent appealed. The Court examined RPTL § 486-a, which provides for exemptions for HMOs, and determining that "exclusive" use as required therein is the same as the "exclusive" use required under RPTL § 420-a, namely principal or primary use. Petitioner, on the motion, had made a prima facie demonstration of entitlement to judgment as a matter of law, and appellants failed to raise a triable issue of fact.

Matter of Matter of Ahavas Chaverim Gemilas Chesed, Inc. v Town of Mamakating, 99 A.D.3d 1156 (3rd Dept 2012)-Taxpayer, a religious congregation seeking to operate a camp on several of improved parcels which it owned, sought a real property tax exemption pursuant to RPTL 420-

a for those properties for several tax years, and brought CPLR Article 78 and RPTL Article 7 actions challenging the denials. Supreme Court granted summary judgment to respondents, and petitioner appealed. The Court held that a taxpayer seeking a review pursuant to RPTL Article 7 and CPLR Article 78, of the denial of an exemption application, bears the burden of proof as to whether it is entitled to the claimed exemption. Since petitioner's applications failed to establish that the property would primarily be for a religious use, it was thus rational for respondent to have denied petitioner's applications for tax exemptions for the parcels for the 2009 tax year. The Court also noted the failure of petitioner, or the party hired to operate the prospective camp, to have obtained a special permit for the contemplated (camp) use. While the owner's failure to apply for a use permit cannot be made a prerequisite to a RPTL 420-a tax exemption, where the applicant is taking good faith steps to renovate a property for an intended exempt use, the actual use of a property in contravention of local laws can be a valid basis for denying an application for a tax exemption. Regarding the 2010 tax year, petitioner's application had the same deficiency of proof on the matter of primary religious use of the property. While property not ready for an intended religious use may also be exempt prior to the use, to demonstrate that improvements (towards the use) are in "good faith contemplated", within the

meaning of RPTL 420-a, an applicant seeking an exemption must have concrete and definite plans for utilizing and adopting the property for exempt purposes within the reasonably foreseeable future. Here, there was a definite failure of proof of such plans. In addition, a contemplated secondary use of property for non-religious purposes will not defeat an application for a tax exemption, but only if such non-religious use is reasonably incident to the petitioner's charitable aims. Here, petitioner failed to demonstrate how the proposed hotel use was related to its religious purposes. Thus denial of petitioner's 2010 application was also proper.

Matter of Hudson Prop. Owners' Coalition, Inc. v. Slocum, 92 A.D.3d 1198 (3rd Dept. 2012)-Petitioner, a not-for-profit association of homeowners, and individual homeowners, brought CPLR Article 78 action against respondent assessor, alleging that tax roll was illegal since it was not assessed at a uniform percentage of value. The petition was dismissed by the trial court for failure to state a cause of action. The 3rd Department affirmed, finding that, where the petition merely asserted that the Assessor had performed a revaluation (or reassessment) that changed the assessments of approximately 90% of all real property located in the municipality from those in the prior tax year's tax roll, without substantial evidence of overvaluation as

related to individual properties, such as a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser, the petitioner was defective..

Matter of Paws Unlimited Foundation, Inc. v. Maloney, 91 A.D.3d 1173 (3rd Dept. 2012)-Petitioner, a not-for-profit animal welfare organization which ran a shelter on the subject premises, sought an exemption pursuant to RPTL § 420-a for the shelter and a fee based kennel which would also be operated on the property. Upon denial of the application, petitioner brought a challenge pursuant to CPLR Article 78, and moved for summary judgment, which motion was granted. The Court affirmed, finding that entities may receive an RPTL 420-a(1)(a) tax exemption where the entity is organized exclusively for the purposes enumerated in that section; the property is used primarily for the furtherance of such purposes; no pecuniary profit, apart from reasonable compensation, inures to the benefit of any officer, member, or employee of the entity, and the use is not a guise for profit-making operations. The mere charging of a fee for use of a premises, it held, will not defeat such a tax exemption, if the fee is "reasonably incident to" the entity's charitable aims (the operation of an animal shelter.)

Eminent Domain

New York Central Lines, LLC v State of New York, 2012 NY Slip Op 8704 (2nd Dept, December 19, 2012)-Claimants, a railroad line, filed a claim relating to a part permanent fee, part permanent easement, taking by the State of New York to expand the Brooklyn-Queens Expressway. At trial, although the parties agreed that the highest and best use of the property was as a rail corridor (its pre-taking use), condemnor sought to value the land pursuant to Reproduction Cost New Less Depreciation as a specialty. The trial court rejected that valuation methodology, however, as the evidence demonstrated that the property was not a specialty. Condemnor also sought to reduce the market value of the property to 15% of the estimated value, which the trial court likewise rejected as not supported by the facts, figures, and calculations of the condemnor's expert. Claimant's expert, supported by several scholarly articles on rail corridor valuation, sought to value the taking by utilizing comparable sales to arrive at a corridor value for the property which not only valued the "across-the-fence" value of the parcel but also the value of the corridor itself. The Trial Court accepted the use of a market analysis but rejected the proposed corridor valuation, and awarded \$ 12,104,106 in damages. The State appealed claiming the judgment was excessive, while the claimant cross-appealed,

arguing the award was inadequate. The Second Department dismissed condemnor's appeal but reversed as to the claimant's appeal, holding that the trial court's rejection of the corridor valuation was not supported by the evidence or adequately explained. It also held that the trial court improperly failed to award direct damages for the easement taking, which the Second Department determined from the trial evidence was 5% of the market value. The matter was remitted for a calculation of the value attributable to that 5% reduction, and for determination of the proper corridor valuation.

March 20, 2013

