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**1**11 IN THE MATTER OF THE APPLICATION UNDER ARTICLE 7 OF THE REAL PROPERTY TAX LAW BY Diana Sachs Aylward, ET. AL., Petitioners, against Assessor, City of Buffalo, AND THE BOARD OF ASSESSMENT REVIEW OF THE CITY OF BUFFALO, COUNTY OF ERIE AND STATE OF NEW YORK, Respondents.**

**2009-3366**

**SUPREME COURT OF NEW YORK, ERIE COUNTY**

***2013 N.Y. Misc. LEXIS 6211; 2013 NY Slip Op 52253(U)***

**June 6, 2013, Decided**

**NOTICE:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**COUNSEL: 1*11** For Petitioners: Jorge S. de Rosas, Esq., Wolfgang & Weinmann, LLP, Buffalo, NY.

For Respondents: Joel R. Kurtzhalts, Esq., Bennett, DiFilippo & Kurtzhalts, LLP, East Aurora, NY.

**JUDGES:** HON. Timothy J. Walker, J.C.C. Acting Supreme Court Justice.

**OPINION BY:** Timothy J. Walker

**OPINION**

Timothy J. Walker, J.

Petitioners are the owners of twelve parcels of residential real property located in the City of Buffalo, New York (collectively, the "Property"). Petitioners commenced these special proceedings pursuant to *Article 7 of the Real Property Tax Law* ("RPTL"), and seek a reduction in the assessments of the Property. Pending before the Court are five related tax certiorari proceedings, commencing with the 2009-2010 tax year, through the 2013-2014 tax year (the "Proceedings").

Respondents have moved, pursuant to § *408 of the Civil Practice Law and Rules* ("CPLR"), for certain paper discovery (as identified more fully below) and an order authorizing their appraiser to enter upon the Property to conduct an exterior and interior inspection of all improvements thereon. In the event Petitioners refuse to allow Respondents' appraiser access to the Property, Respondents alternatively seek an order, pursuant to *CPLR § 3126(2),* precluding **I*21** Petitioners from introducing an appraisal report or the testimony of an appraiser into evidence at the trial of the Proceedings.

This discovery motion must be considered in the context of the standards and burdens applicable to tax certiorari proceedings.

It is well settled that the challenged assessments are presumed correct, and Petitioners bear the burden of overcoming such presumption by coming forward with "substantial evidence" to the contrary *[Matter of FMC Corp. v. UNMACK, 92 NY2d 179, 187, 699 N.E,2d 893, 677 N.Y.S.2d 269 (1998)].* Substantial evidence is "evidence grounded in objective data and sound theory *[Niagara Mohawk Power Corp. v. Assessor, 92 NY2d 192, 699 NE.2d 899, 677 N It. S.2d 275 (1998)].* In the context of a tax certiorari matter, substantial evidence:

will most often consist of a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser *[Id. at 196].*

The parties acknowledge that they intend to rely on appraisal reports at trial. The preparation, filing and exchange of appraisal reports intended to be used at trial is governed by *section 202,59* of the Uniform Rules for New York State Trial Courts *[22 NYCRR § 202.591* A litigation appraisal is characterized by a significant I*31 level of detail and supporting documentation. In this regard, § *202. 59(g)(2)* requires that:

[t]he appraisal reports shall contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached. If sales, leases or other transactions involving comparable properties are to be relied on, they shall be set forth with sufficient particularity as to permit the transaction to be readily identified, and the report shall contain a clear and concise statement of every fact that a party will seek to prove in relation to those comparable properties. The appraisal reports also may contain photographs of the property under review and of any comparable property that specifically is relied upon by the appraiser, unless the court otherwise directs.

In preparing appraisals of real property, appraisers have traditionally relied on one of three methods of valuation: comparable sales, capitalization of income or reproduction cost less depreciation *[Allied Corp. v. Town of Camillus, 80 NY2d 351, 604 N.E.2d 1348, 590 N. Y.S.2d 417 (1992)]*. The comparable sales method of valuation is "generally the preferred measure **[*4]** of a property's value for assessment," and the parties have indicated they intend to employ that method to value the Property in the **[**2]** Proceedings *[Id., at 356].'* Pursuant to the sales comparison approach to value, an appraiser selects one or more properties that he or she deems similar to the subject property and makes adjustments to them to address the differences between them and the subject property *[Latham Holding Co. v. State, 16 NY2d 41, 209 1V.E.2d 542, 261 N. Y.S.2d 880 (1965)* [2]; *Matter of Peck v. Obenhoff, 84 AD2d 633, 444 N.YS.2d 282 (3d Dept. 1981)* (petitioner in a tax certiorari proceeding was incapable, as a matter of law, of establishing that the subject property was overvalued where his appraiser failed to make necessary adjustments to comparable sales)].

1 The capitalization of income approach to value is typically used to value income producing properties *[Conifer Baldwinsville Associates v. Town of Van Buren, 115 AD2d 325, 495 N. Y.S.2d 869 (4th Dept. 1985)]*. The Property at issue in the Proceedings is owner-occupied residential and is not income producing. The reproduction cost less depreciation method of valuation is not relevant to the Proceedings because it is typically used to value specialty property or property that is otherwise incapable **r*51** of being valued by the sales comparison or income approaches to value *[Matter of Great Atlantic & Pacific Tea Company, Inc. v. Kiernan, 42 NY2d 236, 366 N.E.2d 808, 397 N. Y.S.2d 718 (1977)]*.

2 *Latham Holding Co. v. State* was decided in the context of a claim following an appropriation of a portion of claimant's real property. While not a tax certiorari case, its holding that comparable sales must be appropriately adjusted applies to tax certiorari proceedings as well as appropriation (and eminent domain) matters.

In comparing and adjusting comparable sales to the subject property, appraisers typically evaluate the following elements of comparison: property rights conveyed; financing terms; conditions of sale; expenditures made after purchase; market conditions; location; the use(s) to which the subject and comparable properties are being made; non-realty components of value; economic characteristics; and physical characteristics [The Appraisal of Real Estate, 12th Edition, Appraisal Institute, p. 426]. Physical characteristics, which may require adjustment, typically include:

differences in building size, quality of construction, architectural style, building materials, age, condition, functional utility, site size, attractiveness, **[*6]** and amenities [Id., at 426],

Moreover, *RPTL § 302(1)* mandates that a property's assessment shall be based on, *inter alia*, its "condition" as of March 1 of the current tax year.

While discovery in *RPTL Article* 7 proceedings is not permitted as of right, it is governed by *CPLR § 408*, "pursuant to which trial courts have broad discretion in directing the disclosure of material and necessary information" *[Matter of Wendy's Restaurants, LLC v. Assessor, 74 AD3d 1916, 1917, 903 N.Y.S.2d 849 (4th Dept. 2010)]*. When a discovery motion in a tax certiorari proceeding is granted, such:

discovery takes place pursuant to *CPLR 3101(a)*, which provides generally that [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action [or proceeding]. The Court of Appeals has ruled that [the phrase] material and necessary should be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in preparation for trial by sharpening issues and reducing delay and prolixity. **[**3]** The test is one of usefulness and reason' *[Id., quoting Town of Pleasant Valley v. New York State Bd. of Real Prop. Servs., 253 AD2d 8, 15-16, 685 N.Y.S,2d 74 (2d Dept. 1999)]*.

It [*7] is against this background that the Court shall consider Respondents' application, which seeks the following discovery for purposes of preparing the appraisal report (or reports) Respondents intend to use at trial:

Documents relating to ownership of the Property, including the deeds, RP-5217 reports, purchase contracts and closing statements;

Documents evidencing mortgages and/or financing;

Surveys;

List of capital improvements, including related contracts and construction costs;

Access to the exterior and interior of the Property for the purpose of conducting an inspection of the land and improvements thereon.

The Demand for Documents

The first category of documents relates to ownership of the Property and consists of deeds, RP-5217 reports, purchase contracts and closing statements.

While ownership of the Property does not appear to be at issue in these proceedings, a deed contains more than the identity of the seller and purchaser. A deed may contain discoverable information such as, *inter alia,* a restrictive covenant that may tend to devalue the property. A deed also identifies the precise quantity of land conveyed. Respondents would have no way of knowing such information without the **1*81** deed.

The RP-5217 report, known as the Real Property Transfer Report, contains information about the sale of real property. Upon purchasing real property in Erie County, purchasers are required to complete the RP-5217 Report and file it with the Erie County Clerk's Office ("Clerk's Office"). The report must be signed by the buyer and the seller (not their agents). The RP-5217 report contains information that is discoverable in these proceedings, such as a property's use (i.e., one family residential, agricultural, apartments, etc.) and the conditions of the sale (i.e., whether the sale was arms-length, whether the sale is between relatives or business partners, etc.).

With respect to purchase contracts and closing statements, the Property's purchase price is reflected on the RP-5217. Moreover, purchase price is not highly relevant to the Proceedings (if relevant at all) unless the Property was purchased recently prior to one of the assessment years in question *[Allied Corp, v. Town of Camillus, supra, at 356* (the best evidence of value is a recent arm's-length sale. Absent that evidence, the courts rely on an appraisal report prepared in accordance with accepted appraisal standards)]. **[*9]** Accordingly, Petitioners are not required to produce copies of their respective purchase contracts and closing statements.

Even though the deed and RP-5217 report are discoverable, Petitioners are not required to **[**4]** provide copies of these documents to Respondents to the extent they are available for public inspection and copying at the Clerk's Office *[see Matter of Beryl, 118 AD2d 705, 499 N. Y.S.2d 980 (2d Dept. 1986)].* Purchasers of real property in Erie County typically record deeds and they are required to file the RP-5217 report with the Clerk's Office. Petitioners shall provide Respondents with copies of their respective deeds and RP-5217 reports only to the extent these documents are not otherwise filed with the Clerk's Office and available for public inspection and copying.

The second category of documents that Respondents seek from Petitioners relates to mortgage and financing documents. In opposing this prong of the motion, Petitioners rely on *Farash v. Smith, 59 NY2d 952, 453 N.E.2d 537, 466 N.Y.S.2d 308 (1983),* which held that "while a court in determining fair market value may consider evidence of loans advanced on property during or near a particular tax status date when reviewing an assessment proceeding such evidence 1*101 standing alone is not entitled to greatest weight' because the reasons behind the terms and amount of the loan may be uncertain and unrelated to market values" *[Id., at 955* (internal citations omitted)]. *Farash* does not preclude the use of mortgage information in a tax certiorari proceeding. Rather, the court may consider such evidence, and *Farash* merely comments on the weight it should be given.

Mortgage information, however, is also typically recorded in the Clerk's Office. Accordingly, Petitioners shall provide Respondents with copies of all mortgages encumbering the Property only to the extent they are not otherwise filed with the Clerk's Office and available for public inspection and copying.

Respondents also seek copies of existing surveys of the Property. The extent to which the quantity of land conveyed in the deed and the Property's boundaries differ, if at all, from the quantum of land and boundaries depicted on the survey and, if so, the location of any such irregularities, are matters that could affect the value of the Property. Accordingly, Petitioners shall produce copies of their respective surveys, because surveys are not typically recorded in the Clerk's Office or otherwise 1*111 publicly available.

Finally, Respondents seek a list of capital improvements, including related contracts and construction costs. It can hardly be disputed that capital improvements go to the heart of a property's value. Indeed, Petitioners do not contest the relevance of such information. Rather, they seek to avoid having to produce it and direct Respondents to obtain it from the City of Buffalo's Department of Permit and Inspection Services (the "Department"). Respondents contend that a permit is required to be filed with the Department relative only to those capital improvements limited to structure (such as excavation, foundations, building-walls and building-structures) [Affidavit of James Comerford, Jr,, Commissioner of Permit

and Inspection Services for the City of Buffalo, 1113-4]. Accordingly, there are many types of capital improvements that do not require the filing of a permit. Moreover, such permit records are frequently not up to date and property owners often upgrade or otherwise perform work on the interior of their homes without notice to public officials [Affidavit of John Zukowski ("Zukowski Aff."), at ¶12]. Petitioners shall provide Respondents with a list of capital **1*121** improvements and construction costs and copies of related contracts.

The Demand for Access to the Property to Conduct Inspections

Respondents seek access to the Property to conduct an exterior and interior inspection of the land and all improvements thereon. They contend that such an inspection is critical to their **1**51** appraiser's preparation of the appraisal report they intend to use at trial.

In support of their argument, Respondents have submitted the Zukowski Affidavit. Mr. Zukowski is an experienced licensed real estate appraiser in New York who holds the MAI designation (i.e., Member of the Appraisal Institute), which is the highest professional designation an appraiser may earn in New York. Mr. Zukowski has worked as an appraiser for 32 years, he has prepared well over 100 self-contained appraisal reports and he has been qualified to testify in well over 35 proceedings in New York [Zukowski Aff., at 1111-2].

Mr. Zukowski acknowledges the requirement that appraisers in *RPTL Article 7* litigation are required to prepare, pursuant to *22 NYCRR 202.59(g)(2),* an appraisal report for use at trial, which contains all of facts, figures and calculations relied on by the appraiser to support **1*131** his or her ultimate determination of value [Zukowski Aff., at rif4-5]. An exterior and interior inspection of the subject property being appraised is essential to preparing a self-contained appraisal report in order to properly evaluate the subject's "physical configuration and characteristics ..., age, condition and quality of improvements ..." [Zukowski Aff., at ¶7]. This is consistent with *RPTL 302(1)* (property shall be annually assessed as of a certain date according to its condition) and the holding in *Niagara Mohawk Power Corp. v. Assessor, supra, at 196* (substantial evidence in a tax certiorari dispute "will most often consist of a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser").

Respondents have demonstrated that the evaluation of a property's condition is integral to the preparation of a probative appraisal report in New York. Accordingly, it necessarily follows that in accessing the Property, their appraiser seeks information that will be "material and necessary" in the defense of the Proceedings *[Matter of Wendy's Restaurants, LLC, supra., at 1917].*

In opposing Respondents' application, Petitioners allege **[*14]** that their right to privacy, as guaranteed by the *Fourth Amendment to the United States Constitution,* shields the Property from such an inspection. The *Fourth Amendment* provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The basic purpose of this Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials" *[Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)].* The *Fourth Amendment* is enforceable against the States through the *Fourteenth Amendment to the United States Constitution.*

In asserting their constitutional argument, Petitioners rely on *Camara v. Municipal Court, supra.* In that case, a housing inspector employed by the City of San Franciso Department of Public Health entered an apartment building to make a routine annual inspection for possible violations of the city's housing code. Appellant (the lessee of the apartment building's **[*15]** ground floor) refused to allow the Department of Public Health's representatives access to his leasehold on multiple occaisions, because they lacked a search warrant. For his repeated refusal to allow entry onto his leasehold, Appellant was eventually arrested and charged with a misdemeanor **[**6]** punishable, upon conviction, by a fine not to exceed $500.00 or by imprisonment not to exceed six (6) months, or both.' Following an analysis of the law of search and seizure, the United States Supreme Court held:

> 3 Appellant was charged with violating § 507 of the City of San Francisco's Housing Code, which then provided, in relevant part, that: "Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment ."

that administrative [*16] searches of the kind at issue here are significant intrusions upon the interests protected by the *Fourth Amendment*, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the *Fourth Amendment* guarantees to the individual *[Id., at 534* (emphasis added)].

While this Court does not disagree with the holding in *Camara v. Municipal Court*, and is bound to follow it, it does not apply to the facts and circumstances of the Proceedings. Indeed, there are important factual distinctions, including that entry onto Appellant's property in *Camara* was attempted by a government official. It is undisputed that none of Respondents' government officials seek entry onto the Property. Rather, entry is being sought by Respondents's expert witness, i.e., their appraiser, such that there is no "arbitrary invasion[ ] by government officials" *[Id., at 528]*.

Second, the reason government officials sought entry onto Appellant's property in *Camara* is very different from the Proceedings. In *Camara*, government officials were searching for violations of the city's housing code which, if uncovered, could lead to civil and criminal penalties. Similarly, Appellant's I*171 refusal to permit entry onto his property resulted in his arrest. The factual context of the instant civil tax certiorari proceedings could not be more different, and Petitioners face no such criminal consequences related to a mere inspection by an appraiser - not a government official.

Third, Petitioners, unlike Appellant in *Camara*, are willing parties in a civil lawsuit that they commenced. As such, they have placed the physical characteristics of the Property (which include condition, quality, etc.) in controversy.

Accordingly, *Camara v. Municipal Court, supra*, does not require an appraiser (who is not a governmental official) to secure a search warrant before he may enter upon real property for the mere purpose of observing it - with no criminal or civil penalties to follow - in order to prepare an appraisal report to defend a municipality in a lawsuit that the property owner commenced.

In further support of their constitutional arguments, Petitioners cite *Matter of Yee v. Town of Orangetown, 76 AD3d 104, 904 N.Y.S.2d 88 (2d Dept. 2010)*, and *Schlesinger v. Town of Ramapo, 11 Misc 3d 697, 807 N. Y.S.2d 865 (Sup. Ct., Rockland Co. 2006)*. Neither decision, however, lends support to Petitioners' arguments here because they **[*181** are distinguished by the facts and circumstances of the Proceedings. [**7]

*Matter of Yee* held that it was error for the judicial hearing officer ("JHO") to have dismissed petitioners' small claims assessment review ("SCAR") proceeding, because petitioners refused to allow respondents' assessor to inspect their real property.

There are several important distinctions between *Matter of Yee* and the instant proceedings. First, and most importantly, the parties in the Proceedings agree that assessors, as government officials employed by the municipal party adverse to a petitioner in an *RPTL Article 7* proceeding, are not permitted entry onto the subject property, regardless of whether the proceeding is brought pursuant to Title 1 of the RPTL (the Proceedings) or the SCAR provisions of Title 1-A of the RPTL. The City of Buffalo's asessor is not seeking entry onto the Property. Rather, Respondents' expert witness (i.e., its appraiser) is seeking entry. *Matter of Yee* does not reach the issue of whether an appraiser is permitted entry onto property.

Second, SCAR proceedings, which are governed by *RPTL § 732(2)*, are informal and do not require the parties to present expert witnesses or submit a detailed **I*191** self-contained appraisal report in accordance with *22 NYCRR § 202.59*. Moreover, unlike the procedural context of the instant proceedings, *section 732(2)* provides that "[t]he petitioner shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence ... ." Finally, upon electing to commence a SCAR proceeding, a homeowner waives her right to commence a tax review proceeding in Supreme Court pursuant to *RPTL § 702*.

Finally, due to their nature as small claims proceedings, discovery is not generally permitted in SCAR proceedings. In this regard, *RPTL Article 7*, title 1-A explicitly provides that SCAR petitions are not governed by the much broader rules of disclosure as contained in *Article 31 of the CP LR*.

*Schlesinger v. Town of Ramapo*, is similarly unpersuasive. In that case, the court denied the appraiser entry onto petitioner's property in an *RPTL Article 7* tax review proceeding. In rendering its decision, the court relied on *Camara v. Municipal Court, supra*, but this Court has already determined that *Camara* does not preclude an appraiser from inspecting a petitioner's real property in an *RPTL Article 7* proceeding.

In reaching its decision, the *Schlesinger* **[*20]** court also found that a review of building permits on file at the local town's offices would provide the respondents "with a reasonable, alternative means of evaluating the interior of petitioner's residence ... *[Schlesinger, supra, at 701]*. As previously stated above, this Court disagrees with that proposition, because improvements to real property (both interior and exterior) are often made without the proper filing of a building permit *[see also*, Comerford Aff., at 1113-4 and Zukowski Aff., at T121,

Finally, the *Schlesinger* respondents based their application for an inspection of petitioner's property on *22 NYCRR § 202.59(e)* which provides, in relevant part, that at the scheduling of a pretrial conference, the IAS judge may "take whatever action is warranted to expedite final disposition of the proceedings." The court determined that § *202.59(e)* does not provide authority to an appraiser to conduct an inspection of a petitioner's property. This Court is not required to reach that issue, because Respondents have not moved pursuant to § *202.59(e).* Rather, they rely upon *CPLR §§ 408, 3120(a)(1)(h), 3021,* and *3026,* and *22 NYCRR § 202.59(g)(2),* none of which were considered in *Schlesinger*.

Having **[*21]** placed, *inter alia,* the condition and quality of the Property in issue by commencing the Proceedings, Respondents shall be permitted to avail themselves of CPLR **[**8] §** *3120(a)(1)(ii)* which provides, in relevant part, that after commencement of an action, a party may serve another party with notice:

to permit entry upon designated land or other property in the possession, custody or control of the party served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon *[Iskowitz v. Forkosh Constr. Co., Inc., 269 AD2d 131, 132, 703 N.Y.S.2d 20 (1st Dept. 2000)].*

Such motions are routinely granted when, as here, a principal issue in the matter is the condition of the real property to be inspected *[14]* Moreover, the terms "inspecting," "surveying" and "photographing" are expressly used in the statute.

In the context of a tax certiorari proceeding, the Appellate Division, Fourth Department has recently held that where a discovery motion is granted pursuant to *CPLR § 408,* "discovery takes place pursuant to *CPLR 3101(a) ..." [Matter of Wendy's Restaurants, LLC v. Assessor, supra, at 1917].* **[*22]** Accordingly, if *CPLR § 3101(a)* applies to discovery granted in tax certiorari proceedings then, by necessity, *CPLR § 3120(a)(1)(ii)* would also apply upon a proper showing. Respondents have made that showing in the Proceedings,

Respondents also argue, by analogy, that *CPLR § 3121* provides their appraiser with authority to enter upon the Property to inspect it for purposes of preparing the appraisal report they intend to use at trial, *Section 3121* requires a plaintiff in a personal injury action to make herself available for a physical or mental examination whenever her "condition ... is in controversy," While *section 3121* applies to the examination of a person's body, it is analogous to the Proceedings in that a petitioner who places the condition of her real property at issue should have not have a higher expectation of privacy than a plaintiff in a personal injury action who places the condition of her body at issue.

Petitioners contend that *CPLR Article 31* should not apply to the Proceedings, because "in a tax certiorari proceeding any analogy to negligence actions, contract claims, and any other law pertaining to ordinary civil actions is improper" [Transcript of Oral Argument, dated **[*23]** April 25, 2013 ("Transcript"), p. 15]. Petitioners cite *Matter of Singer Co. v. Tax Assessor, 86 Misc 2d 631, 382 N. Y.S.2d 628 (Sup. Ct., Westchester Co. 1976)* in support of their argument. That case limited a petitioner's recovery in a tax certiorari proceeding to the relief requested in its application, even though the court ultimately determined that the value of the subject property was lower. The court refused to permit the petitioner to amend its *ad damnum* clause, even though such amendments are allowed in negligence actions, *Matter of Singer Co. is* limited to the very narrow issue of whether a petitioner in tax certiorari litigation may amend the *ad damnum* clause of her petition. As such, it does not support such a broad, sweeping proposition as Petitioners propose. Moreover, the Appellate Division, Fourth Department has already determined that *CPLR Article 31* applies to tax certiorari litigation in the context of discovery granted pursuant to *CPLR § 408 [see Matter of Wendy's Restaurants, LLC v. Assessor, supra, at 1917].*

Petitioners also oppose the inspection of the Property on the basis that the Uniform Standards of Professional Appraisal Practice ("USPAP") do not mandate that an appraiser **I*241** inspect a property's improvements [USPAP 2010-2011 Ed., Advisory Opinion 2]. It is undisputed that all appraisers of real property in New York are expected to comply with USPAP **[**9]** [Zukowski Af., at ¶3].

While USPAP does not require an inspection, neither does it preclude one, Indeed, Advisory Opinion 2 provides that while an inspection is not required, "one is often conducted." Advisory Opinion 2 provides further that the "extent of the inspection process is an aspect of the scope of work" and "[i]t is the appraiser's responsibility to determine the appropriate scope of work, including the degree of inspection necessary to produce credible assignment results given the intended use." [USPAP 2010-2011 Ed., Advisory Opinion 2 (Emphasis added)]. In this regard, Respondents have submitted the affidavit of an experienced appraiser, who avers that interior and exterior inspections of the improvements on real property are critical to his ability to prepare a credible appraisal report; that his inability to observe a home's quality and condition and the workmanship associated with after-purchase capital improvements renders the report less credible; and that in some circumstances he may be required **P*251** to withdraw from completing an assignment where he is required to make too many extraordi-

nary assumptions in the event he is not provided with access to a property's improvements [Zukowski Aff., at ¶¶8-13]. This is consistent with controlling New York law regarding the level of detail required in an appraisal report to be used at trial *[see, e.g. Niagara Mohawk Power Corp. v. Assessor, supra* (defining substantial evidence) and *22 NYCRR § 202.59(g)(2)].*

In response, Petitioners submit the affidavit of Dominic Penale, currently an appraiser certified in New York (but having not earned the MAI designation) and a former assessor of the City of Niagara Falls. Mr. Penale states that as an assessor he assessed (not appraised) thousands of real properties without the benefit of interior inspections. His averments are not surprising, given that the parties agree that an assessor is not permitted to conduct an interior inspection without a property owner's permission. It is telling that Mr. Penale couched his statement in terms of his role as an assessor (and not in his role as an appraiser). While he has been an appraiser for twenty-one years [Penale Aff., at ¶2], he does not state the number **[*261** of appraisals he has prepared (as opposed to assessments he has set) without the benefit of exterior and interior inspections.

Petitioners contend further that, in lieu of an appraiser being permitted to gather relevant and necessary information by inspecting the improvements on the Property, Respondents' appraiser should be required to rely on third-party information, such as canvassing the neighborhood:

The Court: What would the appraiser do? What third-party information would the appraiser have access to and what is he supposed to do? Canvas the neighborhood, peek in the windows, what?

Counsel: Perhaps. I don't know, It's guesswork

[Transcript, at 12].

The appraisal process in a tax certiorari proceeding is not "guesswork" and appraisers should not be relegated to having to speak to a petitioner's neighbors or otherwise attempt to peek through windows (presumably from the street). Moreover, a petitioner's neighbors, assuming they were laymen, would not be in a position to evaluate the particulars of a petitioner's home, and their 1**101 "opinion" would otherwise constitute inadmissable hearsay.

Petitioners next contend that Respondents' appraiser should not be permitted to inspect [*271 the improvements on the Property because the appraiser will likely be unable to inspect the interiors of the properties he uses as comparable sales. Properties used as comparable sales, however, are recent sales, most (if not all) of which are supported by detailed MLS (Multiple Listing Service) listings, which describe the comparable's attributes. MLS listings, as used in the process of selling real estate, typically accentuate a property's attributes to enable the seller to achieve as a high a sales price as possible. Persons embroiled in tax certiorari litigation (which they have initiated) are typically seeking to achieve the opposite outcome in terms of reducing the value of their assessment. Moreover, the owners of properties used as comparable sales have not placed the condition of their property in issue by having commenced an *RPTL Article 7* proceeding. For these reasons, an inspection of comparable sales is not critical to the appraiser's preparation of an appraisal and has no bearing on whether an appraiser should be permitted to inspect the property which is the subject of an Article *7* proceeding.

Finally, Petitioners contend that a notice to admit, as contemplated by *CPLR 3123(a), 1*281* will be sufficient to apprise Respondents of the condition, quality, etc. of the improvements on their Property. This Court disagrees because a notice to admit:

should be used only for disposing of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after full trial *[The Hawthorne Group, LLC v. RRE Ventures, 7 AD3d 320, 324, 776 N. Y.S.2d 273 (1st Dept. 2004)].*

Such matters as, *inter alia*, the quality and condition of a home and the workmanship related to after-purchase improvements are not "uncontroverted questions of fact or those that are easily provable." Rather, they are "material issues or ultimate facts that can only be resolved after a full trial."

By the nature of these proceedings, a notice to admit is unworkable, inefficient and would lead to the precise type of over burdensome fishing expedition that the CPLR seeks to avoid. For instance, in order to determine the type of flooring in a given room, the notice would need to separately request whether it consisted of carpet, ceramic tile, slate, marble, linoleum, hardwood, laminate, vinyl, etc., and there **1*291** are numerous subcategories for several of these options. A battery of similar questions would need to be posed regarding, *inter alia*, kitchen counter-top materials and bathroom and kitchen fixtures.

Moreover, quality, condition, workmanship and the like are matters that are incapable of being evaluated by a party or her attorney via a notice to admit. Such items must be observed by the parties' respective experts. Accordingly, a notice to admit is not proper and should not be used where, as here, the information sought is within the opinion of the appraiser as an expert witness *[see Falkowitz v. Kings Highway Hospital, 43 AD2d 696, 349*

*N. Y.S.2d 790 (2d Dept. 1973)* and *Haroche v. Haroche, 38 AD2d 957, 331 N. Y.S.2d 466 (2d Dept. 1972)1*

For the reasons stated herein, and after due deliberation having been had thereon, it is hereby

ORDERED, that Respondents' application is granted, in part, as follows:

1. Within thirty (30) days of being notified by Respondents, under oath, that Petitioners' I** 1 1] respective deeds, RP-5217 reports, and mortgages are not filed with the Clerk's Office or otherwise available for public inspection and copying, Petitioners shall provide Respondents with copies of such documents;

2. Within thirty (30) I*30] days of the date of this Decision and Order, Petitioners shall provide Respondents with copies of all surveys of the Property;

3. Within thirty (30) days of the date of this Decision and Order, Petitioners shall provide Respondents with a list of all capital improvements performed at the Property since purchased by Petitioners, a list of all related construction costs, and copies of related contracts;

4. Within thirty (30) days of the date of this Decision and Order, the parties shall schedule those inspections of the Property that Respondents seek, and such inspections shall be completed by Respondents' appraiser within sixty (60) days of the date of this Decision and Order; and

5. Petitioners' refusal to permit Respondents' appraiser entry onto their Property to conduct an inspection of the land and an exterior and an interior inspection of all improvements thereon, for the purpose of preparing Respondents' appraisal report(s) to be used at the trial of the Proceedings, shall result in Petitioners being precluded from introducing an appraisal report or the testimony of an appraiser into evidence at trial.

This constitutes the Decision and Order of this Court. Submission of an order by **I*311** the parties is not necessary.

The Court received and considered the following submissions in connection with Respondents' application:

Respondents' Notice of Motion, dated February 19, 2013, together with the Attorney Affidavit of Joel Kurtzhalts, Esq., sworn to on February 19, 2013, the Affidavit of John Zukowski, sworn to on February 15, 2013, and the Affidavit of James Comerford, Jr., sworn to on February 13, 2013 (with attached Schedule A);

Respondents' Memorandum of Law (undated); and

Petitioners' Responding Affidavit of Jorge de Rosas, Esq., sworn to on April 13, 2013, together with the attached Affidavit of Dominic Penale, sworn to on April (undated), 2013.

Dated: June 6, 2013

Buffalo, New York

HON. Timothy J. Walker, J.C.C.

Acting Supreme Court Justice