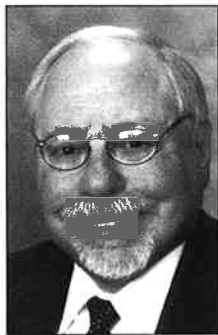


# Long Island Weekly



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## TAX CERTIORARI AND CONDEMNATION



WILLIAM D. SIEGEL



SAUL R. FENCHEL

### *Ruling Examines Condemnation Of Portion of Leasehold Interests*

Several significant condemnation and tax certiorari cases were decided in the past several months. Long Island, as is usually the norm, has a disproportionately large share of such decisions in these areas of law.

The extensive nature of the power to condemn non-traditional real property interests, such as only some of a tenant's leasehold rights, is illustrated by the Fourth Department decision in *Kaufmann's Carousel, Inc. v. City of Syracuse Industrial Development Agency*, 301 A.D.2d 292, 750 N.Y.S.2d 212 (4th Dept. 2002). The court there upheld the assistance given by the Syracuse Industrial Development Agency (SIDA) to the Pyramid Companies, the developer of the proposed shopping center and tourist attraction to be known as DestiNY USA, which is planned to dwarf the Mall of America in Minnesota, presently the nation's largest mall.

The property, rights and interests condemned by SIDA to aid this project included those portions of leasehold interests held by Kaufmann's, Lord & Taylor and J.C. Penney department stores through their leases with Carousel Center (the first shopping center component of what will become DestiNY USA), which "would in some way impair or impede the DestiNY USA project."

The Appellate Division rejected contentions that the lease interests were not interests in real property, but only contract rights not subject to acquisition by eminent domain. Acquisition of these interests was permitted by Article 18-A of the General Municipal Law allowing industrial development agencies to acquire real property including "rights or easements therein" under the Eminent Domain Procedure

Law. EDPL 103 (F) specifically defines real property as including "all lands and improvements to ... and every estate, interest right, legal or equitable in lands..." The court held:

we conclude that the leasehold interests constitute interests in real property that may be acquired by SIDA...

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... as long as [the tenants] receive just compensation for the value of the lease hold interests...acquired ...

The court further held that portions of these leases may be acquired "without also acquiring the underlying real property" because acquisition of such real property would be "in excess of what is needed for [SIDA's] public purpose."

The court also rejected the argument that the acquisition of the leasehold interests was really for the private benefit of Pyramid and not for a public purpose, holding that the condemnation:

must be confirmed if "the exercise of the eminent domain power is rationally related to a conceivable public purpose." Although in addition to the public benefit Pyramid will benefit privately from the project, that "incidental private benefit will not invalidate [the] agency's determination so long as the public purpose is dominant." Here, SIDA's stated purposes for the acquisition of petitioner's property support the determination that the DestiNY USA project serves a legitimate public purpose, and that the public purpose is dominant (citations omitted)

### Garbage Collection

*J.C. Penney Co., Inc. v. Town of Oyster Bay*, 755 N.Y.S.2d 628 (2d Dept. 2003), is another in a long series of cases in which the Towns of Oyster Bay and Hempstead have for many decades limited the collection of garbage for commercial properties. Homeowners receive virtually unlimited municipal garbage collection. Most commercial properties pay relatively high taxes to town garbage collection districts, but are, as a practical matter, denied municipal garbage collection by rules and regulations that limit the number and size of containers permitted to be picked up and bar dumpster pickup.

The Appellate Division held that the petitioner in *JC Penney* had failed to show that it had made a formal demand for municipal service, but also held that the challenges to the rules and regulations were without merit.

Actions of commercial property owners for non-discriminatory

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William D. Siegel is a member of Siegel, Fenchel & Peddy in Garden City.  
Saul R. Fenchel is a member of Siegel, Fenchel & Peddy in Garden City.

garbage collection have been strikingly unsuccessful. But condominium and homeowner associations have won their actions for equitable collection policies as compared to other homeowners. See *Applebaum v. Town of Oyster Bay*, 81 N.Y.2d 733, 593 N.Y.S.2d 765 (1992). (The authors were counsel in the Applebaum case and also in *Sysco Corp. v. Town of Hempstead*, 227 A.D.2d 544, 642 N.Y.S.2d 963 (2d Dept. 1996), where a challenge to the denial of collection services to commercial properties was dismissed, Sysco was precedent for the J.C. Penney case).

### Tax Escalation Clauses

The tenant in *Ram First Associates v. 363 East 76th Street Corp.*, 297 A.D.2d 506, 747 N.Y.S.2d 13 (1st Dept. 2002), was required to pay “5.5 percent of the increases in real estate taxes over the amount of such actual real estate taxes attributable to the base year.” The creative landlord included in its billings the value of J-51, STAR (School Tax Relief), veterans and SCRIE (Senior Citizen Rent Increase Exemption) abatements and exemptions attributable to the residential portion of the cooperative building in which the tenant occupied ground floor retail space. Noting that these abatements and exemptions reduced the actual tax payments by the landlord, the court held that tax escalation clauses are “meant to provide relief for the landlord where ‘assessed’ tax required actual payment.” The tenant was not liable for its prorata share of the taxes not actually paid because of such abatements and exemptions. For more on the subject of tax escalation clauses, see also Siegel & Peddy, “Negotiating Tax Escalation Clauses,” NYLJ, Nov. 4, 2002.

### Charitable Tax Exemption

The property owner in *Greentree Foundation v. Assessor of County of Nassau*, 755 N.Y.S.2d 271 (2d Dept. 2003), was denied an exemption for the 420-acre former Whitney estate in North Hills devoted to use as a United Nations retreat and conference center. The grounds for denial were that the

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property...'*

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use of the facility was not intensive enough to justify the exemption and that the property was not open to the public.

The trial court and Appellate Division upheld the denial of the exemption. The first ground cited is a fairly normal application of the principle that a property must be exclusively devoted to a charitable purpose. However, it should be noted that partial exemptions are typically allowed where only a portion of the property is used for charitable purposes. For instance, a hospital may own an office building in which 50 percent of the building is used for hospital office and clinics and the remainder rented to private medical

practices. A 50 percent exemption is normally granted in such circumstances.

But a property whose partial charitable use is on a time basis as opposed to a space basis would generally not qualify for a partial exemption. However, the open to the public issue seems to defy common sense; security reasons clearly prevent a property used for U.N. conferences from being fully open to the public. Furthermore, many charitable properties are not open to the general public.

The Greentree property is presently paying \$778,000 in taxes as a result of the denial of the exemption.

*Matter of Garden City Plaza Associates, Ltd. v. The Mayor*, 754 N.Y.S.2d 661 (2d Dept. 2003), involved three large office buildings in Roosevelt Field in the Village of Garden City, which were part of a Superfund site whose ground water contamination was allegedly created by a third party off-site. (This contamination perhaps went back to the time when Charles Lindbergh flew to Paris from Roosevelt Field.)

The well-written and well-reasoned trial court decision addressed many issues, but the only one specifically discussed by the Appellate Division was contamination. Petitioner did not argue that the contamination affected the ability to lease or operate the property, but contended that the contamination affected the marketability of the property pursuant to the Federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA) because of potential liability to anyone in the chain of title.

The trial court accounted for the “increased risk from contamination” by adding 1 percent and 1.5 percent to the mortgage and equity rate components, respectively, in the capitalization rate calculations. The higher capitalization rates resulted in lower market values.

The Appellate Division did not address the details of the contamination issue, but merely held that:

Upon our review of the record, the petitioner did not demonstrate by a preponderance of the evidence, that the property was over assessed ....

This was a novel case because it concerned the important issue of how to measure the obvious negative effect on a property's value of contamination caused by a third party. The cost to cure would most likely ultimately be paid by such third party and did not affect the rentability or normal operation of the property. The omission of a fuller discussion of the valuation issue here was a sorely missed opportunity to provide needed judicial guidance to this not all that uncommon issue.

In this particular situation, the seminal Court of Appeals decision in *Commerce Holding Corp. v. Board of Assessors of the Town of Babylon*, 88 N.Y.2d, 724, 649 N.Y.S. 2d 932 (1996), did not precisely fit and needed further amplification. *Commerce Holding* held, that the deduction of remaining clean up costs from the uncontaminated value “is an acceptable, if imperfect, surrogate to quantify environmental damage and provide a sound measure of the reduced value a buyer would be willing to pay for the contaminated property.”

The property owner in *Garden Plaza Associates* is currently seeking permission to appeal to the Court of Appeals.