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October 17, 2012

Robert Leslie, Esq.
Hudson River Area Office
350 Northern Blvd, Ste. 304
Albany, NY 12204

Re: Proposed Apportionment

Dear Mr. Leslie:

As you may recall, at the District's last meeting there was discussion of the Albany Port District Commission and lands owned by that Commission. For your reference, we enclose a copy of *Callanan Road Improvement Corp. v. Arthur McMullen Co.*, 253 AD 424, 427 (1938) in which the Appellate Division concluded: "The port district is therefore a territorial division of the state with its borders accurately fixed and defined by the statute creating it." More recently, Supreme Court, Rensselaer County issued *Albany Port District Commission v. Board of Assessment Review of the Town of East Greenbush, et al.*, 140 Misc. 2d 430, 432 (Sup. Ct. Rensselaer County 1988) in which the Court likewise found the Albany Port District Commission to be a Department of the State. That case was appealed to and upheld by the Appellate Division. *Albany Port District Commission v. Board of Assessment Review of the Town of East Greenbush, et al.*, 157 AD2d 959 (3d Dept. 1990). Copies of these Decisions are likewise enclosed for your convenience.

Very truly yours,

MILLER, MANNIX, SCHACHNER & HAFNER, LLC


Leah Everhart

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Enclosures

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OCT 19 2012

HUDSON RIVER-BLACK RIVER
REGULATING DISTRICT
ALBANY, NY



PRINTED ON RECYCLED PAPER

253 A.D. 424, 2 N.Y.S.2d 666

CALLANAN ROAD IMPROVEMENT
COMPANY, Respondent,

v.

ARTHUR MCMULLEN COMPANY,
ULSTER DAVIS, INC., SAGER-
SPUCK SUPPLY COMPANY, INC., and
FRED A. NICHOLSON, Appellants,
Impleaded with ALBANY PORT
DISTRICT COMMISSION and Others,
Respondents, and Others, Defendants.

Supreme Court of New York,
Appellate Division, Third Department.
March 9, 1938.

CITE TITLE AS: Callanan Rd.
Improvement Co. v McMullen Co.

Liens

Mechanic's lien --- Albany Port District Commission, created by Laws of 1925, chap. 192, is municipal corporation within contemplation of Lien Law, § 5 --- District does not fall within classification of public benefit corporation (Gen. Corp. Law, § 3, subd. 2) --- Plaintiffs are entitled to judgment in action to foreclose lien for materials furnished by contractor for construction of public improvement under contract with Albany Port District Commission

The Albany Port District Commission, created by chapter 192 of the Laws of 1925, and therein declared to be a perpetual 'public corporation' and to have perpetual existence with power *inter alia* to acquire real estate, to sue and be sued, to exercise the right of eminent domain,

and to issue bonds and other indebtedness, and with its borders accurately fixed and defined, is a municipal corporation within the contemplation of section 5 of the Lien Law. The district has much broader powers than a public benefit corporation (Gen. Corp. Law, § 3, subd. 2) and does not fall within that classification. Accordingly, plaintiffs are entitled to judgment in this action to foreclose a lien for materials furnished to a contractor for the construction of a public improvement (Lien Law, §§ 2, 5) under a contract with the Albany Port District Commission.

SEPARATE APPEALS by the defendant Arthur McMullen Company and by the defendants Ulster Davis, Inc., Sager-Spuck Supply Company, Inc., and Fred A. Nicholson, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Albany on the 3d day of September, 1937.

The judgment was entered upon the decision of an official referee to whom the issues were referred to hear and determine.

Thomas W. Cantwell, for the plaintiff, respondent.

Francis Kelliher [*Eli S. Silberfeld* and *Frederick S. Danziger* of counsel], for the defendant Arthur McMullen Company, appellant.

Woollard & Morris [*Homer E. Peters* and *Ernest B. Morris* of counsel], for the defendants Ulster Davis, Inc., and Fred A. Nicholson, appellants.

Edwin L. Fowler [*Homer E. Peters* and *Ernest B. Morris* of counsel], for the defendant Sager-Spuck Supply Company, Inc., appellant.

*425 *John C. Watson*, for the defendant Albany Port District Commission, respondent.

Whalen, Mc Namee, Creble & Nichols, for the defendant New York State National Bank, Albany, respondent.

Harold B. Slingerland, for the defendant Heidritter Lumber Company.

Stedman & Stedman, for the defendants John T. D. Blackburn, Inc., and Albany Lumber & Planing Mill Company, Inc.

Werner H. Pigors, for the defendant R. B. Wing & Son Corporation.

George A. Reilly, for the defendant William A. Mangan.

O'Connell & Aronowitz [*Stanton Ablett* of counsel], for the defendant Peter McCabe, respondent.

Wait, Wilson & Newton [*Frederick W. Newton* and *Howard G. Wilson* of counsel], for the defendants Hudson Valley Lumber Company, Inc., and Charles O. Nichols, doing business as Nichols Brothers, respondents.

A. Mark Levien, for the defendant Dexter Carpenter Coal Company, Inc.

BLISS, J.

Decision upon this appeal depends upon our answer to the question: Is the Albany Port District a municipal corporation within the contemplation of section 5 of the Lien Law? The action is to foreclose a lien for materials furnished to a contractor for the construction of an improvement under a contract with the Albany Port District Commission. The official referee found that the Albany Port District was a municipal corporation and, therefore, its contract was one for a public improvement within the intent of section 5 of the Lien Law which grants a lien to a person performing labor for or furnishing materials to a contractor for the construction of a public improvement, pursuant to a contract by such contractor with

a municipal corporation. Section 2 of the Lien Law defines the term 'public improvement' when used in that law as 'an improvement upon any real estate belonging to the State or a municipal corporation.' Subdivision 1 of section 3 of the General Corporation Law defines a municipal corporation as follows: 'A 'municipal corporation' includes a county, town, school district, village and city and any other territorial division of the State established by law with powers of local government.'

In *MacMullen v. City of Middletown* (187 N. Y. 37, 41), GRAY, J., writing for the Court of Appeals, said: 'A municipal corporation is a political or governmental agency of the State which has been *426 constituted for the local government of the territorial division described and which exercises, by delegation, a portion of the sovereign power for the public good.' It is apparent, therefore, that the powers delegated need not be the full plenary legislative power of the State. A portion of the sovereign power is all that need be conferred upon the subdivision.

In *Commissioner of Internal Revenue v. Ten Eyck* (76 F. [2d] 515) the United States Circuit Court of Appeals, Second Circuit, thoroughly analyzed the powers of the Albany Port District Commission in an effort to determine whether it was performing a usual governmental function or whether its activities were proprietary only. By tracing port and harbor developments throughout northern Europe and North America and discussing their fundamental purpose and the nature of their activities, it was shown that they have always been regarded as part of the functions of government and not those of a mere proprietary or profit making activity on the part of the government. This same conclusion was reached

by the court with regard to the Albany Port District.

The appellants contend that the Albany Port District is not a municipal corporation, but is, instead, a 'public benefit corporation,' which is defined in subdivision 2 of section 3 of the General Corporation Law as 'a corporation organized to construct or operate a public improvement wholly or partly within the State, the profits from which inure to the benefit of this or other States, or to the the people thereof.'

The Albany Port District was created by chapter 192 of the Laws of 1925. The district is declared by the statute to be a 'public corporation' and to have perpetual existence with power among other things to acquire real estate, sue and be sued, exercise the right of eminent domain and to issue bonds and other evidence of indebtedness. It embraces all the territory on the easterly and westerly sides of the Hudson river which on January 1, 1929, was included in the city of Albany and the city of Rensselaer (see Laws of 1929, chap. 293, § 1); and all lands and water in the Hudson river contiguous thereto, subject to the right, title and interest of the State in and to the lands under the waters of the Hudson river. Its affairs are administered by a commission of five members which is a body corporate. The commission is given general power and authority over the survey, development, control and operation of port facilities in such port district, and the co-ordination of the same with existing or future agencies of transportation. It shall also fix rates, charges and wharfage for the use of all port facilities and collect rates, charges and wharfage for such facilities owned by the district. It has power to regulate and supervise *427 the construction and operation of all port

facilities by whomsoever constructed, installed or owned.

It may cause taxes to be levied in its behalf by submitting an annual budget to each city, which in turn must levy taxes for its proportionate share.

The commission is also empowered to make any reasonable order which it may determine to be necessary for the proper development, maintenance and use of the port relating to the construction, equipment, repair, maintenance, use and rental of any dock, wharf, slip, terminal or warehouse owned or leased by such corporation or individual within the district and it may by rule prescribe a civil penalty of not more than fifty dollars for disobedience to an order or violation of a rule for any distinct act of such disobedience or violation, or, in the case of a continuing disobedience or violation, a penalty of not more than fifty dollars for each day that it continues. Such penalty is to be recovered by suit brought by the commission against the offending party.

The port district is, therefore, a territorial division of the State with its borders accurately fixed and defined by the statute creating it. The statutory delegation of the legislative power to regulate and supervise the construction and operation of all port facilities, by whomsoever constructed, installed or owned within the district and the fixing of rates, charges and wharfage for the use of all port facilities within the district confer upon the district limited powers of local government within the definition of a municipal corporation in subdivision 1 of section 3 of the General Corporation Law.

*

The regulation of buildings and the fixing of rates are functions within the police power. The exercise of the right of eminent domain is another attribute of sovereignty and while it might not, in and of itself, be held to be a sufficient power of local government to bring the district within the definition, when coupled with these other powers it is a further indication that the Legislature intended the district to have, within its field and territorial limits, ample powers to effect its governmental purpose. The district thus exercises within its jurisdiction limited police, taxation and eminent domain powers, all of which are portions of the sovereign power.

The public benefit corporation as defined by subdivision 2 of section 3 of the General Corporation Law was first known to statute law in 1929, while the Albany Port District was created in 1925. The district has much broader powers than a public benefit corporation and does not fall within that classification.

The judgment should be affirmed, with costs.

HILL, P. J., MCNAMEE, CRAPSER and HEFFERNAN, JJ., concur.

Judgment affirmed, with costs.

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140 Misc.2d 430, 531 N.Y.S.2d 209

In the Matter of the Albany Port
District Commission, Petitioner,

v.

Board of Assessment
Review of the Town of East
Greenbush et al., Respondents

Supreme Court, Rensselaer County
July 25, 1988

CITE TITLE AS: Matter of Albany Port
Dist. Commn. v Board of Assessment
Review of Town of E. Greenbush

HEADNOTES

Taxation--Exemptions--Land Owned by
Albany Port District

([1]) Vacant land acquired by petitioner Albany Port District in 1927 is exempt from real property tax since the Albany Port District created by State law (L 1925, ch 192) as part of a joint effort by the State and Federal Government to improve marine transportation within the State is a department of the State within the meaning of the statute exempting real property owned by the State or a department or agency thereof from taxation (RPTL 404). The tax exemption is not lost if no governmental use of the land is presently occurring since the statute does not contain any requirement that the land be held for a public use.

**TOTAL CLIENT SERVICE
LIBRARY REFERENCES**

Am Jur 2d, State and Local Taxation, §§ 340, 347, 348.

Real Property Tax Law §404.

NY Jur, Taxation, §§ 90, 101.

APPEARANCES OF COUNSEL

DeGraff, Foy, Conway, Holt-Harris & Mealey (*James H. Tully* of counsel), for petitioner.
David R. Dudley, Town Attorney, for respondents.

OPINION OF THE COURT

F. Warren Travers, J.

This is a proceeding for review of the tax assessments for the year 1986 on two separate parcels of vacant land situate in the Town of East Greenbush, New York. The petitioner claims that the parcels are wholly exempt, under section 404 of the Real Property Law, from real property taxes levied by respondents.

Petitioner moves for summary judgment and respondents oppose the motion.

The Albany Port District was created by an act of the New York State Legislature (L 1925, ch 192) as part of a joint effort by New York State and the United States of America to improve marine transportation within the State of New York. *431 The statute establishes the district boundaries as including all the territory within the City of Albany and the lands belonging to the City of Albany within the Town of Bethlehem; all the lands within the City of Rensselaer and all the lands and water in the Hudson River contiguous thereto. The vacant land being taxed is outside the Albany Port

District and was acquired by petitioner by purchase in 1927.

Petitioner asserts that RPTL 404 exempts the land in question from the imposition of tax. The claim is premised upon the argument that the Albany Port District land is actually real property owned by the State of New York or a department or agency thereof. Respondents' position is that the enabling statute does not confer tax-exempt status and that RPTL 300 renders the real property subject to tax. Respondents further assert that the land in question lies outside the district boundaries and has not been used for any governmental purpose. There is no factual dispute that the land has been vacant since the time of acquisition in 1927.

The Second Circuit Court of Appeals, in 1935, examined the historical nature of port activities and specifically the creation of the Albany Port District. (*See, Commissioner of Internal Revenue v Ten Eyck*, 76 F2d 515.) In that case, the court concluded that the ownership, control and operation of port facilities are a usual governmental function of the State. The court (at 517) stated "Commissions similar to this one, created for purposes of supervision and control of ports, in nearly all instances, have been governmental agencies, so constituted as to exercise the same kind of regulatory and supervisory functions as does the Albany Port District Commission".

An examination of Laws of 1925 (ch 192) reveals that the Albany Port District is declared to be a public corporation with perpetual existence. The Commissioners are appointed by the Governor and such members take the constitutional oath of office and file the

same in the office of the Secretary of State. Among the powers granted is the right to equip and maintain port facilities. It is also granted powers similar to those enjoyed by private business such as conferring with other government officials, to lease or construct facilities, execute contracts, fix rates and charges for use of port facilities, employ necessary people. It also has powers that an ordinary business does not, such as the power of condemnation, the power to create a traffic bureau and to cause taxes to be levied upon the property within the Cities of Albany and Rensselaer. Reports of all these activities are filed with the *432 State of New York. The State of New York originally appropriated money to support the creation of the Commission.

Considering all of these factors the court must determine if the Albany Port District is a department or agency of the State within the meaning of RPTL 404. The court is guided by and bound by the determination of the Third Department in *Callanan Rd. Improvement Co. v McMullen Co.* (253 App Div 424). The question before the court was whether the Albany Port District was a municipal corporation or public benefit corporation pursuant to the laws then in existence. The court determined that it was not a public benefit corporation but a municipal corporation. Upon reviewing the various powers and functions, the court concluded (at 427) that "[t]he port district is, therefore, a territorial division of the State". This court being bound by that determination finds as a matter of law that the Albany Port District is a department of the State within the meaning of RPTL 404.

The next question then presented is whether the tax exemption conferred by section 404 is lost if no governmental use of the land is presently occurring. Respondents rely upon *Erie County Water Auth. v County of Erie* (47 AD2d 17) to support the position that the ownership alone is not sufficient to qualify property as tax exempt. There, however, the property was leased to a private tenant and no public use occurred during the term of the lease. Clearly, the facts are different.

The property in this case is not being used, is not generating any income from private users and is lying vacant. Presumably it is being held for future port facilities.

Considering the limited amount of riverfront property, the acquisition of this land for future

port facilities would appear prudent. The fact that it has remained vacant since 1927 does not destroy its primary purpose of being held for public use. (See generally, *Bush Term. Co. v City of New York*, 282 NY 306.) In any event, section 404 does not contain any requirement that the land be held for a public use. (*Matter of New York State Teachers' Retirement Sys. v Srogi*, 84 AD2d 912, *affd* 56 NY2d 690.)

The property in question is therefore the property of a department or agency of the State of New York and exempt from real property tax pursuant to RPTL 404 (1). The motion for summary judgment is granted. *433

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157 A.D.2d 959, 550 N.Y.S.2d 216

In the Matter of Albany Port
District Commission, Respondent,

v.

Board of Assessment
Review of the Town of East
Greenbush et al., Appellants

Supreme Court, Appellate Division,
Third Department, New York
January 18, 1990

CITE TITLE AS: Matter of Albany Port
Dist. Commn. v Board of Assessment
Review of Town of E. Greenbush

OPINION OF THE COURT

Mikoll, J.

SUMMARY

Appeal from an order of the Supreme Court (Travers, J.), entered September 22, 1988 in Rensselaer County, which granted petitioner's application, in a proceeding pursuant to RPTL article 7, to, *inter alia*, declare the assessment of certain parcels of land owned by petitioner in the Town of East Greenbush unlawful.

Petitioner is a public corporation created by an act of the Legislature (L 1925, ch 192) to improve marine transportation within the State. Petitioner owns two parcels of vacant land against which respondents assessed property taxes. The parcels are located outside the geographic boundaries of petitioner. Petitioner, claiming that the two parcels are exempt from taxation pursuant to RPTL 404 (1), commenced

the instant proceeding pursuant to RPTL article 7 to review respondents' assessment of taxes on the two parcels for the year 1986. Subsequently, petitioner moved for summary judgment pursuant to CPLR 3212 and RPTL 720 (1) declaring the tax assessment illegal and void. Respondents opposed the motion.

In its decision granting petitioner's motion for summary judgment, Supreme Court found that petitioner is a department of the State within the meaning of RPTL 404 (1) and, therefore, exempt from the real property tax. An order was then entered declaring, *inter alia*, the tax on said property unlawful, exempt from taxation and striking the property from the Town of East Greenbush tax roll. This appeal by respondents ensued.

There should be an affirmance. RPTL 404 (1) provides: "Real property owned by the state of New York or any department or agency thereof, including but not limited to real property described in subdivisions two and three of this section, whether heretofore or hereafter acquired or constructed, is and shall be deemed to have been and to be exempt from taxation". "Petitioner has the burden of establishing its entitlement to [a tax] exemption and the statute must be strictly construed against petitioner" (*Matter of New York State Teachers' Retirement Sys. v Srogi*, 84 AD2d 912, 913, *affd* 56 NY2d 690). Petitioner in the instant proceeding has met that burden. It had the power and authority to acquire and hold the land (L 1925, ch 192; *see, Callanan Rd. Improvement Co. v McMullen Co.*, 253 App Div 424, *affd* 280 NY 536; *see also, Commissioner of Internal Revenue v Ten Eyck*, 76 F2d 515, 518). RPTL 404 does not restrict the exemption to only thatland *960 owned by petitioner and located therein, nor does it

require the land to be held for a public use (*see, Matter of New York State Teachers' Retirement Sys. v Srogi, supra*, at 913). Accordingly, Supreme Court properly declared that the tax on petitioner's land was unlawful and exempt from taxation. Order affirmed, without costs.

Kane, J. P., Mikoll, Yesawich, Jr., Levine and Mercure, JJ., concur. [*See*, 140 Misc 2d 430.]

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