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At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York, on the 18 day of FEBRUARY, 2011

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ALLEGANY

FREDERICK GRAM AND JANE GRAM,
Petitioners,

v.

DECISION and JUDGMENT

ASSESSORS OF THE TOWN OF CUBA AND THE BOARD OF ASSESSMENT REVIEW OF THE TOWN OF CUBA,
Respondents.

INDEX NO. 39265
(Allegany County)

APPEARANCES: J. MICHAEL SHANE, ESQ., for Petitioners
DAVID T. PULLEN, ESQ., for Respondents

PAPERS CONSIDERED: The NOTICE OF PETITION and the PETITION, with annexed exhibits;

the VERIFIED ANSWER, with annexed exhibits, including the AFFIDAVIT OF CHAIRMAN OF ASSESSORS; and

the AFFIRMATION OF ATTORNEY J. Michael Shane, Esq.

Petitioners are owners of a single-family residence or "cottage" located at 357 North Shore Road in the Town of Cuba (Town), Allegany County. By this proceeding, which is in its form an article 78 proceeding brought pursuant to Real Property Tax Law (RPTL) § 736 (2), petitioners seek judicial review of the September 29, 2010 determination of a hearing officer, Dominic S. Telesco, rendered in a proceeding for small claims assessment review (SCAR) brought by petitioners pursuant to title 1-a of RPTL article 7 (§§ 729-739). The SCAR petition (like the instant article 78 petition) sought review of the assessment placed on petitioner's property for the 2010 tax year, which assessment had been set by respondent Assessors of the Town of Cuba (the assessors) at $188,000, up from the previous year's tax year's assessment

of $115,000.[1] The SCAR petition was filed by petitioners following their unsuccessful attempt to obtain a reduction in their assessment from respondent Board of Assessment Review of the Town of Cuba (the BAR). Before the BAR (as before the hearing officer), petitioners had sought the reduction of their assessment from $188,000 to $95,000, but the BAR, like the assessors before it and the hearing officer after it, found the property to be properly assessable at the $188,000 level. By their complaint pursuant to RPTL § 524, and further by their presentation to the hearing officer in the SCAR proceeding, petitioners have framed their challenge as going to the alleged excessiveness (as opposed to inequality or illegality) of their assessment.

The operative allegation of the article 78 proceeding, which respondents generally deny, is that the hearing officer lacked a rational basis for his determination to uphold the assessment at $188,000. Petitioners seek an order vacating that determination and directing the hearing officer to grant the relief sought in the petition.

The Court understands from presiding over this and certain parallel litigation that the subject property is located on the shore of Cuba Lake, in an area designated by the taxing authorities as Neighborhood Code 50. The Court further understands that some properties in that neighborhood consist in whole or in part of lands that are owned in fee by the State of New York (State) but leased by the State to private citizens for residential purposes. Although the lands now typically are leased for short terms, lease renewals are routinely granted, and thus the private tenants have erected on such lands and occupy and enjoy such individually owned improvements as residences (some seasonal but some occupied year-round) and residential outbuildings and other structures, including driveways, garages, sheds, boat docks, walls,

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[1]According to the materials before the Court, property in the Town is assessed at 100% of its value.

fences, etc.[2] The Court understands that the situation presents unique assessment/valuation issues inasmuch as the State-owned lands are clearly exempt from real property taxation (*see* RPTL § 404 [1], 490; *Matter of New York State Teachers' Retirement System v Srogi,* 84 AD2d 912, 913 [4th Dept 1981], *affd* 56 NY2d 690 [1982]; *see also Boardman v Town of New Windsor,* 39 AD3d 853, 854 [2d Dept 2007]) and further inasmuch as any leasehold interest in such lands constitutes an item of personalty that likewise is not properly taxable (*see Fort Hamilton Manor, Inc. v Boyland,* 4 NY2d 192, 197-198 [1958]; *Matter of Grumman Aircraft Eng'g Corp. v Board of Assessors of Town of Riverhead,* 2 NY2d 500, 507 [1957], *cert den* 355 US 814 [1957]). The Court further understands, however, that any permanent taxpayer-owned improvement to the State-leased lands constitutes an interest in real property that is properly taxable at whatever the actual value of such improvements might be (*see Fort Hamilton Manor, Inc.,* 4 NY2d at 198; *Black River Ltd. Partnership v. Astafan,* 166 AD2d 914 [4th Dept 1990], *appeal dismissed* 77 NY2d 834 [1991]; *Matter of Lupo v Board of Assessors of Town of Huron,* 10 Misc 3d 473, 481 n 6 [Sup Ct Wayne Co 2005]; *see also New York Mobile Homes Assn. v Steckel,* 9 NY2d 533, 539-540 [1961]; *see generally* RPTL § 300), certainly taking into account their particular location on lakefront or lake view lands (owned by whomever) and any other factor reflecting on the desirability and hence the value of those improvements.

According to evidence adduced before the hearing officer, petitioners' property, primarily meaning their 2016-sq.-ft. or 2160-sq.-ft., two-story, nine-room, three-bedroom, 1½-bath

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[2] The record suggests that the leases typically are for three-year renewal periods and call for payment of nominal rents of hundreds of dollars per year, that such lease renewals are offered only to the current owners of the improvements located on the leased lands, that the tenant is typically denied any right to remove any of the owned improvements during or at the end of any lease term, and that (as elucidated herein) there is a market for the resale and purchase of the owned improvements and the corresponding right or expectancy to occupy, use, and enjoy the property (i.e., the leased land and improvements) for any remaining years of a current leasehold term and for any renewal term.

residence, was constructed in 1915. As so constructed, the house has two fireplaces but no basement, air conditioning, or central heating system. A 120-sq.-ft. enclosed porch was likewise constructed in 1915, as was a 200-foot stone wall. Other permanent improvements to the property include an 8 x 10' machine shed constructed in 1920, a 24' x 30', two-car detached garage constructed in 1930, a 14' x 40' machine shed constructed in 1960, and a 312-sq.-ft. stake dock constructed that same year. The Court understands from petitioners' presentation before the hearing officer that their property consists of a parcel owned in fee and two lots leased to them by the State. The Court further gathers from petitioners' presentation that petitioners take no issue with the $7500 assessment placed on the (apparently unimproved) fee parcel (identified as tax parcel 153.10-1-32), and that this proceeding concerns only the validity of the assessment placed on the remaining property, which is to say the improvements on the State-leased lots aggregating .77 acre (identified as tax parcel 144.22-1-356). Petitioners purchased their interest in the property in 1981 for $72,000.

Petitioners' written presentation before the hearing officer consisted of three documents: 1) a July 8, 2010 market-value appraisal by Thomas P. Butler; 2) an inventory and reproduction-cost valuation of the improvements on the parcel; and 3) a Memorandum of Law.

The real estate appraisal of Butler had as its object to show that the market value of the taxable portion of the property was $109,500. That sum was calculated by subtracting from the $267,000 "total market value" of the property (i.e., of the lands and the improvements) the $150,000 value of the nontaxable personal property (i.e., the leasehold interest in the State-owned lands), and by further subtracting from that the uncontested $7500 assessment placed on the fee parcel (thus, $267,000 minus $150,000 minus $7500 equals $109,500). In arriving at a total market value of $267,000 for the subject property (improvements and lands, whether leased or owned in fee), Butler compared the subject to four comparable lakefront residences

that had sold for prices ranging from $245,000 to $275,000. The Court will not note all of the particulars of the comparison, but will note the following: first, the time of sale in the case of three of the four comparable sales was relatively remote, i.e., in October of 2007, or nearly three years before the appraisal date, in the case of two of the three sales, and in December of 2008, or a year and a half in advance of the appraisal, in the case of the third (in the case of the fourth comparable, the sale was pending). However, apparently no adjustment at all was made by the appraiser for time of sale. Second, the appraiser made relatively small adjustments – no larger than $9300 or less than 4% of a given sales price -- for the considerably larger or smaller size and room counts of three of the comparables. Third, although the appraiser in his next analytical step valued the leasehold interest in the land at $150,000, the appraiser made comparatively small adjustments (ranging from $10,000 to $20,000, or no more than about 13% of the ultimately arrived at land value) for the fact that the subject was of significantly larger land size than all of the comparables (ranging from .13 to .37 acre, in comparison to the subject's .77 acre). Fourth, although his net adjustments to the comparables produced a range of adjusted values of from $266,700 to $294,760, the appraiser, without explanation, selected a number at the low end of that range as his indicated value for the subject.

The appraiser then sought to determine the value of the leased land – i.e., the personalty – for purposes of subtracting that value from the overall market value. To do that, the appraiser listed four sales of totally or relatively unimproved leased lands (presumably likewise lakefront) in the neighborhood. The first listed sale was the August 2008, $140,000 sale of a .4-acre parcel improved with a well, septic system, and concrete slab. The second was the May 2002 sale of a 90' x 120' lot improved with a single-car garage for $125,000. The third was the September 2004, $125,000 sale of a 104' x 111' lot. The fourth was the September 2008 sale of a .42-acre lot for $200,000. Then, without any comparative analysis

whatsoever, the appraiser extrapolated a value of $150,000 for the subject's nontaxable personalty, or State-leased land. Thus, to recapitulate, the appraiser found a taxable value for the subject property, meaning the market value of its taxpayer-owned improvements as opposed to its State-leased land, of $109,500.

Then, the appraiser (or someone) undertook on behalf of petitioners to value each of the subject taxpayer-owned improvements on a reproduction cost basis. By the use of per-square-foot cost estimates and adjustment factors set forth in certain tables, it was extrapolated that the reproduction cost for a new 1820- to 1835-sq.-ft. house[3] was $139,670. To that figure was added the $18,000 reproduction cost of two fireplaces and 1½ baths, and from that sum was subtracted approximately $15,000 for the fact that the subject house did not have a basement.[4] The resultant total replacement cost new of $142,420 was then multiplied by .33 to arrive at a depreciated replacement cost of $46,998 for the subject residence. There is no indication in the record of how the 67% physical depreciation factor (for a residence that was still being used for its original intended purpose and supposedly had a 60-year service life) was arrived at. It is evident that the analyst either used the 100-year service life tables and ascribed to the subject residence an effective age (about 93 years) that was virtually as high as its actual age (95 years), or used the 60-year service life tables but ascribed to the subject an effective age of about 56 years. In the appraisal report, however, the residence had been described as being in average to good condition, having average appeal and marketability, showing no need for any

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[3] Again, estimates of the size of the house elsewhere in petitioners' materials ranged from 2016 to 2160 sq. ft., so whoever did this work seems to have underestimated the reproduction cost new of the subject house by something on the order of 9% to 15%.

[4] Interestingly, whoever did this analysis interpreted the tables as directing him to subtract such value on a per-square-foot basis for the fact that the subject residence lacked a basement directly beneath *both* its 1410-square-foot ground floor *and* its 425-sq.-ft. second story.

major repairs, and being located in a neighborhood of properties similarly showing average to good maintenance and ranging in actual age from 27 to 160 years.

To the aforementioned figure of $46,998 arrived at as the depreciated replacement cost of the residence, the analyst added two sums, i.e., $21,000 and $18,680, to arrive at a taxable value for the property of $86,678.[5] The $21,000 ostensibly represented the value of the "Cottage add-ons 15 year period." If that figure or the quoted language is explained or even referred to elsewhere in petitioners' materials, this Court cannot find such explanation or reference. The aforementioned $18,680 figure, however, clearly represented the aggregate value ascribed to the "Lot improvements," i.e., the dock, two sheds, stone wall, garage, and porch, all of which were valued according to tables listing the per-square-foot cost of reproducing such items.

Petitioners' Memorandum of Law the Court need not summarize, although the Court would find fault with its assertion that "it has long been a cardinal rule for valuation for tax purposes in New York that the maximum value which may be assessed on realty in the absence of special considerations is the reconstruction cost less depreciation." Of course, with regard to non-specialty property for which there exists a market, it is the full fair market value of the property that is the touchstone of New York's system of real property taxation.

Concerning what went on during the oral presentation before the hearing officer on September 8, 2010, this Court has virtually no information. In his affirmation, counsel for petitioners complains that the hearing officer insisted that such counsel be sworn before addressing the issues, but that the hearing officer did not similarly administer the oath to the assessors or to counsel for respondents. In his affidavit, Assessor Briggs disputes that

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[5]Some melding of petitioners' two valuation figures – the $109,500 arrived at via the market data approach and the $86,678 arrived at via the reproduction cost approach, apparently accounts for the $95,000 figure that petitioners consistently have advanced as being the full taxable value of their realty, although that nowhere is made explicit by petitioners.

assertion, recounting that the hearing officer directed that all persons appearing before him, including the two assessors and both attorneys (petitioners themselves did not appear), be sworn. In paragraph 7 of respondents' verified answer, as well as in Assessor Briggs' affidavit, it is alleged that petitioner' counsel, in response to a question from the hearing officer, indicated that his clients would not consider selling their premises for less than $285,000. What respondents may have stated or submitted into evidence before the hearing officer, and indeed whether they made any presentation at all, is not ascertainable from the record placed before this Court.

The Decision and Report of the hearing officer are likewise not particularly elucidating. From the arguments advanced before this Court, it is fairly clear that the hearing officer went far off on a tangent insofar as he lamented that the assessor had been routinely deprived of information concerning resales of Cuba Lake properties (i.e., leaseholds and improvements). What the hearing officer said in his Report concerning the valuation/assessment issue actually before him was limited to the following:

> "It is the decision of this [h]earing [o]fficer that the sale price, inclusive of the land and improvements, and not counting the leasehold interest value,... should be the [a]ssessed [v]alue figure to be used by the Assessor[']s Office, which in this case is what the Town of Cuba Assessors are now doing. It is therefore the decision of this hearing [o]fficer that no reduction in assessed value is authorized or allowed" (bold type and underlining omitted).

On his form Decision, the hearing officer checked boxes indicating that petitioner's challenge to their assessment had been rejected because the proof of valuation presented by them was inadequate for its lack of sufficient supporting data. Upon its consideration of the parties' submissions, this Court renders the following determinations:

"The New York State Legislature enacted the SCAR statute in the RPTL 'to afford "speedy and inexpensive relief" to wrongfully assessed homeowners through a simplified review procedure' (*Matter of Meola v Assessor of Town of Colonie,* 207 AD2d 593, 594, quoting *Matter*

of Town of New Castle v Kaufmann, 72 NY2d at 686)" (*Yee v Town of Orangetown,* 76 AD3d 104, 108 [2d Dept 2010]). With respect to proceedings before a hearing officer, RPTL 732 (2) provides:

> "The petitioner need not present expert witnesses nor be represented by an attorney at such hearing. Such proceedings shall be conducted on an informal basis in such manner as to do substantial justice between the parties according to the rules of substantive law. The petitioner shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence. ... The hearing officer shall consider the best evidence presented in each particular case. Such evidence may include, but shall not be limited to, the most recent equalization rate established for such assessing unit, the residential assessment ratio promulgated by the commissioner pursuant to [RPTL § 738], the uniform percentage of value stated on the latest tax bill, and the assessment of comparable residential properties within the same assessing unit."

There can be no doubt that there exists a presumption that the assessment is correct (*see Matter of Sass v Town of Brookhaven,* 73 AD3d 785, 787 [2d Dept 2010]; *Matter of Agosh v Town of Cicero Bd. of Assessment Review,* 150 Misc 2d 756, 764 [Sup Ct Onondaga Co 1991]) and that it is incumbent upon petitioners to demonstrate that the assessment was excessive within the meaning of RPTL 729 (2) (*see Yee,* 76 AD3d at 112; *Matter of Krzys v Town of Clifton Park,* 267 AD2d 658, 659 [3d Dept 1999]; *Matter of Pace v Assessor of Town of Islip,* 252 AD2d 88, 90 [2d Dept 1998], *lv denied* 93 NY2d 805 [1999]). " 'When a Hearing Officer's determination [under title 1-A of RPTL article 7] is challenged, the court's role is limited to ascertaining whether the determination has a rational basis' (*Matter of Meola v Assessor of Town of Colonie,* 207 AD2d 593, 594 [1994], *lv denied* 84 NY2d 812 [1995]; *see Matter of McNamara v Board of Assessors of Town of Smithtown,* 272 AD2d 617 [2000])" (*Matter of Sterben v Board of Assessment Review of Town of Amherst,* 41 AD3d 1214, 1215 [4th Dept 2007]; *see Matter of Lauer v Board of Assessors,* 51 AD3d 926, 927 [2d Dept 2008]), "that is, whether it is not affected by an error of law or not arbitrary and capricious (see CPLR 7803 [3])" (*Sass,* 73 AD3d at 788).

Here, the information provided to the Court does not allow for, let alone compel, a conclusion that the hearing officer's determination lacks a rational basis insofar as it upheld the assessment placed by the assessors upon petitioners' taxable interest in the subject property. In other words, the hearing officer did not fail in his obligations to determine the assessment challenge based on the "best evidence presented in [the] particular case" and to "do substantial justice between the parties according to the rules of substantive law," both as required by RPTL § 732 (2). Petitioners' counsel's apparent concession at the hearing that petitioners would not part with their interest for less than $285,000 goes a long way towards refuting any claim that the $188,000 assessment is excessive (*see Matter of Greenfield v Town of Babylon Dept. of Assessment,* 76 AD3d 1071, 1074 [2d Dept 2010] [held: among other evidence, petitioner's listing of subject property at price above assessment provided rational basis for hearing officer's rejection of claim of excessiveness]). The same is true with regard to the affirmative proof that other lakefront houses and cottages conceded by petitioners to be comparable to their own have sold for prices ranging from $245,000 to $275,000. Clearly, the assessors are discounting such actual or hypothetical sales prices to a large extent to take into account that part of what petitioners would sell, and what other similarly situated owners have bought, is the nontaxable leasehold right to occupy the State-owned lands. However, petitioners' entire challenge to the excessiveness of their assessment hinges on their ostensible assertion that the assessors are, in placing their assessments on such properties, insufficiently discounting the price that petitioners would accept or that other like owners have paid to arrive at the value of the taxable permanent improvements. However, like the hearing officer, this Court concludes that petitioners have not adduced adequate proof to support their contention that a, say, $97,000 discount (i.e, petitioners' $285,000 bottom-line selling price minus the $188,000 assessment) is insufficient to arrive at the value of petitioners' taxable improvements only. In this regard, the

Court notes that petitioners' analysis of market value is problematical not merely because of some obvious liberties taken by the appraiser in evaluating the subject parcel (i.e., leased land and improvements) based largely on two- and three-year-old sales of other houses situated on much smaller acreages.[6] The appraiser's analysis is further problematical because it apparently arbitrarily attributes, without any analysis at all of the comparable lands' features, a $150,000 value to petitioners' leasehold interest in the lands and then purports merely to subtract that arbitrary figure from the aforementioned ascribed (and problematical) total market value of the land and improvements in order to arrive at a value for the improvements only.

Petitioners' attempt to value the subject improvements on the basis of the depreciated replacement cost is even more obviously flawed, and indeed the Court has considerable difficulty with petitioners' formulation that the value of the improvements in question can be reliably ascertained by means of their reproduction cost less depreciation. First, as a matter of logic, petitioners cannot go through the trouble of analyzing the market value of the properties as a whole (including land, leasehold interests, and taxpayer-own improvements) with reference to market data, then subtract the supposed value of the lands or leasehold interest as that supposed value has likewise been arrived at with reference to market data, and yet pretend that what remains is anything other than the residual value of the improvements ascertainable through a market data approach. Second, as noted *supra,* whoever performed the reproduction cost analysis seems to have underestimated the size of the subject house to a considerable extent. Third, as suggested *supra,* this Court has huge doubts about the 67% physical

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[6] Indeed, in the Court's view, any attempt by petitioners' appraiser to attribute most of the comparables' sales prices, and most of the subject's hypothetical value, to the value of the leased land founders upon the evidence that the appraiser made only relatively minor adjustments, in both dollar and percentage terms, for the fact that the comparables' acreages ranged in size from less than about one half to as little as about one sixth of the subject's acreage.

depreciation factor employed in the analysis, especially where the subject residence is described by petitioners' appraiser as being in average to good condition, having no need for any major repairs, and being located in a neighborhood of similar houses ranging in age from 27 to 160 years. Fourth, and most basically, absolutely no concession has been made to the reality that the subject improvements, whatever their depreciated reproduction cost might be, are located on a lake, and that the market demonstrably would pay a large premium over the cost of those improvements in order to enjoy the lake access and view provided by them. That is true despite the fact that any buyer's objective legal right (as opposed to subjective expectation) of such enjoyment of the improvements is limited to the duration of the current short-term lease of the underlying State-owned lands.

In sum, "the hearing officer's determination that the petitioner failed to meet his burden of presenting credible and substantial evidence of excessive assessment had a rational basis (*see* RPTL 732 [2]; *Matter of Montgomery v Board of Assessment Review of Town of Union,* 30 AD3d 747, 749 [2006])" (*Lauer,* 51 AD3d at 927).

Accordingly, the Petition is DISMISSED.

SO ORDERED:

HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

FEB 18 2011

BY KEVIN J. O' CONNOR
COURT CLERK