

REAL PROPERTY
TAX &
CONDEMNATION

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Combining Giants: Saves Money?

The Governor and Legislature propose to consolidate the New York State Office of Real Property Services (“SORPS”) with the New York State Department of Taxation and Finance (“T&F”). This consolidation appears to be moving forward, as T&F has now found room for SORPS personnel at the State Office Campus.

The merger of SORPS into T&F is expected to produce operational synergies through combined facilities and integration of staff resources. This initiative expands upon the current “hosting” arrangement between the agencies that reduced administrative support between them. It would discontinue SORPS and the State Board, by creating the Office of Real Property Tax Services within T&F. It also eliminates the Executive Director, who would be replaced by a governor appointed deputy commissioner. It is not clear whether SORPS counsel’s office is eliminated or rolled into T&F’s counsel. However, SORPS’ staff is rolled into the new office under T&F. Thus, the present SORPS staff remain. The consolidation is expected to save approximately \$1.9 million in 2010-11. The effective date of the merger would be “immediate.” The exact basis for that savings is not explained.

The State Board’s power to review and determine complaints regarding State equalization rates, special franchise assessments, railroad ceilings, etc. is transferred to the Tax Appeals Tribunal (“Tax Tribunal”). The review by the Tax Tribunal does not appear to be different from the present review conducted by the State Board. Judicial challenges of special franchise assessments determined by the Tax Tribunal remain governed by RPTL §740. Such judicial challenges are **NOT** (in the present version of the budget bill) limited to an Article 78 review. Thus, the judicial challenge remains de novo. However, we will need to be attentive to any proposed changes to this merger language. Presently, for all other tax challenges heard by the Tax Tribunal, as a quasi-judiciary administrative agency, its decisions are reviewed by the arbitrary and capricious standard.

Within 60 days of enactment of the consolidation, the T&F Commissioner must provide the President of the Tax Tribunal a list of all outstanding complaints on special franchise, equalization rates, etc. and all previously determined complaints for the subject year under review. Whereupon, the Tax Tribunal immediately undertakes responsibility for review of the remaining outstanding complaints. While it is not clear what exact procedures or review the Tax Tribunal

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will apply, the statute provides that all rules, regulations, orders, opinions, determinations and decisions of SORPS are transferred in whole to T&F and shall remain in effect until modified or abrogated by the Tax Tribunal. Thus, the Tax Tribunal may, in the future, impose its own rules and regulations in an effort to conform its hearing process for special franchise assessments, etc. from being informal to formal under the New York State Administrative Policy Act (meaning the probable assertion that the arbitrary and capricious standard applies in judicial proceedings, or the equivalent of a CPLR Article 78 proceeding review). The statute itself, though, does not change the present de novo review standard for judicial challenges of special franchise assessments.

The proposed statute makes RPTL §525 applicable to the Tax Tribunal's review process, and thereby, its provision for dismissal of tax certiorari proceedings for willful failure to respond to discovery requests during the Tax Tribunal's review. That means, in challenging special franchise tentative assessments, we can expect laborious discovery requests (that must be responded to in very short time frames of 10-20 days) to attempt to set up a "willful failure" finding in support of motion to dismiss a subsequent judicial proceeding.

Another potentially troubling provision provides that records in the Commissioner's custody "in the course of discharging the duties imposed upon him" is subject to public access to the full extent permitted by the Freedom of Information Law ("FOIL"). We note that FOIL precludes production of documents designated as "trade secrets" or "competitively disadvantageous" from public disclosure. A concern is that the new SORPS office may seize on this language to deny continued designation of reports as confidential (i.e., overrule the decision in *City of Schenectady v. O'Keefe*, 50 A.D.3d 1384, 1386-87 (3rd Dep't 2008)); thereby, potentially subjecting the reports filed with SORPS to disclosure. If the consolidation is passed with the presently proposed language, we will need to monitor the new SORPS' office policy on this matter. Ultimately, we should prevail if we challenged SORPS' application of this language to approve public disclosure (provided we can demonstrate the requirements of confidentiality established in *City of Schenectady*).

Overall, the presently proposed consolidation does not appear to change the procedures and operations that presently exist at SORPS or the standard governing judicial challenges to their decisions. ■

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