MUNICIPAL LAW ALERT: AD VALOREM TAXES AGAINST UTILITY PROPERTIES

Municipal Alert
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New ruling should give towns increased latitude

Imagine a power line corridor running through a town. The power line crosses through several special taxing districts, including a water district, a garbage district, and a sewer district. The utility owning the power line resists paying the special district taxes on the grounds that it does not use the services. Is the utility liable for taxes imposed by the town under Real Property Tax Law 102(14) to defray the costs of these services?

The long-established rule in New York is that a town may only levy a special ad valorem tax against property if that property is "benefited" from the service provided. In other words, the property must be "capable of receiving the municipal service funded by the special ad valorem tax."[1] Until recently, however, courts have tended to interpret "benefit" narrowly so as to limit a town's ability to impose special taxes against utility property, such as power transmission equipment or pipelines.[2]

A recent decision from New York's highest court suggests, however, that towns may now have increased latitude in levying special ad valorem taxes against utility properties. In *Niagara Mohawk v. Town of Watertown*,[3] the Court of Appeals decided three cases in three different towns, each involving whether "mass property, including poles, wires, insulators, and pipelines" belonging to same utility were subject to special district taxes.[4]

In the first of these, the Court held that the property was subject to water district taxes in the Town of Bethlehem because "transmission and distribution facilities … benefit from the Town's water district, which maintains a system of mains, pipes and hydrants available for purposes of firefighting. Indeed, the Town's longtime fire chief attested that he had responded to calls ... on numerous occasions ... at [the utility's] ... facilities."[5]

The second case concerned a special levy imposed in the Town of Tonawanda for garbage collection. Again, the Court sided with the Town, noting that "otherwise vacant or undeveloped lands improved by electric and gas transmission fixtures and appurtenances" benefit from the garbage district because "there is sufficient theoretical potential of the properties to be developed in a manner that will result in the generation of garbage, which, in fact, these properties already produce in the

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form of landscaping debris."[6]

In the third case, the Court remanded the matter to the trial court to determine if the utility property benefited from a sewer district located in Watertown. The Court noted that "there are questions of fact as to whether Niagara Mohawk owns the land on or under which the transmission and distribution facilities are situated, and as to whether, even if Niagara Mohawk does not own the land, the sewer district encompasses storm sewers that actually or might potentially safeguard Niagara Mohawk's transmission and distribution facilities from flooding."[7]

Each of these results differs markedly from the result reached by the Court of Appeals only nine months earlier in *New York Telephone Co. v. Town of Oyster Bay*.[8] There, the Court of Appeals sided with a telephone company that sought to exempt telephone lines, wires, cables, poles, supports, and equipment enclosures for electrical conductors, known as "mass property," from a town's special garbage collection tax. The Court agreed with the Town that the mass property constituted real property but concluded the mass property was not "benefited" real property because it was not "capable of receiving the municipal service funded by the special ad valorem tax."[9] The Court explained: "in determining whether a property is benefited ... we look to the innate features and legally permissible uses of the property, not the particularities of its owners or occupants or the state of the property at a fixed point in time. As a class of property, telephone poles can never produce or require garbage collection. ... They therefore are not benefited."[10]

The *Niagara Mohawk* decision does not overrule *New York Telephone*. The Court applied the same standard and in no way signaled that it was departing from established precedent. Nevertheless, *Niagara Mohawk* suggests that courts may be more inclined than in the past to uphold special district taxes levied against utility property, so long as it can be shown that the property receives a benefit from the services supported through the levy.

In light of Niagara Mohawk, towns should review whether they are collecting all appropriate special district levies from utility property within their borders. Going forward, towns should assess special district taxes against utility property wherever there is a credible basis to conclude that the property benefits from the services provided. In addition, under Article 5 of the Real Property Tax Law, towns may be able to recover taxes for the current and prior years by petitioning the Board of Assessment Review to correct the property's omission from the special district.11

New Notice Requirements

Municipalities should be aware that additional notice requirements have been adopted for certain zoning applications for properties near municipal boundaries.

General Municipal Law § 239-nn was adopted "to encourage the coordination of land use development and regulation among adjacent municipalities." Effective July 1, 2006, when an application for a use variance, special permit, subdivision, or site plan is filed on any property within 500 feet of a municipal boundary in a city, town, or village (other than New York City), and a hearing is to be held, then at least ten days prior to any such hearing the municipality must send the notice of hearing to any adjacent municipality whose boundary rests within 500 feet of the subject property. According to the new law, the notifying municipality may appear and be heard at the hearing.

[1] *New York Telephone Co. v. Town of Oyster Bay*, 4 N.Y.3d 387, 394, 796 N.Y.S.2d 7, 10 (2005).
[2] *See, e.g., id.* ("mass property" consisting of telephone lines, wires, cables, poles, supports, and equipment enclosures produced no garbage and therefore did not benefit from special garbage collection levy).
[3] *See Niagara Mohawk v. Town of Watertown*, 2005 N.Y. Slip Op. 9810, 2005 N.Y. LEXIS 3428 (December 22, 2005).
[4] *See id.* at *2.
[5] *See id* at *5.
[6] *See id.* at *6.
[7] *See id.*
[8] 4 N.Y.3d 387, 796 N.Y.S.2d 7 (2005).
[9] *Id.* at 394, 797 N.Y.S.2d at 10.
[10] *Id.*
[11] *See* Real Property Tax Law § 553(1)(c) and (d) (McKinney's 2006); cf. *Niagara Mohawk v. Town of Clay*, 208 A.D.2d 170, 622 N.Y.S.2d 635 (4th Dep't 1995) (upholding correction of final tax assessment to remove partial real property tax exemptions where town subsequently determined, based on new Court of Appeals authority, that utility did not qualify for exemption).

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