Case No.: 516152

To Be Argued By:
Brian M. Quinn, Esq.
(Time Requested: 10 Minutes)

New York Supreme Court

Appellate Division - Third Department

In the Matter of the Application of

HIGHBRIDGE DEVELOPMENT BR, LLC,

Petitioner-Appellant,

-against-

THE ASSESSOR OF THE TOWN OF NISKAYUNA, NEW YORK,

Respondent-Respondent,

-and-

SOUTH COLONIE CENTRAL SCHOOL DISTRICT,

Intervenor/Respondent-Respondent.

RESPONDENTS' BRIEF AND APPENDIX

Schenectady County Index Nos.: 2008-2498; 2009-1862; 2010-1829

TABNER, RYAN AND KENIRY, LLP
On behalf of Respondents
18 Corporate Woods Boulevard
Albany, New York 12211
(518) 465-9500

Table of Contents

Table of Authorities

Page

Statutes, Rules & Opinions

Counterstatement of Facts

In these RPTL Article 7 proceedings, Petitioner challenges its real property tax assessments [R 13-25].[1] The subject tax parcel consists of approximately 12.33 acres located in the Town of Niskayuna and County of Schenectady ("Property"), opposite the newly redeveloped Mohawk Commons [R 410].

Up until 2008, the Property was used as an elderly home and received tax exempt status [R 67-68, 377-378, 469]. In May 2008, Petitioner purchased the Property for retail development and paid $3,500,000 in a transaction reported as arm's length [R 132-133, 175-177, 194-205, 411, 456]. In connection with the sale, Petitioner apparently had a contractual right to sell the property (undeveloped) to an independent third party for $7.5 million [R 43, 65, 339-351]. After the sale, the Property was no longer used as an elderly home and lost its tax exempt status [R 67-68].

Petitioner thereafter commenced these proceedings for the 2008-2010 tax years [R 13-25]. The parties filed and exchanged appraisal reports. The parties' fair market value ("FMV") contentions, the assessments, and the equalization rates were as follows [R 68, 82, 102, 233-234, 331-332, 418-419, 435, 464]:

Year	Petitioner's FMV	Respondents' FMV	Assessment	Equalization Rate
2008	$1,300,000	$3,500,000	$3,100,000	100%
2009	$1,400,000	$3,500,000	$3,100,000	100%
2010	N/A	$3,500,000	$3.1/$3.5 million	100%

[1] References to "R" are to the Record of Appeal and "A" are to Respondents' Appendix.

During the proceedings, Petitioner sought to: (1) obtain summary judgment based on the subject building's condition and; (2) preclude Respondents' appraisal for its alleged failure to value the Property based on its current use [R 217, 260-263]. Respondents sought to dismiss the 2008-2010 petitions for procedural deficiencies [R 84-89, 272; A 20-27]. Supreme Court, Schenectady County (Reilly, Jr., J.), denied the summary judgment motion and reserved decision on the other two motions [R 9, 242-244].

At trial, both sides presented testimony from their appraisers [R 93-213]. Petitioner's appraisal report regarding the valuation date of July 1, 2008 ("2009 appraisal") and Respondents' appraisal report (regarding tax years 2008-2010) were both apparently received into evidence [R 55-57, 97-98, 370]. Petitioner's appraisal report containing the valuation date of July 1, 2007 ("2008 appraisal"), however, was received into evidence only for the limited purpose of challenging a certain location adjustment made by Respondents' appraiser [R 207-209].

After the trial, Judge Reilly: (1) denied Petitioner's motion to preclude; (2) dismissed the 2008 petition for Petitioner's failure to exhaust administrative remedies; (3) denied the 2009 petition for Petitioner's failure to establish an overvaluation by a preponderance of the evidence, and; (4) dismissed the 2010 petition for Petitioner's failure to comply with RPTL 708 (3) [R 7-12].

Petitioner now appeals [R 2-3].

Summary of General Legal Principles

"The ultimate purpose of valuation [in an Article 7 tax proceeding] is to arrive at a fair and realistic value of the property involved" (FMC Corp. v Unmack, 92 NY2d 179, 189 [1998] [internal quotation marks and citations omitted]). "The best evidence of value, of course, is a recent sale of the subject property ..." (id. [internal quotation marks and citations omitted]). "Recent sales of a subject property, if legitimate and arm's length, must be accorded significant weight in determining the value of property" (Matter of Bay Pond Condominiums v Town of Waverly, 195 Misc 2d 489, 494 [Sup Ct, Franklin County 2003]).

Where such evidence is lacking, however, "courts have appropriately valued property by utilizing [other valuation methods such as] the comparable sales method ..." (FMC Corp., 92 NY2d at 189). "By its very definition, a comparable sale need not be identical to the subject property. A comparable sale need only be sufficiently similar to serve as a guide to the market value of the subject complex, notwithstanding differences between these comparables and the subject property" (id. [internal quotation marks and citations omitted]).

Further, real property assessments are presumed valid, and the petitioner in a tax certiorari proceeding has the burden of proving that an assessment is erroneous by substantial evidence (see id. at 187; Matter of General Motors Corp. v Assessor,

Town of Massena, 146 AD2d 851, 853 [3d Dept 1989]; City of Troy v Kusala, 227 AD2d 736, 738 [3d Dept 1996]). In determining whether "substantial evidence" exists, a court should "determine whether the documentary and testimonial evidence proffered by petitioner is based on 'sound theory and objective data'" (FMC Corp., 92 NY2d at 188 [citation omitted]).

The trier of fact must examine the petitioner's case, standing alone, in determining whether the requisite burden of proof has been met (see 50 Front Street Corp., 73 AD2d 1022, 1023 [3d Dept 1980]). If the taxpayer fails to present sufficient evidence of an overassessment, "it is of no avail to assert claimed deficiencies in [the respondent's] appraisal" (see City of Troy, 227 AD2d at 738). "[T]he presumption, as well as the assessment, remain intact and the court is not even required to review the assessed value" (Carvalho v Bd. of Assessors, 2005 NY Misc LEXIS 3555, 234 NYLJ 115 [Sup Ct, Nassau County 2005] [citations omitted]).

If the petitioner meets this initial burden, however, the petitioner must then prove by a preponderance of the evidence that its real property has been overvalued (see FMC Corp., 92 NY2d at 188). Throughout the proceedings, the petitioner carries an affirmative burden to prove an overvaluation (see id.).

Argument

POINT I: THE ASSESSMENTS ARE SUPPORTED BY THE RECORD

Contrary to Petitioner's assertions, the assessments for the 2008-2010 tax years are fully supported by the record. In addition to the procedural deficiencies discussed below (Points IV & V, infra), Petitioner purchased the Property in 2008 for $3.5 million and failed to submit persuasive proof sufficient to justify a reduction in the assessments.

A. Petitioner Purchased the Property for $3.5 Million

"Recent sales of a subject property, if legitimate and arm's length, must be accorded significant weight in determining the value of property.... Recent sales, if not extraordinary, lessens the need of the appraiser or the court to engage in speculation" (Matter of Bay Pond Condominiums, 195 Misc 2d at 494; see e.g. FMC Corp., 92 NY2d at 189; Matter of Rite Aid Corp. v Otis, 102 AD3d 124, 126-127 [3d Dept 2012]; Matter of Thomas v Davis, 96 AD3d 1412, 1414-1415 [4th Dept 2012]).

Here, Petitioner purchased the Property by warranty deed dated May 30, 2008 for $3.5 million [R 132-133, 175-177, 194-205, 336, 411, 456]. The $3.5 million purchase price occurred in an arm's length transaction, which was negotiated between sophisticated parties. Both Petitioner (the buyer) and the seller acknowledged the nature of the arm's length transaction, and Respondents'

appraiser determined that no compulsion existed [R 132-133, 175-177, 194-205, 411, 456]. As such, this $3.5 million purchase price represents the best evidence of value (see FMC Corp., 92 NY2d at 189; Matter of JB Park Place Realty, LLC v Village of Bronxville, 50 AD3d 689, 689 [2d Dept 2008]; Reckson Operating P'ship, L.P. v Assessor(s) of Greenburgh, 289 AD2d 248, 249 [2d Dept 2001]).

To the extent Petitioner attempts to disclaim the nature of the arm's length transaction, such assertions are unavailing. Petitioner's appraisal contains no analysis of the recent $3.5 million sale and merely summarily characterizes it as one not at arm's length [R 11, 160-161; A 4, 11]. Such an analysis not only constitutes willful blindness as to the subject Property's valuation, but also disregards the mandates of 22 NYCRR 202.59 (g) (2), which require an appraisal's conclusions to be supported by facts, figures and calculations by which the conclusions were reached (see Pritchard v Ontario County Industrial Development Agency, 248 AD2d 974, 974 [4th Dept 1998]; Matter of Niagara Mohawk Power Corporation v Town of Tonawanda, 233 AD2d 920, 920 [4th Dept 1996]; see also Heinemeyer v State of New York Power Authority, 229 AD2d 841, 843 [3d Dept 1996]). Moreover, there is no evidence that any factors affected the arm's length nature of the sale [R 279-280] and, in any event, the court below was free to discredit any testimony from Petitioner's appraiser on this issue as unpersuasive.

B. Petitioner Offered No Evidence Regarding the 2008 Tax Year

In addition, Petitioner offered no evidence as to value in connection with the 2008 tax year. The 2008 appraisal, for example, was admitted only for a limited purpose, and Petitioner's appraiser essentially did not otherwise rely upon the 2008 appraisal during his testimony [R 209].

The 2009 appraisal, moreover, cannot be considered to value the Property for the 2008 tax year. It utilizes a taxable status date of March 1, 2009 and a valuation date of July 1, 2008 rather than the applicable taxable status and valuation dates for the 2008 tax year [R 305; A 3, 5] (see RPTL §§ 301; 302; 520 [2]). These dates affect the valuation and analysis, especially where, as here, the Property's condition allegedly changed from 2008 to 2009.

C. The Trial Court Properly Discredited Petitioner's Proof

Contrary to Petitioner's assertion, the court below properly discredited Petitioner's proof. Petitioner's appraiser failed to provide any meaningful analysis of the Property's sale in 2008 for $3.5 million [R 298, 306; A 1-19]. In addition, he relied solely on a sales comparison approach "based on properties that are not comparable to petitioner's parcel" (Norton Co. v Assessor of Watervliet, 3 AD3d 760, 761 [3d Dept 2004]).

Unlike the subject Property, sale 1 (allocated the "most weight") and sale 5 from Petitioner's 2009 appraisal involved properties being used for office use

and/or located in areas developed for office use; sale 2 (also allocated the "most weight") was a farm stand divided by a road; sale 3 was essentially provided no weight; and sale 4 was developed as townhouses, a use Petitioner's appraiser did not recommend for the subject Property [R 119, 142-145, 285; A 14-19].[2]

In addition, Petitioner's appraiser failed to make appropriate adjustments. Regarding the 2009 appraisal, Petitioner's appraiser made no location adjustment for sale 3, which was relatively inferior to the subject Property [A 16]. Sale 3 was located on Route 2 and possessed less exposure than (the subject Property's location on) Balltown Road and State Street in Schenectady [R 146-147, 411, 456]. Petitioner's appraiser also offered no explanation as to why he did not perform a trend adjustment for sale 1, which was sold in 2004 [A 14]. Moreover, even where adjustments were made, Petitioner's appraisal contains no facts, figures or calculations by which the adjustment conclusions were reached and, as such, it fails to comply with the requirements of 22 NYCRR 202.59 (g) (2) [A 19] (see Matter of Niagara Mohawk Power Corporation, 233 AD2d at 920; Pritchard, 248 AD2d at 974; see also Heinemeyer, 229 AD2d at 843).

D. The Trial Court Properly Credited Respondents' Proof

Contrary to Petitioner's assertion, Respondents presented a credible appraisal through their qualified expert [R 504-509], who performed a sales

[2] Petitioner did not include the 2009 appraisal in the Record on Appeal.

comparison approach based on comparable sales. As one of the comparable sales, Respondents' appraiser used the actual May 30, 2008 sale of the subject Property [R 456-464]. Respondents' appraiser also used other sales involving properties with unoccupied buildings. Sale 4, for example, involved a building that did not contribute to overall property value and was subsequently demolished; as in this case, after transfer, the purchasers sought to develop the property for commercial use [R 459]. Sale 3 similarly had a residence on the property of no significant contributory value [R 458].

Unlike Petitioner's appraiser, Respondents' appraiser also made appropriate adjustments and explained each adjustment in his appraisal [R 460-462]. After making the adjustments, Respondents' appraiser concluded that the recent $3.5 million purchase price of the subject Property was the "best indication" of the subject Property's value [R 463]. He also concluded that the "additional three sales analyzed and compared to the subject property generally bracket the value indication of the subject property" [R 463].

Accordingly, the assessments are fully supported by the record.

POINT II: THE COURT BELOW PROPERLY DENIED PETITIONER'S SUMMARY JUDGMENT MOTION

Petitioner argues that the court below should have granted it summary judgment for the 2008 and 2009 tax years [Petitioner's Brief, at 13]. This argument lacks merit.

A. Petitioner Ignores the Tax Status Date for the 2008 Tax Year

First, even if the building had been worthless after May 2008 based on its partial deterioration, this is irrelevant for the 2008 tax year, which was based on the condition of the Property as of March 1, 2008 [R 305-306, 377] (see RPTL §§ 302; 520 [2]). "Events occurring after [such] date, including the destruction of improvements, do not affect the assessed value of the property for that tax year" (Spiegel v Board of Assessors, 161 AD2d 627, 629 [2d Dept 1990]).

Here, because the land and the building were still being used as of March 1, 2008 (and were capable of being used for some time after the sale), Petitioner was "not entitled to a reduction in the assessed [value of its Property] by reason of the [alleged] destruction of the improvements thereon which occurred subsequent to the taxable status date" (id.) [R 57-58, 220, 223, 240 (advising the court of the Property's alleged condition for only March 1, 2009)].

B. Petitioner Did Not Seek Summary Judgment for the 2009 Tax Year

Second, contrary to its assertion, Petitioner did not seek summary judgment for the 2009 tax year. As evidenced by Petitioner's notice of motion and moving papers, Petitioner limited its motion to only the 2008 tax year [R 217-223] and, even if it had sought such relief, the motion would have been premature and procedurally improper because issue had not yet been joined for the 2009 petition at the time of the motion. In fact, the return date for Petitioner's summary judgment motion was September 11, 2009, well before the expiration of Respondents' time to answer the 2009 petition (returnable October 2, 2009) [R 17, 217] (see RPTL § 712 [1]).

C. Petitioner Submitted Insufficient Proof and Ignored the Recent Sale of the Property For $3.5 million

Third, Petitioner's proof on the motion was insufficient. "The valuation of assessed property is ... essentially a question of fact, the courts' principal task being to discern the most accurate estimation of value for the specific property before it" (Consolidated Edison Co. v City of New York, 8 NY3d 591, 595-596 [2007]). As explained above, a party seeking to overturn an assessment must first overcome this presumption of validity through the submission of substantial evidence (FMC Corp., 92 NY2d at 187-188). "In the context of a proceeding to challenge a tax assessment, substantial evidence will most often consist of a

detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser" (Matter of Niagara Mohawk Power Corp. v Assessor of the Town of Geddes, 92 NY2d 192, 196 [1998]). 22 NYCRR 202.59 (h) further provides that "any party who fails to serve an appraisal report as required by this section shall be precluded from offering any expert testimony on value."

Here, Petitioner relied solely on incompetent evidence, namely, an attorney affirmation, and submitted neither an appraisal report nor an affidavit of a qualified appraiser to substantiate its position.[3] Without an appraisal, it can hardly be said that Petitioner conclusively established the value of the property (see e.g. Eckerd Corp. v Gilchrist, 8 AD3d 876, 876 [3d Dept 2004] ["petitioner presented ample proof to avoid the summary disposition of the proceeding before it has had an opportunity to file its appraisal"]). This is evidenced by the fact that both appraisers at trial valued the property well above the $728,000 value sought by Petitioner on the motion, as well as the post-summary judgment statements made by Petitioner's trial counsel that "there is ... not only historical but substantial

[3] The attorney affirmation was from one of Petitioner's members, namely, Louie Lecce [R 219]. Attorney Lecce asserted that on or about May 30, 2008 the residents of the elderly home were moved to a new facility [R 220]. Sometime after May 30, 2008, Petitioner also removed trees and other matters on the property and left the property "vacant" and in a "dilapidated condition" [R 220]. Attorney Lecce also relied on a Site Development Permit Application filed March 12, 2009 and asserted that the Town was fully aware that the Property was not being used and that it was being torn down [R 219-223].

monetary value to [the] building" [R 61].

Further, Petitioner misplaces reliance on the reply affidavit it submitted from John Roth, a member of Petitioner who allegedly performed construction work [R 238-241]. Petitioner failed to properly identify the witness as an expert and, even assuming a person in the construction industry could opine as to value in an RPTL Article 7 proceeding, Petitioner's decision to supply the "evidence" through a reply affidavit (served one day before the return date [R 217, 241]) should be entirely disregarded: it deprived Respondents (who answered the moving papers) of the opportunity to provide an affidavit of a builder or appraiser in response to John Roth's belated assertions (see Seefeldt v Johnson, 13 AD3d 1203, 1203-1204 [4th Dept 2004]; Azzopardi v American Blower Corp., 192 AD2d 453, 454 [1st Dept 1993]; Dannasch v Bifulco, 184 AD2d 415, 417 [1st Dept 1992] ["The function of reply papers is ... not to permit the movant to introduce new arguments in support of, or new [documents or] grounds for the motion"]).

In any event, John Roth purported to opine solely about the building's value for the taxable status date of "March 1, 2009 for Tax year 2010" [R 240-241]. He did not provide any conclusion as to the value of the property as a whole and merely disagreed with the Assessor's opinion that the building had value. He also did not even discuss the recent sale of the property for $3.5 million referenced in Respondents' opposition papers [R 234], which, in fact, would have been a basis

for the court to award summary judgment in favor of Respondents (see Reckson Operating P'ship, L.P., 289 AD2d at 249; Meditrust C/O Conifer Park v Fahey, 226 AD2d 999, 1000-1002 [3d Dept 1996]).

D. Petitioner Improperly Sought to Challenge Only a Portion of the Assessment

Further, as Judge Reilly explained [R 242-244], RPTL § 502 (3) provides that "[o]nly the total assessment ... shall be subject to judicial review...." The purpose of this statute is to "prohibit review of either the land or the building assessment separately" and to dispense with the notion that "the assessed value of the land component [is] the maximum land value which [can] be assigned to the land in calculating total value" (Shubert Organization, Inc. v Tax Com. of New York, 60 NY2d 93, 97 n [1983]). As the Court of Appeals explained,

> "[e]ither value may be above or below or the same as the value fixed by the board of assessors; the only restriction on the judicial determination is that the total assessment it fixes cannot exceed the total assessment under review. Within the figure for total assessment, however, the components of value for land and improvement may be freely adjusted as warranted by the evidence" (id. at 97).

Petitioner further contends that RPTL § 502 (3) does not apply because Petitioner impliedly accepted the Assessor's value allocated for the land [Petitioner's Brief, at 16-17 (citing Sterling Estates, Inc. v Board of Assessors of the County of Nassau, 66 NY2d 122 [1985])]. Petitioner's contention lacks merit.

There is no evidence of any stipulation between the parties regarding the

value of the land. In fact, the 2008 and 2009 petitions seek a reduction well below the Assessor's value [R 15, 19]. In addition, the value allocation made by the Assessor is clearly insufficient by itself to prove any such stipulation; otherwise, RPTL § 502 (3) would be rendered meaningless (see Matter of Shubert Org., 60 NY2d at 96-97; Matter of Johnson v Kelly, 45 AD3d 687, 688 [2d Dept 2007] ["The petitioners' appraisal, rather than addressing the total acreage, only appraised the unimproved land portion of the property while ignoring the value of the improved acre and the improvements thereon"]; Matter of Young v Town of Bedford, 37 AD3d 729, 730 [2d Dept 2007] ["The petitioner improperly seeks to challenge a portion of the assessment"], affg 9 Misc 3d 1107[A], 2005 NY Slip Op 51444[U] [Sup Ct, Westchester County 2005]).

Moreover, "[t]he Sterling case does not change the requirement that the Petitioners have the burden of proof as to the total assessment and are required to submit an appraisal that addresses the total assessment and each of the component parts" (Johnson v Kelly, 11 Misc 3d 1081[A], 2006 NY Slip Op 50649[U] [Sup Ct, Orange County 2006], affd 45 AD3d 687 [2d Dept 2007]). Considering that Petitioner ignored evidence concerning the $3.5 million sale of the Property, did not submit an appraisal on its motion for summary judgment, and failed to even opine in any competent manner as to the overall value of the Property, the court below correctly denied Petitioner's summary judgment motion.

POINT III: THE PROPERTY'S CURRENT USE WAS THE SAME AS ITS HIGHEST AND BEST USE

Petitioner contends that Respondents' appraisal should be precluded because it values the Property on a highest and best use analysis rather than a current use analysis [Petitioner's Brief, at 11-12, 19-22]. Petitioner, however, offered Respondents' appraisal into evidence and therefore cannot challenge its admissibility [R 55-57]. Further, Petitioner fails to acknowledge that the current use was the same as the highest and best use in this case (see Club St. Agnello Abate of Amsterdam v State of New York , 68 AD2d 264, 265-266 [3d Dept 1979] ["highest and best use of the subject property was its then current use"]; Suffolk Cement Prods. v State of New York, 54 AD2d 804, 804 [3d Dept 1976] [trial court "found the highest and best use of claimant's property was its then current use"]; Lem v State of New York, 45 AD2d 805, 805-806 [3d Dept 1974]; Eleven Riverside Drive Corp. v Tax Commr. of City of N.Y., 2009 NY Misc LEXIS 4298, 2009 NY Slip Op 31706[U] [Sup Ct, New York County 2009] ["Both experts agreed that the highest and best use of the property is the current use"]; Matter of Vil. of Spring Val. NY v N.B.W. Enters. Ltd., 19 Misc 3d 1108[A], 2008 NY Slip Op 50603[U] [Sup Ct, Rockland County 2008] ["in analyzing the highest and best use for the subject premises, (the appraiser) concluded that said use was the current use"]).

Respondents' appraiser credibly testified that the current use in this case was the same as the highest and best use analysis that he employed [R 187-189]. He noted that the Property had ceased being used as an elderly home and was in the process of redevelopment [R 175-177, 189-190, 411, 456]. Because of this, he valued the property as if vacant pending development and used comparable sales such as the subject Property and others having buildings with no significant value [R 464 (applying the "Sales Comparison Approach as vacant land suitable for redevelopment with a retail orientation")].

Petitioner failed to submit any evidence to impeach this testimony. Petitioner's appraiser, for example, did not opine that the subject sales chosen by Respondents' appraiser were not comparable based on any reason related to a highest and best use analysis [R 105-114, 133-141]. On rebuttal, Petitioner's appraiser did not even address this issue [R 206-213].

In fact, Petitioner's evidence supported the testimony of Respondents' appraiser. Like Respondents' appraiser, Petitioner's appraisal applied the Sales Comparison Approach utilizing "a value of the subject property as if vacant and ready to be developed into a retail plaza use" [A 11]. Petitioner's appraiser relied on comparables involving sales of vacant property and those with conditions regarding the demolition of buildings [A 14-18]. Petitioner's appraiser also used vacant land data sheets to describe the terms of the comparable sales [A 14-18].

Like Respondents' appraiser, Petitioner's appraiser also valued the Property's improvements at $0; noted the deteriorated aspect of the building; and performed a sales comparison analysis as if the land was vacant [R 106, 171-172, 186, 204, 331, 376, 380, 384, 411, 450-451, 453-454, 456; A 1-19]).

Petitioner's contention that the current use and (Respondents') highest and best use are different in this case is further belied by the fact that Petitioner's 2009 appraisal (which purportedly relied on a current use analysis) utilizes three of the same "comparable" sales utilized by Petitioner's 2008 appraisal (which admittedly relied on a highest and best use analysis) [R 121, 306, 321, 324-330; A 14-18]. In fact, two of the sales (Nos. 1 and 2) from Petitioner's 2008 (best-use) appraisal were allocated the most weight in Petitioner's 2009 (current-use) appraisal [R 324-325; A 19].

Indeed, the methodology developed for Petitioner's two appraisals (one for highest and best use and the other for current use) are virtually identical. Petitioner's purported current-use appraisal for 2009 provides:

> "METHODOLOGY DEVELOPED - Because the condition of the subject property as of the taxable status date is already in transition to a retail plaza use, the highest and best use of the property as concluded earlier in this report is relied on to develop an estimate of market value. A land value, or a value of the subject property as if vacant and ready to be developed into a retail plaza use, is provided through the sole reliance on the Sales Comparison Approach" [A 11 (emphasis added)].

Likewise, Petitioner's highest and best use appraisal for 2008 provides:

> "METHODOLOGY DEVELOPED - Because the condition of the subject property as of the taxable status date cannot be determined for the current use, highest and best use is relied on. Interest in the subject property in its highest and best use was already expressed to the current owners. A land value, or a value of the subject property as if vacant and ready to be developed into a retail plaza use, is provided through the sole reliance on the Sales Comparison Approach" [R 322 (emphasis added)].

Further, even if highest and best use were different from current use in this case, Petitioner's argument lacks merit for two additional reasons. First, as discussed above, Petitioner's appraisal applied the same method as Respondents' appraisal and therefore both sides' appraisals would have to be precluded if there were any merit to Petitioner's assertion.

Second, a highest and best use appraisal is appropriate where the property consists of vacant land and/or contains worthless buildings (see 10 Opinions of Counsel SBRPS No 45; see also Matter of Dresser-Rand Co. v Assessor of Town of Erwin, 227 AD2d 890, 890 [4th Dept 1996]; Matter of Weingarten v Town of Ossining, 85 AD2d 697, 698 [2d Dept 1981]). Here, Petitioner asserted during these proceedings that the Property was "vacant" and possessed a worthless building [R 220, 240; see also A 8 (reporting that two thirds of the previously used facility "had been demolished and what remained was boarded up, not fit for

access nor use")]. Petitioner's appraiser also valued the building as $0 and in fact hypothetically demolished it [R 331; A 2-3, 13-19]. Under these circumstances, the highest and best use method would have been appropriate.

Accordingly, the court below properly denied the preclusion motion.

POINT IV: THE COURT BELOW PROPERLY DISMISSED THE 2008 PETITION

Contrary to Petitioner's assertion, the court below properly dismissed the 2008 petition because Petitioner failed to exhaust its administrative remedies prior to seeking judicial review.

It is well established that litigants must "address their complaints initially to administrative tribunals, rather than to courts and ... exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts" (Young Men's Christian Association v Rochester Pure Waters District, 37 NY2d 371, 375 [1975] [internal quotation marks and citation omitted]). A reviewing court may not usurp the agency's function and set aside an administrative determination on a ground that had not been presented to the agency because to do so would "deprive the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action" (id. [internal quotation marks and citations omitted]). This is especially true in tax cases, where "there is a traditional emphasis on strict compliance with procedures devised to maximize efficient

enforcement" (id. [internal quotation marks and citation omitted]; see e.g. Sterling Estates, Inc., 66 NY2d at 125-126).

Here, the 2008 Article 7 Proceeding was commenced on December 19, 2008, without any review by the Board of Assessment and before the assessment was made part of the final assessment rolls in 2009. Therefore, the court below properly dismissed the 2008 Article 7 Proceeding for Petitioner's failure to exhaust administrative remedies [A 23-24] (see Sterling Estates, Inc., 66 NY2d at 125-126; Cornwell v Town of Esperance, 252 AD2d 795, 796 [3d Dept 1998] ["A statutory prerequisite ... is the exhaustion of administrative remedies by timely filing a written complaint with respondent Board of Assessment Review"]; Lavoie v Assessor of Town of Kent, 222 AD2d 561, 562 [2d Dept 1995]; see also RPTL § 706 [2]; 512; 524 [3]). Contrary to Petitioner's assertion, RPTL § 553 does not dispense with this requirement (see RPTL §§ 520; 553; 702 [2]; 706 [2]; 10 Opinions of Counsel SBRPS No 21; see also Cornwell, 252 AD2d at 795-796).

Moreover, even if RPTL § 553 applies, Petitioner seeks to challenge more than the removal of the exemption in this proceeding (see Garv Realty Corp. v Gifford, 54 AD2d 578, 578 [2d Dept 1976]). In addition, Petitioner also failed to seek administrative and judicial review from a final determination of the assessor [A 23-24].

POINT V: THE COURT BELOW PROPERLY DISMISSED THE 2010 PETITION

Contrary to Petitioner's assertion, the court below properly dismissed the 2010 petition based on Petitioner's failure to comply with RPTL § 708 (3).

Under RPTL § 708 (3), in a special proceeding under Article 7 of the RPTL, "one copy of the petition and notice shall be mailed within ten days from the date of service thereof as above provided [to the clerk of the assessing unit or the assessor] to the superintendent of schools of any school district within which any part of the real property ... is located" (RPTL § 708 [3] [emphasis added]). The subsection further provides that the petitioner shall also mail notice within ten days "to the treasurer of any county in which any part of the real property is located" (RPTL § 708 [3] [emphasis added]). Once the school district and the county treasurer are notified, "[p]roof of mailing one copy of the petition and notice to the superintendent of schools [and] the treasurer of the county . . . shall be filed with the court within ten days of the mailing" (RPTL § 708 [3] [emphasis added]).

The statute further provides that "[f]ailure to comply with the provisions of this section shall result in the dismissal of the petition, unless excused for good cause shown" (RPTL § 708 [3]; see Matter of Harris Bay Yacht Club, Inc. v Town of Queensbury, 46 AD3d 1304, 1305 [3d Dept 2007]). An omission or mistake by an attorney, such as failing to mail a notice to the superintendent of the school

district, "does not constitute 'good cause shown' within the meaning of RPTL § 708 (3)" (Matter of MMI, LLC v LaVancher, 45 AD3d 1481, 1482 [4th Dept 2007]; see Matter of Gatsby Indus. Real Estate, Inc. v Fox, 45 AD3d 1480, 1481 [4th Dept 2007]). Under such circumstances, failure to comply with the statute may not be excused as a "procedural irregularity" because to do so would nullify the requirement of good cause shown (Matter of Gatsby Indus. Real Estate, Inc., 45 AD3d at 1481 [internal quotation marks and citation omitted]).

Further, good cause has been found "under the particular facts" of a case, when a petitioner complied with the statute, but made a factual, geographical mistake and notified an incorrect school district after "petitioner made a good faith effort to comply with the statute" (Harris Bay, 46 AD3d at 1306). However, the Third Department distinguished the error of timely mailing the notice, albeit to the wrong school district, from "a case of pure law office failure involving either no attempt to accomplish the mailing or a misreading of the applicable statute, resulting in mailing to the wrong party" (id. [citing cases]).

In this case, Petitioner concedes that it failed to timely serve the School District, yet asserts that the court below should have excused its noncompliance. However, unlike the petitioner in Harris Bay, and as outlined in Respondents' letter brief dated September 2010 [A 20-51], Petitioner did not otherwise comply with RPTL § 708 (3). In addition, Petitioner did not make a factual geographical

mistake after making a good faith effort to establish the correct school district. Rather, Petitioner knew that the South Colonie Central School District ("South Colonie") was the proper school district. In fact, it notified South Colonie of the 2008 Article 7 Proceeding by mailing the 2008 petition to South Colonie, which answered the petition, attended judicial conferences, responded to Petitioner's summary judgment motion and otherwise participated in the 2008 proceeding [R 26, 226, 270, 368; A 52-54]. Yet, despite its knowledge of the proper school district, Petitioner failed to properly notify South Colonie in either the 2009 proceeding or the 2010 proceeding. Instead, Petitioner attempted to notify the Schenectady City School District in the 2009 proceeding and a third school district, Niskayuna Central School District, in the 2010 proceeding [A 24-51].

Further, it is irrelevant whether or not South Colonie was prejudiced by Petitioner's failure to comply with the statute. "[N]oncompliance with the statute may not be excused on the ground that respondents have not been prejudiced thereby" (MM1, 45 AD3d at 1482 [citations omitted]). Actual notice of the proceeding will not excuse the failed notice because "there is no statutory exception to strict compliance with the provisions of RPTL § 708 (3) with respect to the absence of prejudice" (Matter of Gatsby Indus. Real Estate, Inc., 45 AD3d at 1481 [internal quotation marks and citation omitted]).

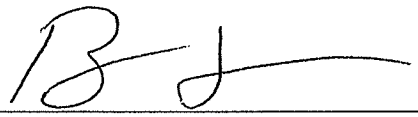
Further, contrary to Petitioner's assertion, the Town and County were not required to make repetitive requests for the same relief requested by the School District. The municipal respondents presented a joint defense in this case. They submitted a joint appraisal, collectively prepared court submissions, and relied upon the School District's counsel to appear and examine the witnesses at trial on their behalf [R 26, 226, 233, 297, 368]. As such, the Town and County properly relied on the School District to make the motion on their behalf.

Conclusion

The court below properly determined the procedural issues and merits regarding the subject petitions. In addition, the assessments are fully supported by the record, including the $3.5 million sale of the Property. Accordingly, Respondents respectfully request that the Court affirm the order of the court below.

Dated: December 9, 2013
Albany, New York

TABNER, RYAN and KENIRY, LLP



Brian M. Quinn, Esq.
On Behalf of Respondents
18 Corporate Woods Boulevard
Albany, New York 12211
Telephone: (518) 465-9500