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

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ALLEGANY

HARRY W. KEELEY, Individually and on Behalf of all Persons Similarly Situated in Neighborhood Code 50 of the Town of Cuba, Comprising 348 Properties,
Petitioner(s),[1]

v.

TOWN OF CUBA ASSESSORS, TOWN OF CUBA BOARD OF ASSESSMENT REVIEW, TOWN OF CUBA, CUBA-RUSHFORD CENTRAL SCHOOL DISTRICT, and COUNTY OF ALLEGANY,
Respondents,

For a Judgment pursuant to Article 78 of the CPLR relating to the method of assessment applied at Cuba Lake for the years 2010-2011

DECISION and JUDGMENT

INDEX NO. 38799
(Allegany County)

APPEARANCES: J. MICHAEL SHANE, ESQ., for Petitioner(s)
DAVID T. PULLEN, ESQ., for Respondents Town of Cuba Assessors, Town of Cuba Board of Assessment Review, and Town of Cuba
BERNARD B. FREEDMAN, ESQ., for Respondent Cuba-Rushford Central School District
THOMAS A MINOR, ESQ., for Respondent County of Allegany

PAPERS CONSIDERED: The ORDER TO SHOW CAUSE;

the PETITION, with annexed exhibits;

the AFFIDAVIT OF ATTORNEY J. Michael Shane, Esq.,

the BRIEF of Petitioner;

the ANSWER AND AFFIRMATIVE DEFENSES of Respondent Cuba-Rushford Central School District, together with the AFFIDAVIT of Diane Wetherall;

the ANSWER AND AFFIRMATIVE DEFENSES of Respondent County of Allegany;

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[1]References to "petitioner," in the singular, are to Harry W. Keeley, whereas references to "petitioners" are to all would-be members of the purported class of property owners.

the VERIFIED ANSWER of Respondents Town of Cuba Assessors, Town of Cuba Board of Assessment Review, and Town of Cuba

the NOTICE OF MOTION of Respondents;

the AFFIRMATION [of David T. Pullen, Esq.] IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ..., with annexed exhibits;

the MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ...;

the RESPONDING AFFIRMATION [of David T. Pullen, Esq.] IN SUPPORT OF RESPONDENTS MOTION TO DISMISS ...;

the AFFIDAVIT OF ATTORNEY Thomas A. Minor, Esq., with annexed exhibits;

the transcript of the EXAMINATION BEFORE TRIAL of Harry W. Keeley;

the transcript of the EXAMINATION BEFORE TRIAL of Barry Cummins;

the transcript of the EXAMINATION[S] BEFORE TRIAL of Nancy Orcutt, Winfred Sweet, Richard Truax, Jr., Merlin Brigs, Norman Ungermann, and David Crowley;

PETITIONERS' RESPONSE TO FIRST SET OF INTERROGATORIES;

the AMENDED PETITION, with annexed exhibits;

the NOTICE OF MOTION TO REJECT AMENDED PETITION [AND] FOR DISMISSAL OF PETITION, and the AFFIRMATION [of David T. Pullen, Esq.] IN SUPPORT OF RESPONDENTS' RENEWED MOTION TO DISMISS ARTICLE 78 PROCEEDING AND MOTION TO STRIKE PETITIONERS' AMENDED PETITION, with annexed exhibits;

the MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ARTICLE 78 PROCEEDING AND ... TO STRIKE PETITIONERS' AMENDED PETITION;

the CASE BRIEF ... of Petitioner, with annexed exhibits;

the MEMORANDUM OF LAW of Petitioner;

the AFFIDAVIT OF HARRY W. KEELEY; and

the REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS ARTICLE 78 PROCEEDING AND ... TO STRIKE

PETITIONER'S AMENDED PETITION.

Petitioner commenced this proceeding to challenge year 2010 property tax assessments made or adhered to by respondents, which are the Town of Cuba (the Town or the assessing unit), the Town Assessors (comprising a board, but hereinafter referred to as the assessors), the Town Board of Assessment Review (the BAR) (collectively, the Town respondents), the Cuba-Rushford School District (the school district), and the County of Allegany (the County). This proceeding is unusual in several respects. First, although it nominally raises claims of unequal and excessive assessment, the petition seems to eschew any demand for relief available under Real Property Tax Law (RPTL) article 7, i.e., the correction or reduction of assessments on discrete tax parcels, including petitioner's.[2] Rather, the petition is brought specifically under CPLR article 78 and seeks a judgment annulling the entire final assessment roll for the Town on account of alleged methodological improprieties on the part of the assessors. Second, in primarily complaining about the assessments made with respect to a certain entire neighborhood of properties surrounding Cuba Lake, a part of the taxing jurisdiction known as Neighborhood Code 50, the petition seeks class action status and relief on behalf of petitioner and the allegedly similarly situated owners of all 347 other properties in the vicinity of Cuba Lake. Finally, although this is a summary proceeding, the Court has seen fit to order that some disclosure take place in an effort to elucidate petitioner's claims (*see generally* CPLR 408).

The petition was brought on by order to show cause, which sought "review pursuant to Article 78 of the CPLR as to why the assessments of petitioner's property[,] and all properties within the Town of Cuba, should not be set aside and voided for failing to follow proper methods

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[2]The petition is lacking, for example, in allegations specifying any particular property, including petitioner's, the current assessment of any such property, and any extent to which such property may be overassessed.

and rules for determining assessed valuations." The order to show cause further sought preliminary injunctive relief, including the barring of any tax collections based on the aforementioned assessments, relief that the Court denied at the outset of this proceeding and will not further address. The petition alleges petitioners' status as owners of residential structures and other improvements located on lands that are variously owned outright by petitioners and/or leased to them. The Court understands from presiding over this and parallel litigation that many properties surrounding Cuba Lake consist of or include lands that are owned in fee by the State of New York (State) but leased to private citizens. The Court further understands that such State lands now typically are leased for short terms and for nominal rents; that lease renewals are routinely granted; that tenants historically have improved the State-owned lands by erecting thereon privately owned residences or cottages and appurtenant structures, including driveways, garages, sheds, boat docks, walls, fences, etc.; that tenants typically are denied any right to remove any such owned improvements during or at the end of any such lease term or renewal; and that there is a market for the resale of the privately owned improvements and (subject to State approval) the assignment of the corresponding right or expectancy to occupy the lands upon which those improvements sit for any remaining years of a current leasehold term and/or for any renewal term. The Court understands that the situation generally presents unique assessment issues inasmuch as 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 full and fair actual market 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.

Apparently in reflection of some of the foregoing facts and principles, the fourth paragraph of the petition alleges that, in preparing the 2010 tax roll for Neighborhood Code 50, the assessors improperly included property exempt from taxation by law. The Court hastens to note, however, that the balance of the petition does not focus on any such claim concerning the assessment of tax-exempt lands or non-taxable personalty, and that this proceeding does not seem to hinge upon or even involve such claim of illegality. Instead, the petition alleges other improprieties or illegalities in the method of assessment. Thus, the tenth paragraph of the petition alleges that once the assessors had "established the equalization rate for the assessing unit at 100%, they "thereby fixed the assessed valuation of all units within the assessing unit," "thus pre[cluding them] from increasing the assessed valuation of those properties, except only [upon] a showing of improvements to the property or rationalization of errors of prior assessed valuations resulting in a reduction." It is further alleged that "[c]hanges of assessment in the assessing unit to the petitioners' properties have effectively and improperly created valuations in direct violation to the established equalization rate of 100%."

The petition states four causes of action. The first alleges that the assessors improperly "selectively reassessed primarily lakeside parcels" within Neighborhood Code 50 "while ignoring

and not reassessing the other properties" within the Town, in violation of RPTL 305 and Article XVI of the New York State Constitution.

The second cause of action alleges that the filing of the tentative tax roll for year 2009 was preceded by a Town-wide reassessment and was followed by the filing of tax grievances by 438 property owners, 418 of whom won BAR reductions averaging $34,000 per property. It is further alleged that, in increasing the assessments for tax year 2010 on "selective properties" within Neighborhood Code 50, only one year after the BAR had determined the final assessments for those properties and "fixed the equalization rate" at 100%, the assessors violated the regulations of the New York State Office of Real Property Tax Services (ORPTS), which permit municipalities to reassess only if they are engaged in an "annual reassessment plan" and then only if the assessors comply with ORPTS regulations and the RPTL. The petition alleges that the assessors were legally "precluded from changing an assessment in any year following an assessment determination when the equalization rate is unchanged in the assessing unit, and the inventory of the property remains unchanged."

By its third cause of action, the petition alleges that the 2010 assessment "is unlawful in that it represents inequality of [assessment of] properties, excessiveness of value[,] and unlawfulness because of the selective process used, and [inasmuch as] the equalization rate is overstated." Petitioners further allege that such assessment is "unequal in that it has been made at a higher proportion[of] value than the assessment of other real property on the same roll." It is alleged that "the general ratio of the assessed value to the full value of real property situated in the [Town] is such that in order to be equal and proportionate with the assessments of other real property, the assessment of petitioners' real property should be reduced as aforesaid to its 2009 assessed value, if less than 2010 assessed value wherein an inventory remains unchanged, or $76/sq. ft. of residential structure if the inventory is changed[,] or a lesser judgment on the 2010 RP-525 for a particular property with inventory change."

By its fourth cause of action, the petition alleges that the Town in 2009 "engaged the services of a professional appraisal company and embarked on a complete reassessment of the Town," that the hired experts "were provided by Respondent Assessors [with] a certified accurate inventory of the properties to be assessed within the assessing unit," but that "the inventory so provided ... was erroneous, substantially incorrect[,] and not reflective of the status of a particular taxable units in the district[,] resulting in erroneous information being supplied to the assessors and the experts in their attempt to determine fair market values for the properties within the assessing unit." It is further alleged that, because the inventories were "skewed and inaccurate," the resultant assessments "are incorrect because they are based on faulty information and incorrect data and are in violation of Article 3 of the RPTL."

The "Wherefore" clause of the petition seeks an order declaring that respondents have employed unlawful and illegal methods for assessing real property within the Town; declaring that the 2010 tax roll was unlawfully and illegally prepared using methodology that violates the statutory and constitutional rights of petitioners; declaring that respondents have unlawfully, illegally and selectively reassessed all Neighborhood Code 50 properties "in excess of 100% equalization"; enjoining respondents from taking action based on the assessments; vacating, annulling and voiding the final assessment roll for 2010, except where an improvement has received a Certificate of Occupancy, or [except where] a RP-525 has reflected a reduction from the 2009 roll"; disqualifying the Town from participating in the annual reassessment program; declaring that the assessors may not reassess any properties within the Town prior to April 1, 2016 except in instances of demolitions and improvements; allowing the assessors, in cases of improvements, to "increase the assessment one time only prior to April 1, 2016[up to] $29/sq. ft. on commercial square footage, and ... up to $76/sq. ft. on residential improvements"[3]; but

[3]According to his answers to certain interrogatories, this figure advance by petitioner as the maximum permissible rate of assessment for residential property within the Town was

declaring that respondent BAR may continue to grant reductions in assessments properly protested or grieved.

Attached to the petition are three documents. Attachment A is a list of the owners of those tax parcels located within Neighborhood Code 50, i.e., those owners who would be included in any class certified at petitioners' request. Attachment B to the petition is the "2008 Final Through 2010 Final Assessment History Report" for the Town, sorted by neighborhood code. The Court is primarily concerned with pages 160-189 of that report, relating to the same properties listed in Attachment A to the petition. For each of the 348 tax parcels in Neighborhood Code 50, the report shows the address, square footage, final 2008 assessment, tentative and final 2009 assessments, and tentative and final 2010 assessments, with the difference between each year's tentative and final assessments for a given property being attributable to any reduction either ordered by the BAR (in 2009 and/or 2010) or directed in the context of a small claims assessment review (SCAR) proceeding (in 2009). The report shows that the vast majority of owners in Neighborhood Code 50 were notified of a large tentative increase in their assessment from 2008 to 2009, and that virtually every one of those aggrieved owners ultimately mounted a significantly successful challenge to such increase before the BAR and/or a SCAR hearing officer (in some instances the significant assessment increase first effected in 2009 was not challenged before the BAR until 2010). The report further shows that, in almost all instances in which a particular property's 2009 tentative assessment had been successfully challenged before the BAR and/or in a SCAR proceeding, the assessor nonetheless raised that property's tentative assessment for 2010, typically to a level that

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arrived at by dividing the Town's aggregate residential assessed value by the total square footage of the Town's residential improvements. Petitioner's figure for the maximum permissible rate of assessment for commercial property in the Town was devised by dividing the square footage of two "high end" "malls" into the assessed valuations for those malls. The Court gathers that one of those malls is not actually located within the Town.

negated all or most of the prior year's downward adjustment. The report further shows that the vast majority of the aforementioned tentative increases for 2010 likewise became the subject of successful BAR challenges, but that in almost every instance in which the Cuba Lake-area property owner won a reduction in his/her 2010 assessment before the BAR, the assessment, as so reduced and as reflected on the 2010 final assessment roll, was nonetheless higher than the final assessment as reflected on the 2009 roll (in some cases, the 2010 final assessment, as so reduced by the BAR, wound up being higher even than the tentative 2009 assessment that had prompted the prior year's significantly successful challenge).[4]

Attachment C to the petition is the "Board of Assessment Review 2010 RP-525 Decision Report" for Neighborhood Code 50. Largely a subset of the data reflected on the aforementioned pages of Exhibit B, that report shows the dollar reduction, if any, made by the BAR to the aforementioned 2010 tentative assessments.

Separate answers to the petition were put in by the County, the school district, and the Town, each of which denied the operative allegations of the petition and raised affirmative defenses or objections in point of law.

Further, respondent Town moved to dismiss the petition, a motion joined in by the other respondents. Such relief was sought on the grounds, inter alia, that the attempt to attain class action status was improper; that the Town had properly conducted an annual reassessment pursuant to ORPTS standards and thus had properly created the 2010 tax roll; that the third and fourth causes of action of the petition were barred by petitioner's failure to exhaust his administrative remedies; and that the relief requested by petitioner was beyond the jurisdiction

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[4]The same report shows that, elsewhere in the Town and in comparison to Neighborhood Code 50, increases in assessments from 2008 to 2009 were nowhere near as prevalent (there were decreases as well), that successful challenges to the 2009 tentative assessments were relatively infrequent (although far from unheard of, especially in Neighborhood Code 40, the Lake View category), and that increases in the assessments from 2009 to 2010 were exceedingly uncommon.

of this Court and without basis in law. Included in the motion papers were the publication entitled "ORPTS Guidelines for the Annual Aid Program a/k/a Guidelines for Annual Reassessment"; a July 12, 2010 letter of ORPTS (*see infra*); and petitioner's RPTL article 5 grievance before the BAR.

During the pendency of that motion to dismiss, the Court, as indicated *supra*, allowed certain disclosure to take place. Such disclosure included examinations before trial of petitioner Keeley and of various Town officials, including the chairmen of the Board of Assessors and the BAR, two other current members of the Board of Assessors, and the Town Clerk. Some paper discovery also was exchanged.

Thereafter, petitioner purported to serve an amended petition. The amended petition is similar to the original petition except (it appears) in the following respects: The amended petition includes expanded allegations concerning the Town's obligations under section 1573 of the RPTL. Further, petitioner now alleges that the Residential Assessment Ratio (RAR) was established by ORPTS at 100% for both 2009 and 2010. As part of his second cause of action, petitioner now alleges that the reassessment of properties in Neighborhood Code 50 unlawfully negated whatever reductions had been made by the BAR in 2009 and deviated from ORPTS regulations, various provisions of the RPTL, and the State Constitution. As part of his third cause of action, petitioner has deleted the original allegation to the effect that the assessments in the neighborhood could not lawfully exceed $76 per square foot (although that figure still appears in the ad damnum clause of the amended petition [*see infra*]). However, petitioner now adds an allegation to the effect that "the equalization rate of Petitioners' properties is understated at 100%." As part of his fourth cause of action, petitioner now alleges that the inaccuracies in the 2009 inventory of the property carried over to the 2010 assessment roll. To the relief demanded in the original petition, the amended petition adds a request for an order

directing respondents to correct inventory errors on or before July 2, 2013, whereupon a court-appointed inspector would review the inventory and report his findings to the Court as a prerequisite to respondents' being permitted to initiate any further general reassessment. Otherwise, petitioner changes from 2016 to 2015 the date before which respondents allegedly are barred from undertaking a general reassessment of property within the Town at levels in excess of $29 per square foot for commercial property and $76 per square foot of residential improvements.

In response, respondents served a notice of motion to reject the amended petition and for dismissal of the petition. With respect to the former request for relief, respondents asserted that the time to amend the petition had expired and that no application for judicial leave to amend had been made by petitioner. With regard to the latter (renewed) request for relief, the papers reiterated those dismissal grounds asserted in support of the first motion to dismiss the petition. Appended to the most recent notice of motion were, among other materials already or newly placed before the Court, the aforementioned July 12, 2010 letter of ORPTS. By that letter, ORPTS advised the assessors that, upon review of the tentative 2010 assessment roll and consideration of the most recent available actual sales data, ORPTS had determined that residential properties within the Town were (following the latest round of reductions granted by the BAR relative to Neighborhood Code 50) being assessed at "closer to 95%" of market value than to 100%. Otherwise, the letter congratulated the Town for its "successful maintenance of assessment equity." Further, respondents submitted the 2009 and 2010 Sales Analysis Reports for residential properties within the Town, broken down by neighborhood code. On the basis of the 2009 final assessment roll and the most recent annual sales data, the first report tends to show that other residential neighborhoods within the Town were being assessed at a weighted mean ratio of 100%, give or take a fraction of a percentage point, whereas properties bearing Neighborhood Code 50 were being assessed at a weighted mean ratio of 87.89%. The

2010 report tends to show that (despite the prevalent increases in assessment over the preceding two assessment cycles) properties in Neighborhood Code 50 were being assessed at a weighted mean ratio of 81.19%

In opposition to the second round of motions, petitioner avoided meeting the contention that service of an amended petition was improper. However, petitioner adhered to his position that the reassessment of properties within Neighborhood Code 50 was methodologically improper, for the various reasons alleged in the petition and amended petition. That position was staked out in part in a six-page "Case Brief" prepared by petitioner Harry W. Keeley, to which Keeley appended various documents, including what appears to be a spreadsheet purporting to make a comparative analysis of per-acre land values in the Town of Cuba, on the one hand, and in the Town and Village of Portville, on the other. The Court must confess that it does not understand the significance of that document. Otherwise, the Case Brief purports to be supported by petitioner's itemization of inventory errors concerning various properties; a certain report of December 2, 2010 purporting to compare certain assessments and/or appraisals placed upon certain properties within the Village of Cuba (i.e., the Town's Neighborhood Code 10) and Neighborhood Code 50; and a second report dated December 2, 2010 purporting to analyze the last three years' assessments placed on 22 properties within Neighborhood Code 50.[5]

In reply, respondents objected strenuously to this Court's consideration of the Keeley Case Brief but otherwise adhered to their position that the amended petition should not be considered and that the petition should be dismissed.

Now, upon consideration of the parties' respective submissions, this Court renders the

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[5]Those 22 properties had not been the subject of BAR proceedings for tax year 2009, but their owners nonetheless had thereafter sued under CPLR article 78 and had won favorable settlements intended to equalize the treatment of their properties with the properties of those who had followed proper procedure by grieving their assessments to the BAR.

following determinations:

Preliminarily, and in the interest in facilitating review of this matter, the Court determines to accept the amended petition, including its new or expanded allegations, and to construe the original answers as well as both the original and renewed motions to dismiss as going to both the petition and the amended petition. Further, the Court determines to consider the Keeley Case Brief, for whatever it is worth. Contrary to respondents' contention, the submission of the Case Brief does not constitute the unauthorized practice of law by Mr. Keeley, a litigant herein. Nor, as indicated at oral argument of the petition and motions, does the Court consider the submission of the Keeley Case Brief even at a relatively late stage of the litigation to be something that warrants the imposition of sanctions. However, the Court does agree with respondents that the Keeley Case Brief's purported supporting documentation goes to issues of valuation of discrete properties rather than to issues of methodology, in derogation of the allegations of the petition and amended petition.

Turning to the merits of the proceeding, the Court agrees with respondents that petitioner's attempt to obtain class certification in this matter is inappropriate and, to a great extent, needless. Petitioner's submissions show that each property in Neighborhood 50 was subjected to different assessments and different rates and amounts of increase from tax year 2008 to tax year 2010, and that each obtained distinct relief, if any, from the BAR and/or via SCAR proceedings. Moreover, to the extent that each member of the class might seek further relief from his or her own assessment (and the Court is aware of several who have in fact sought such relief, either via SCAR proceedings or conventional tax certiorari proceedings), the questions of fact upon which such relief would hinge – unique and variegated features and peculiar value of each tax parcel -- are not common but rather are unique to each member of the class and predominate over those factual questions that would affect all of the purported members (*see* CPLR 901 [a] [2]). For those reasons, courts consistently decline to grant class

status to petitioners in proceedings to challenge real property tax assessments (*see LaCarruba v Legislature of the County of Suffolk*, 225 AD2d 671, 671-672 [2d Dept 1996]; *Penfield Tax Protest Group v Yancey*, 210 AD2d 901 [4th Dept 1994]; *Conklin v Assessor of the Town of Southampton*, 141 AD2d 596 [2d Dept 1988]). In any event, to the extent that petitioner has raised claims that might be "typical" of those that might be pressed on behalf of other property owners (CPLR 901 [a] [3]), the certification of a class seems as though it would be unnecessary to vindication of petitioner's claims and requests for relief. To the extent that petitioner seeks a judgment under CPLR article 78 annulling of the entire 2010 assessment roll for the Town, or directing that assessments across the board be made or adjusted in some manner, such relief would, whether under principles of stare decisis and collateral estoppel or simply as a practical matter, inure to the benefit of all of the would-be members of the class, at least those who truly are aggrieved by higher-than-appropriate assessments on their property.

Concerning the appropriateness of petitioner's obtaining the aforementioned relief under CPLR article 78, the Court concludes that this proceeding may be maintained as a CPLR article 78 proceeding and that petitioner is not relegated to seeking relief pursuant to RPTL article 7. Given their ostensible basis not only in the RPTL provisions, but also in ORPTS regulations and State constitutional requirements of equal protection of the laws, petitioner's overlapping claims of excessive, unequal, selective and otherwise unlawful assessment all seem to be concerned with the process or "methodology" much more than the specific results of the most recent reassessment of the subject properties within the Town, especially in Neighborhood Code 50. Basically, petitioner asserts, in support of his requests for article 78 relief, that the Assessor acted arbitrarily and unconstitutionally in selectively reassessing or "singling out" the subject properties, among all of the properties in the Town, and substantially raising the assessments of tax parcels bearing Neighborhood Code 50. Petitioner further alleges, in support of his various requests for relief, that the assessors improperly based on their assessments on a

flawed inventory. Clearly, where the petitioner seeks to challenge only his own assessment and where the relief sought could be granted only upon a determination of the illegality of the tax or the excessiveness or inequality of the assessment placed on the particular subject property, the petitioner should be relegated to proceeding under RPTL article 7 (*see Matter of AES Somerset, LLC v Town of Somerset,* 24 AD3d 1263 [4th Dept 2005]; *Matter of Cassos v King,* 15 AD3d 758 [3d Dept 2005]; *Matter of General Elec. Co. v MacIsaac,* 292 AD2d 689, 690-691 [3d Dept 2002]; *Matter of Bassett Mtn. Recreation Ctr. v Town of Jay Bd. of Assessors,* 232 AD2d 934 [3d Dept 1996]; *Samuels v Town of Clarkson,* 91 AD2d 836, 837 [4th Dept 1982]). However, where as here it is asserted that the "method [of assessment] employed involving several properties is unconstitutional" or otherwise unlawful, the petitioner may seek relief pursuant to CPLR article 78 (*Bassett Mtn. Recreation Ctr.,* 232 AD2d at 934; *see Estrellita LLC v Town Bd. of Town of Alexandria,* 60 AD3d 1363 [4th Dept 2009]; *Cassos,* 15 AD3d at 758; *Matter of Gray v Huonker,* 305 AD2d 1081 [4th Dept 2003]; *Matter of Averbach v Board of Assessors of Town of Delhi,* 176 AD2d 1151 [3d Dept 1991]; *Matter of Krugman v Board of Assessors of Vil. of Atl. Beach,* 141 AD2d 175 [2d Dept 1988], *appeal dismissed* 73 NY2d 872 [1989]; *see generally General Elec. Co.,* 292 AD2d at 690-691).

Only brief comment is required concerning petitioner's assertion that respondents inappropriately seek summary judgment dismissing the petition and amended petition. First, the motions seek dismissal pursuant to CPLR 7804 (c), (e) and (f), not summary judgment pursuant to CPLR 3312. More important, CPLR article 78 proceedings are by design summary proceedings (ones in which the trial of contested factual issues is a rather rare occurrence), meaning that the propriety of the Court's disposing of this case at this stage is not so much an issue as the premise.

Turning to the various causes of action of the petition and amended petition, the Court concludes that, as a matter of law, respondent assessors did not violate the RPTL, article XVI

of the State Constitution, or ORPTS regulations in the manner in which they put together the 2010 assessment roll. Contrary to petitioner's contention, the assessors did not "selectively" reassess predominantly lakeside parcels or other properties in Neighborhood Code 50 while ignoring the other properties within the Town. The materials before the Court demonstrate that the Town conducted the required annual reassessment in a manner consistent with the requirements of the program administered by ORPTS (*see Matter of Malta Town Centre I, Ltd. v Town of Malta Bd. of Assessment Review,* 3 NY3d 563, 568-571 [2004]). The record indicates that the assessors did in fact conduct a systematic review in which, according to the testimony of the Chairman of the Board of Assessors, the assessments of properties within the various neighborhood codes of the Town were "all considered." During the course of that systematic review, which took into account the then most recent 2009 assessments and several years' worth of sales data, the assessors ascertained that, with the notable exception of properties within Neighborhood Code 50, residential properties within the Town were selling at prices that on average came within a percentage point or less of their assessed values. However, with regard to properties in Neighborhood Code 50, the assessors ascertained that assessments placed on such properties were only about 88% of their adjusted sales prices. The record further demonstrates that, because the law requires that properties within the Town be assessed at a uniform percentage of value, in this case 100%, the adjustors determined to increase the assessments on properties within Neighborhood Code 50 to reflect the market trend and thereby bring those assessments into conformity with the rates of assessment elsewhere within the Town. The Court's understanding of the law and of the systematic reassessment process administered by ORPTS is that there is nothing wrong with the manner in which the assessors focused on Neighborhood Code 50, and that such upward adjustments of assessments within the uniquely appreciating neighborhood or area of the assessing unit is not only permissible, but mandated.

On this issue, the Second Department's decision in Matter of *Mundinger v Assessor of the City of Rye* (187 AD2d 594 [1990]) is instructive. In *Mundinger*, the petitioners were owners of waterfront real property that had undergone reassessment. The petitioners challenged such reassessment on the ground that it constituted a "selective reassessment" that discriminated against the owners of the waterfront property. In passing upon the validity of such a claim, the Second Department noted that a true instance of selective reassessment would have no rational basis and would violate equal protection, but that the "reassessment program in the case at bar would be justified by the [assessors'] obligation to tax real property at a uniform percentage of value if [the] waterfront residential property [in question had] appreciated at a higher rate than non-waterfront residential property" (*Mundinger*, 187 AD2d at 594; see *Parisi v Assessor of Town of Southampton*, 14 Misc 3d 1220[A] [Sup Court Suffolk Co 2007], 2007 WL 172019 *5). That principle of the *Mundinger* case is reflected in the ORPTS publication and regulations, which provide that an assessor may change the assessment on a given property within the assessing unit without reassessing every property in the jurisdiction, provided that such action is necessary to maintain a uniform percentage of assessed value as required by RPTL §305 (2). For that reason, there is "no authority for [petitioner's] allegation that the [concept of a] 'systematic review' . . . mandates a total reassessment of all properties as part of the updating of the assessment roll" (*Parisi*, 14 Misc 2d 1220[A], 2007 WL 172019 *6; *see* 9 NYCRR 201-2.5 [c] [1] ["A reassessment is a systematic analysis of the assessments of all locally assessed properties ... This does not necessarily mean that every property must be appraised every year"], [c] [2] ["An annual reassessment does not mean that each valuation must be re-computed annually. Trending factors based on criteria such as property type, location, size, and age are developed and applied to groups of properties. These factors are derived from assessment-ration studies or other market analyses"]; *see also* 9 NYCRR 201-2.5 [c] [4] - [7] [authorizing certain analytical tools to be used by assessors in determining if given

neighborhoods need to be "trended or reappraised" "in order to restore assessments to a desired uniform percentage of value"]; *cf. Matter of Harris Bay Yacht Club, Inc. v Town of Queensbury,* 68 AD3d 1374, 1375 [3d Dept 2009] [held: assessing body may isolate particular properties for reassessment upon showing of "some legally recognized factor such as improvements to the propert[ies] or equal application to all properties of similar character," i.e., by demonstrating how the "change brings such assessment(s) into line with those of other properties whose assessments go unchanged"]). Given their valid determination in this case that other properties, unlike the Cuba Lake-area properties, were not appreciating from year to year, the assessors rationally determined not to increase the assessments on such other properties but to focus their efforts on updating the assessments in the neighborhood or area that had undergone the appreciation in value (*see Parisi*, 14 Misc 2d 1220[A], 2007 WL 172019 at *7).

For the same reasons, the Court must reject the allegations set forth in the second cause of action of the original and amended petition. As amended, that cause of action alleges that the reassessment of properties within Neighborhood Code 50 only violated the State Constitution, various provisions of the RPL, and ORBS regulations. As indicated *supra*, the Court holds that raising the assessments on properties in a uniquely appreciating part of the assessing unit does not contravene any of those legal authorities, but rather is mandated by them. As further amended, the second cause of action alleges that the 2010 assessments on properties within Neighborhood Code 50, properties to which no improvements had been made, were improper inasmuch as increases in those assessments negated the reductions made by the BAR for the prior tax year. However, this Court concludes that there is no prohibition on reassessing properties within a given neighborhood or area merely because some or even most assessments within that neighborhood or area were reduced during BAR proceedings pertaining to the immediately prior tax year. That is all the more true where, as here, the

assessors undertake a systematic review of all assessments within the Town (*cf.* RPTL 727 [2] [a], [b], 739 [2] [a], [b]; *see generally Malta Town Centre I, Ltd.*, 3 NY3d at 568; *MRE Realty Corp. v Assessor of Town of Greenburgh*, 33 AD3d 802, 803-804 [2nd Dept 2006]). As further amended, the second cause of action alleges that the updated assessments placed on properties within Neighborhood Code 50 "created an equalization rate in excess of 100% for said properties." The Court would read that as alleging that the subject properties were improperly assessed at more than 100% of their value when both the equalization rate and the RAR had been established at 100% for the Town. The allegation is nonetheless clearly lacking in merit. After finalization of the 2010 assessment roll, ORPTS notified the Town that residential properties within the Town were, on average, being assessed at only about 95% of their value.

The Court similarly must reject the allegations of the third cause of action. As amended, it alleges that the subject properties -- meaning not only petitioner Keeley's property but all 348 tax parcels within Neighborhood Code 50 -- are unequally or excessively assessed. Although petitioner is eschewing relief under RPTL article 7 in favor of relief sought pursuant to CPLR article 78, the Court nonetheless concludes that petitioner is precluded from pursuing any claim of inequality of assessment before this Court based on his personal failure to raise such a claim before the BAR. Moreover, as indicated *supra*, the claims that the subject properties are assessed at more than their fair value and at a higher proportion of their market value than other real property or other residential realty on the same assessment roll -- is not supported by the materials before the Court. Indeed, the allegation is contravened to an extent by the letter of ORPTS advising that residential property within the Town, even after the upward adjustment of many residential assessments, was at only about 95% of full value. It is more definitively contravened by the 2009 and 2010 analyses showing that properties within neighborhood Code 50 were and still are being underassessed in relation to their historic average selling prices,

whereas the assessments of other residential properties were and are averaging about 100% of their prices.

Finally, the Court determines that the allegations of inventory errors or inaccuracies set forth in petitioner's fourth cause of action are insufficient to warrant the relief demanded by the petitioner. The Court acknowledges that some of the matters highlighted in the testimony of petitioner Keeley – especially the alleged non-existence of certain inventoried improvements – are disquieting. Nonetheless, the Court concludes that the alleged inventory errors or inaccuracies concerning a relative handful of properties are not so pervasive as to warrant the drastic relief of annulling the entire assessment roll of the Town (*see generally Hellerstein v Assessor of Town of Islip,* 37 NY2d 1, 13-14 [1975]; *New York Public Interest Research Group, Inc. v Board of Assessment Review of City of Albany,* 104 Misc 2d 128, 134-135 [Sup Ct Albany Co 1979]). For one thing, petitioner Keeley himself testified to his awareness that many of the errors had been brought to the attention of the taxing authorities and that reductions in assessments had been predicated on such corrective information, although the inventory itself may not have been corrected. For another thing, although the precise square footage of docks, sea walls, outbuildings, and the like might be relevant to the valuation of discrete improvements or property features on a reproduction cost basis, the assessments at issue are based on the aggregate market value of all of the taxable elements of the property. None of that is to negate the fact that respondent assessors are under a continuing obligation to maintain an accurate inventory of taxable real property within the assessing unit and to correct such errors as have been pointed out to them (*see generally* RPTL § 500 [1]). However, the Court must decline the invitation, set out in the Keeley Case Brief, that the Court oversee the assessors' ongoing responsibility of maintaining a correct inventory of property within the Town. That function properly lies within the primary jurisdiction of those local officials charged with keeping the assessment roll (*see generally Uniformed Firefighters Assn of Greater New York v City of New*

York, 79 NY2d 236, 241-242 [1992]; *Capital Tel. Co. v Pattersonville Tel. Co.,* 56 NY2d 11, 22 [1982]; *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 362-363 [1987]).

Accordingly, the petition and amended petition are DISMISSED, and the determination to establish the final real property tax assessment roll for the Town of Cuba for tax year 2010 is CONFIRMED.

SO ORDERED:

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

GRANTED

FEB 18 2011

BY
KEVIN J. O' CONNOR
COURT CLERK