

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CLOVERLEAF REALTY OF NEW YORK, INC.
and SUNRISE PARK REALTY, INC.,

Petitioner,

-against -

TOWN OF WAYWAYANDA,

Respondent.

-----X

LaCAVA, J.

DECISION/ORDER

Index No:
11710/2007
12613/2008

Motion Date:
7/9/09

The following papers numbered 1 to 13 were considered in connection with this motion by respondent Town of Waywayanda (Town) for dismissal pursuant to CPLR § 7804 (f) and § 3211 (a) 1 and 7 seeking dismissal:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF PETITION/AFFIRMATION	1
MEMORANDUM OF LAW	2
NOTICE OF MOTION/AFFIRMATION/MEMORANDUM OF LAW	3
MEMORANDUM OF LAW	4
VERIFIED ANSWER	5
AFFIDAVIT AND RETURN	6
3/26/09 LETTER BRIEF FROM JAMES G. SWEENEY, ESQ.	7
MEMORANDUM OF LAW	8
NOTICE OF PETITION/PETITION/EXHIBIT	9
NOTICE OF PETITION/PETITION/EXHIBIT	10
EXHIBITS	11
MINUTES	12
MINUTES	13

This is an action, pursuant to CPLR Article 78, seeking to challenge the special assessments by the Town for water and sewer improvements relating to parcels owned separately by petitioners Cloverleaf Realty of New York, Inc., and Sunrise Park Realty, Inc.

(collectively Cloverleaf). Cloverleaf alleges that the Town, rather than enacting special assessments on the basis of benefit accruing to the individual properties for the improvements, have improperly assessed the cost of the said improvements on an *ad valorem* basis. Cloverleaf challenged the assessments on two separate petitions in 2006, and on single petitions for 2007 and 2008; one of the 2006 petitions was previously dismissed (McGuirk, J., December 7, 2007) as untimely¹; subsequently, the remaining matters were transferred to this Court for resolution, and respondents have now moved pursuant to CPLR §7804 (f) and §3211 (a) 1 and 7 to dismiss.

Facts

As set forth above, petitioners own two parcels of land, designated in the tax map of the Town of Waywayanda as 4-1-36.22 and 6-1-72.2 (Cloverleaf and Sunrise, respectively.) At a public meeting held on April 5, 2001, the Town Board approved two Resolutions scheduling a public hearing on Sewer District #1 and Water District #1 on May 3, 2001. Said Orders, also dated April 5, 2001, each provided that the "...method of financing...to be employed will be the issuance of bonds, it being the intention that the entire cost is to be paid by the benefitted property owners....". At the May 3, 2001 public hearing on the Orders, the Board minutes reflect that the Town Engineer, Ross Winglovitz, stated what the projected cost per parcel for water and sewer would be, noting that residential properties were to be assessed based on property size, while commercial properties were to be assessed based on assessed value, and in addition that charges would also be levied based on metered usage. The Board then approved two Resolutions, establishing Water District #1 and Sewer District #1, respectively; the Resolutions incorporated by reference the April 5, 2001 Orders and their cost estimates, though without explicit reference to the proposed method of assessment relating to those costs.

At a subsequent Town Board meeting dated March 25, 2003, the Town Board approved two Resolutions setting an increase in the maximum amounts to be expended for Sewer District #1 and Water District #1. Said resolutions, also dated March 25, 2003, each

¹ Subsequently, petitioners brought the dismissed 2006 matter as a 1983 action (42 USC 1983) in Federal Court, asserting the existence of due process claims relating to the failure of the Town to properly notice them of the special assessments. While that action was dismissed at the District Court (*Cloverleaf et al. v. Waywayanda et al.*, U.S. District Court, S.D.N.Y., Brieant., J.), the Circuit Court (572 F.3d 93, 2nd Cir., July 15, 2009), held that the 1983 action in Federal Court is not barred by the expiration of the CPLR 217 limitations period for such actions.

Ordered that:

"...the expense of said facilities [i.e., the sewer and water improvements] shall be assessed, levied, and collected from the several lands or parcels of land within the District, so much upon and from each as shall be in just proportion to the amount of benefit which the Town Board determines said increase and improvement of the facilities shall confer upon the same...."

The Cloverleaf and Sunrise parcels were both wholly situated within the newly created Water and Sewer Districts. In 2006, following the assessment of the properties in the two Districts in the manner described above by the Town Engineer--i.e., by parcel size for residential properties, and *ad valorem* for commercial premises--petitioners objected to the assessments as unlawful, and have objected in each of the subsequent tax years, including the filing of the instant petitions.

Motion to Dismiss

Respondent has now moved, pursuant to CPLR § 7804 (f) and §3211 (a) 1 and 7, for dismissal of the 2007 and 2008 petitions. Respondent argues that the assessments here are supported by the strong presumption of regularity and legality, and that the assessment, in effect, a two-tiered assessment structure consisting of a flat-fee for residential properties and an *ad valorem* assessment for commercial parcels, merely signifies a judgment by the Town Board that residential and commercial properties are benefitted differently, and that the assessment method (as disclosed during the 2001 public hearing) merely reflects that legislative judgment. The Town also argues that any objection to the assessment formula is untimely, as any such objection should have been interposed at or shortly after the 2001 public hearing disclosing the formula.

Petitioners assert that Town Law §202 (2) requires that a special assessment be imposed on a benefit basis, and that, in any event, the Order which called for the Public Hearing (of May 3, 2001) specified that the assessment would be on that basis, as did the Order (of May 25, 2003) creating the Water and Sewer Districts. Consequently, since the assessments have been either on the basis of a flat rate (for residential parcels) or on an *ad valorem* basis (for commercial properties), petitioner argues that the assessments are unlawful.

Objections as to Law and Special Assessments

Town Law §202 provides:

2. The expense of the establishment of a sewer, sewage disposal, wastewater disposal, drainage or water quality treatment district and of constructing a trunk sewer or drainage system therein and of constructing lateral sewers, drains and water mains pursuant to paragraph (a) of subdivision one of section one hundred ninety-nine, and of constructing street improvements pursuant to section two hundred shall be borne by local assessment upon the several lots and parcels of lands which the town board shall determine and specify to be especially benefitted by the improvement, and the town board shall apportion and assess upon and collect from the several lots and parcels of land so deemed benefitted, so much upon and from each as shall be in just proportion to the amount of benefit which the improvement shall confer upon the same.

3. The expense of the establishment of a park, public parking, water, lighting, snow removal, water supply, water... district... and providing improvements or services, or both, therefor, and of constructing lateral water mains pursuant to paragraph (b) of subdivision one of section one hundred ninety-nine, shall be assessed, levied and collected from the several lots and parcels of land within the district for each purpose in the same manner and at the same time as other town charges, except as otherwise provided by law. In the event that any order adopted pursuant to section two hundred nine-d of this chapter for the establishment of a water district...or that any petition for the establishment of a water district...shall contain a statement that the cost of constructing the water system...shall be assessed by the town board in proportion as nearly as may be to the benefit which each lot or parcel will derive therefrom, the amount to be raised for the payment of the

principal and interest of the bonds issued for the construction of the water system... pursuant to such petition or order, shall be assessed on the lands within such district in the same manner as provided in the case of trunk sewers.

Regarding the manner in which sewer district financing may be accomplished, Opns. St Comp., 1985, no 85-69, states:

As a general proposition, there are two types of expenses which may be incurred by a sewer district: expenses related to the capital improvements of the district and maintenance expenses.

There are several authorized methods for raising funds to pay the two types of expenses. Capital expenses may be raised by assessments against the real property in the district which, in a sewer district, must be on a benefit basis (Town Law, §202[2]).

(Cf Opns St Comp, 1986 No. 86-52--

Any capital improvements made by a sewer district must be authorized pursuant to the provisions of section 202-b of the Town Law. The cost of such improvements must be assessed by the town board upon the property deemed benefitted in proportion to the benefit received, with a view toward equity and fairness (Town Law, § 202[2]; 1981 Opns St Comp, No. 81-301, p 325).

Furthermore, regarding water districts, Opns St Comp, 2003 No. 03-1 states:

Subdivision 3 of Section 202 generally provides that the expenses of establishing a water district are assessed, levied and collected in the same manner and at the same time as other town charges (i.e., on an "ad valorem basis"; see, e.g., 1991 Opns St Comp No. 91-10, p 24), unless the petition, in the case of an article 12 district, or the notice of hearing, in the case of an article 12-A district, states that the costs of constructing the water system will be assessed

in proportion as nearly as may be to the benefit that each lot or parcel will derive therefrom (i.e., on a "benefit basis"). Section 202(5) provides generally that the expense of an extension to a district is to be collected from "the several lots and parcels of land" within the extension on the same basis (ad valorem or benefit) as the original district; see also Opns St Comp, 1990 No. 90-61.

Generally, Opns St Comp, 1986 No. 86-10 states:

Section 202 of the Town Law provides for the manner in which assessments shall be raised in town special districts. Subdivision 3 of that section provides that a water district shall be established on an ad valorem basis unless the petition submitted pursuant to Article 12 of the Town Law requesting the establishment of the district, or the order of the town board adopted pursuant to Article 12-a of the Town Law for the establishment of the district, provides that the cost of district improvements shall be raised on a benefit basis.

Finally, regarding additional financing for such districts, Town Law §202-b provides:

1. Whenever it shall determine it to be in the public interest, after a public hearing as hereinafter provided, the town board may acquire or construct on behalf of a water, water storage and distribution, ambulance, sewer, sewage disposal or drainage district additional facilities therefor and appurtenances thereto, other than the construction of a lateral sewer, drain or water main authorized to be constructed pursuant to section one hundred ninety-nine, and including additional lands or interests in lands, or may improve or reconstruct existing facilities and appurtenances. The town board shall cause a map and plan of the proposed improvement together with an estimate of the cost to be prepared by a competent engineer duly licensed by the state of New York. When

the map and plan and estimate of cost has been completed, the town board shall call a public hearing thereon and cause a notice thereof to be published and posted in the manner prescribed in section one hundred ninety-three. Such notice shall describe in general terms the proposed improvement or the location of the lands to be acquired, shall specify the estimated expense thereof and state the time when and place where the board will meet to hear all persons interested in the subject matter thereof. If the town board shall decide, after such hearing and upon the evidence given thereat, that it is in the public interest to acquire or construct the proposed improvement, the board shall direct the engineer to prepare definite plans and specifications, and to make a careful estimate of the expense, and, with the assistance of the town attorney or an attorney employed for that purpose, to prepare a proposed contract for the execution of the work.

Any cost or expense incurred pursuant to the authority granted by this section shall be a charge against the district and assessed, levied and collected in the same manner as other charges against the particular district.

These Comptroller's Opinions, and, indeed, numerous others, recognize that Town Law 202 and 202-b (in the case of subsequent District improvements) govern the assessment method for financing municipal improvements. As set forth in greater detail above, at a Town Board meeting on March 25, 2003, two resolutions were approved setting an increase in the maximum amounts to be expended for Sewer District #1 and Water District #1. The resolutions each ordered that the expense of the sewer and water improvements were to be assessed "so much upon and from each as shall be in just proportion to the amount of benefit which the Town Board determines said increase and improvement of the facilities shall confer upon the same....". The board had previously Ordered hearings to establish the Districts, and specified in that Order a benefit basis for taxing and financing in that Order. The conclusion is thus inescapable that petitioner here properly objects to assessments on any basis other than benefit by these special districts.

Insofar as respondent argues the untimeliness of the petitions, the Court notes that, even given a prior expression by a municipal official (the town engineer) at a public hearing, any such expression is merely an inchoate statement of policy until such time as the special assessment is actually imposed by the District. Then, and only then, if the special assessment actually violates the law, will any action challenging it have matured, and any statutory period of limitation on such actions begin to run. In the case of each of the petitions herein, the 120 days within which to commence an action pursuant to CPLR Article 78 began to run on the date the special assessment roll was completed, namely in November of 2007 and 2008. These actions, commenced in December of those years, are thus both timely.

Dismissal Based on Documentary Evidence

The following, as found in *Scott v. Bell Atlantic Corporation* (282 A.D.2d 180, 183 [1st Dept., 2001]), is applicable to this motion:

In general, on a CPLR 3211 motion to dismiss, the pleading should be construed liberally, and the facts as alleged in the complaint are presumed to be true and are accorded the benefit of every possible favorable inference (CPLR 3026; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970). The applicable standard for determining a CPLR 3211(a)(7) motion is whether, within the four corners of the complaint, any cognizable cause of action has been stated (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Morone v. Morone*, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154). The test on a CPLR 3211(a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *IMO Indus., Inc. v. Anderson Kill & Olick, P.C.*, 267 A.D.2d 10, 11, 699 N.Y.S.2d 43).

As correctly argued by petitioner, pursuant to Town Law §202 and 202-b, respondent on April 5, 2001 issued an Order calling for a public hearing for the establishment of the two special districts at issue here. The Order specified that the "...method of financing...to be employed will be the issuance of bonds, it being

the intention that the entire cost is to be paid by the benefitted property owners....". Respondent then conducted a public hearing on May 3, 2001 at which two resolutions were approved regarding the Districts; while the method of financing is absent from those resolutions, they do incorporate by reference the prior Order, including specific reference to the method of financing for the improvements. Subsequently, on March 25, 2003, at a further public hearing to consider an increase in the cost of improvements for the Districts, a resolution setting forth clearly that the expenses of the sewer and water improvements were to be assessed "so much upon and from each as shall be in just proportion to the amount of benefit which the Town Board determines said increase and improvement of the facilities shall confer upon the same..." was adopted for each District. Thus, any special assessment must exclusively be according to benefit; respondent has failed to demonstrate that the documentary evidence, the Orders, Resolutions, or hearing minutes described above, conclusively establish a defense to petitioner's objection to assessment on any basis other than by benefit. Indeed, this documentary evidence indicates strongly that it may not be on any basis other than by benefit.

Dismissal For Failure to State a Cause of Action

In light of the above documentary evidence, which as set forth above indicates that a benefit-based assessment was intended from the very start, and that the current system of assessment is not benefit-based but a flat rate as to residences and ad valorem as to commercial property, it is clear that within the four corners of the complaint (*Guggenheimer*, supra), a cognizable cause of action has been stated with respect to the failure of respondent to tax according to the only method available here -- by benefit².

Based upon the foregoing, it is hereby

ORDERED, that the motion by respondent seeking dismissal pursuant to CPLR §7804 (f) and §3211 (a) 1 and 7 is denied.

² Any questions raised by respondent as to the assertion that the system employed here actually **is** benefit based, because it represents a legislative judgment as to the benefit according to the types of property, is best left to a summary judgment motion or to trial, but the Court notes that it would appear to be very difficult to reconcile any flat-rate or *ad valorem* assessment system with the requirement that taxes be assessed by the actual benefit accorded to each resident.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
September 30, 2009

HON. JOHN R. LaCAVA, J.S.C.

James G. Sweeney, Esq.
Attorney for Petitioners
One Harriman Square
PO Box 806
Goshen, New York 10924

Richard J. Guertin, Esq.
Attorney for Respondent
225 Dolson Avenue, Suite 303
PO Box 3046
Middletown, New York 10940

Michal T. Miano, Esq.
Kaufman Dolowich Voluck & Gonzo, LLP
Attorney for Respondent (#12613/08)
21 Main Street, Suite 251
Hackensack, New Jersey 07601