

9-1-1992

The Illegal Residential Assessment Roll in Nassau County, New York

Adolph Koeppel

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hplj>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Koeppel, Adolph (1992) "The Illegal Residential Assessment Roll in Nassau County, New York," *Hofstra Property Law Journal*: Vol. 5 : Iss. 1 , Article 7.

Available at: <https://scholarlycommons.law.hofstra.edu/hplj/vol5/iss1/7>

This Comment is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Property Law Journal by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

COMMENT

THE ILLEGAL RESIDENTIAL ASSESSMENT ROLL IN NASSAU COUNTY, NEW YORK

*Adolph Koepfel**

INTRODUCTION

Municipal budgeting in the United States relies most heavily on the real property tax; over \$140 billion is raised annually by an *ad valorem* tax on real property.¹ This tax is levied by local government (generally below the state level) based upon the assessment of real property within its borders. Collection of these taxes exceeds ninety percent, since the failure to pay promotes these annual charges into liens upon the property and, ultimately upon continued non-payment, the property will be sold to satisfy these liens for the delinquent taxes. Conceptually, the correct or fair assignment of assessment value for each parcel is designed to assure that each property owner pays a fair share of the tax burden of the taxing jurisdiction. As long as there is some system in place to assure this result, the judiciary has put the imprimatur of constitutionality upon the method.² It is where the system discriminates in favor of some taxpayers and against others on the same assessment roll, that the system breaks down and fails to pass constitutional muster.

* LL.B., LL.M., New York University School of Law. Mr. Koepfel is a senior partner in the Mineola, New York law firm of Koepfel, Martone, Leistman & Herman, who has specialized in tax certiorari proceedings on Long Island since 1962.

1. TAX FOUNDATION, *FACTS AND FIGURES ON GOVERNMENT FINANCE* 182 (1992). While this method of financing municipal government is not utilized as extensively throughout the world as it is in the United States, the method is used, in varying degrees, almost everywhere.

2. See *Spiegel v. Board of Assessors*, 161 A.D.2d 627, 628 (1990) ("Once the assessment roll is established, it is presumed to be correct and free of error . . . and the taxpayer has the burden to explain why and to establish how his property was improperly assessed."); see also *Farash v. Smith*, 59 N.Y.2d 952, 955 (1983) ("There is a presumption that tax assessments are valid.").

In 1938, Nassau County, New York, not only was located in the bucolic country-side; it *was* the bucolic country-side.³ The real property in the county at that time consisted of some four thousand local stores, several thousand small homes, and a few hundred large estates.⁴ The balance was raw, undeveloped acreage and farmland. Mineola, the county seat, a stop on the Long Island Railroad, was literally a one-horse town.⁵ However, it did contain the few municipal structures necessary for running the county government, such as the County Courthouse and the County Office Building—both still stand today. There was little else.

At this time, like most of the counties throughout New York State, the assessment of real property for tax purposes was effected by separate town, city and village assessors. However, town-wide assessments in place prior to 1938 were haphazard, seemingly arrived at with no scientific assessment principles whatsoever. It was time for a change. In or about 1938, it was decided by the County government to consolidate the town assessment processes into a county-wide function; thus was born the Nassau County Department of Assessment.⁶ The J.M. Cleminshaw Company of Cleveland, Ohio was retained to assess all parcels of real estate in the county.⁷ They did their work rather efficiently during the revaluation process and, when they left in 1939, they bequeathed the taxpayers of Nassau County the system which is still in place to this day.

What did this system consist of? All real property was assessed using the cost method;⁸ all land was valued on a front foot basis⁹ and

3. The total population of Nassau County in 1940 totaled only 406,748. LONG ISLAND REGIONAL PLANNING BD., HISTORICAL POPULATION OF LONG ISLAND COMMUNITIES 1790-1980, DECENNIAL CENSUS DATA, at 15 (1982) [hereinafter DECENNIAL CENSUS DATA].

4. EDWARD J. SMITS, NASSAU SUBURBIA, U.S.A. 66, 179-180, 183-87 (1974).

5. According to census data, the population of Mineola in 1940 was a mere 10,064. DECENNIAL CENSUS DATA, *supra* note 3, at 26.

6. The Department was empowered to make all assessments throughout Nassau County, regardless of the town in which the properties were located. *Queens Park Gardens v. Nassau County*, 8 N.Y.S.2d 332, 333 (App. Div. 1938).

7. See *Queens Park*, *supra* note 6, at 333; see also *Queens Park Gardens v. County of Nassau*, 280 N.Y. 789 (1939).

8. The cost method, (often called the cost approach method),

is based on the premise that the value of a property can be indicated by the current cost to construct a reproduction or replacement for the improvements minus the amount of depreciation evident in the structures from all causes plus the value of the land and entrepreneurial profit.

.....
Underlying the theory of the cost approach is the principle of substitution, which suggests that no prudent person will pay more for a property than the amount for

if not subdivided, then on an acreage basis. Where there were building improvements upon the land, such structures were valued by adding the cost of the bricks and mortar (including labor costs) to the value of the land. Since all parcels of real estate were valued as of 1938, each parcel was reasonably sure to bear its fair share of the tax burden which was allocated to it by the budgetary pundits. The cost to acquire the land and to construct a building was what the property was worth. The system, when first put into effect in 1938, was as perfect as one could achieve in terms of accurate valuation and ultimate fairness to each land owner. What, then, went wrong?

To answer this question, we must examine what occurred after 1938. From 1938 until 1946 nothing much happened. World War II came along, and during this period there was very little construction.¹⁰ What was built during this period was assessed at 1938 building costs, utilizing the 1938 price charts left behind by Cleminshaw. There were no serious complaints by the newly assessed taxpayers nor from the taxpayers first assessed in 1938, but there should have been. All structures on the rolls in 1938 were getting older and their assessments should have been reduced for depreciation during this period. True, costs of construction *may* have risen at the same rate as these buildings were depreciating; but no measurement of the increase in building costs against a straightline depreciation was available to the assessor, so that such an assessment change could fairly be made. This state of affairs continued until 1946 when the state legislature enacted Section 603 of the Nassau County Government Law,¹¹ wherein the county assessor, at last, received specific instructions as to the methodology to be followed in assessing real property.

Unfortunately, this legislation was something very much akin to the Constitution of the United Soviet Socialist Republics; on paper,

which he or she can obtain, by purchase of a site and construction of a building without undue delay, a property of equal desirability and utility.

AMERICAN INST. OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 53, 449 (1983).

9. The "front-foot rule" is "[o]ne by which cost of improvement is to be apportioned among several properties in proportion to their frontage on improvement and without regard to benefits conferred." *BLACK'S LAW DICTIONARY* 669 (6th ed. 1990).

10. "Nassau County's growth of the 1920s and 1930s was sharply curtailed . . . [C]onstruction was brought to a virtual standstill . . . Government restrictions and manpower and building material shortages had curtailed the revival of residential building that occurred in the late 1930s." SMITS, *supra* note 4, at 190.

11. Law of July 1, 1946, ch. 708, § 1 (current version at NASSAU COUNTY, N.Y., COUNTY CHARTER ADMIN. CODE CIVIL DIVISIONS ACT art. VI, § 603 (1986) [hereinafter COUNTY CHARTER]).

a marvelous libertarian document breathing fresh air into a moribund body politic, but in reality, a facade. Nothing transpired until Arnold Carlson came along some thirteen years later and brought suit to compel the promulgation of Rules and Regulations as mandated by Section 603 of the County Charter.¹²

During 1959-60, the Nassau County Board of Assessors, pressured by the results of the decision in *Carlson v. Podeyn*,¹³ promulgated written Rules and Regulations for the assessment of real property in Nassau County for the first time. Along with these Rules and Regulations, the Board adopted and published, *inter alia*, Grade Specifications for residential structures, dividing these into five distinct grades with descriptive material for each type. At the same time, price charts for the brick and mortar costs of the construction appeared as well.

Section 603 of the County Charter mandated the promulgation of such Rules and Regulations, and added the following: "[T]he board of assessors shall . . . further adopt rules for the determination of . . . the value of buildings and structures which shall include the factors of cost of construction on some unit basis for each type of construction based on either area or content, depreciation, obsolescence and market value."¹⁴

These Rules and Regulations have remained in force to this day, some fifty-four years; and for the last fifty-four years, the assessment of residential property, as we shall see, has been illegal.

I. THE TRILOGY: *CHASALOW, ACORN PONDS AND GREENS*

In 1981, the New York State legislature enacted Chapter 1057 of the Laws of 1981, which added Articles 18 and 19 to New York's Real Property Tax Law.¹⁵ The addition authorized special assessing units, including Nassau County and New York City, to classify the assessment rolls into four property types.¹⁶ We deal here solely with what in 1982 became Class I properties, or dwellings containing

12. See *infra* note 36.

13. 24 Misc. 2d 317 (1960).

14. COUNTY CHARTER § 603.

15. 1990 WL 385230, 1 (N.Y. Bd. Equal. & Ass.).

16. See N.Y. REAL PROP. TAX LAW § 1802 (McKinney 1993) [hereinafter RPTL]; see also 1985 WL 107224, 2 (N.Y. Bd. Equal. & Ass.). In 1986, a revaluation of all Class II properties (e.g., multiple dwellings, condos and coops), Class III properties (utility real property) and Class IV properties (defined as that which is not Class I, II, or III) was conducted by an outside appraisal firm. Class I properties remained on the rolls untouched, existing in the exact same format as they did in 1939.

three families or less;¹⁷ what will be referred to throughout as the residential assessment roll, which currently contains some 325,000 separately assessed parcels of real estate.

Since 1989, the Supreme Court of Nassau County has struck down this residential assessment roll as unconstitutional or illegal on three occasions. In the first case, *Chasalow v. Board of Assessors of the County of Nassau*¹⁸, the Chasalows sought to set aside a hearing officer's decision that denied the Chasalows a reduction of their tax assessment on their Class I property.¹⁹ The Chasalow's argued that while assessments not contested in a court of law continued to be based upon a theory of cost of construction in 1938, assessments on homes where a protest was filed often resulted in a revised assessment which utilized a very different valuation process.²⁰ The court held that the two very different methods of assessing property within the same property class violated constitutional principles of both the New York State Constitution as well as the Fourteenth Amendment to the United States Constitution.²¹

The second strike at the residential assessment roll was made in *Board of Managers of Acorn Ponds at North Hills Condominium III v. Board of Assessors of the County of Nassau*.²² In that case, after condominium units of three stories or less were reclassified

17. RPTL § 1802(1) (McKinney 1993).

18. Chasalow was tried twice at the Supreme Court level and has visited the Appellate Division, Second Department, once. It is due for appellate review once more. The first case, *Chasalow v. Board of Assessors*, No. 4026/89 (Sup. Ct. Nassau County May 23, 1989) [hereinafter *Chasalow I*], was reversed and remitted by the Appellate Division, Second Department, for further testimony on the issue of equal protection violation. See *Chasalow v. Board of Assessors of the County of Nassau*, 176 A.D.2d 800, 801-02 (App. Div. 1991). Upon the retrial for the myriad reasons discussed, the lower court concluded that the assessment roll for Class I properties was unconstitutional, and directed the Board of Assessors to assess all real property in Class I at a uniform percentage of value as mandated by § 305(2) of the Real Property Tax Law. *Chasalow v. Board of Assessors*, No. 2064/89 (Sup. Ct. Nassau County Dec. 16, 1992).

19. *Chasalow I*, *supra* note 18, at 15.

20. *Id.* at 11.

21. *Id.* For example, the court pointed out that:

[i]n a particular area . . . where virtually all the homes are identical and are situated on the same size plots, . . . property owners in three cases successfully reduced their assessments to \$6,300, \$6,650, and \$6,750, respectively Yet, other homes . . . continue with much higher assessments (e.g., one as high as \$12,600 and many exceeding \$10,000) based upon [the County's] method of assessing homes on the 1938 cost of construction Therefore, by comparing the tax burden of those similarly situated, it is clear that the tax burden is unequally distributed resulting in an equal protection violation.

Id. at 13.

22. No. 22584/87 (Sup. Ct. Nassau County June 18, 1990).

from Class II to Class I properties,²³ the assessor increased, in the following year and years, the assessments on all such units.²⁴ Although such increases were limited to six percent per annum,²⁵ the attack went beyond this statutory limitation, zeroing in on the six percent increase itself.²⁶ The trial court held that the assessment increases were unconstitutional since they were not part of a county-wide revaluation on *all* Class I properties;²⁷ thus, the *Acorn* court reasoned, the unit owners were deprived of due process.²⁸

We now turn to the third case, *Board of Managers of The Greens at North Hills Condominium v. Board of Assessors of the County of Nassau*.²⁹ The taxpayer attacked the assessment on this condominium not in the form of the usual tax appeal, but as an Article 78 proceeding,³⁰ alleging that the Board of Assessors failed to comply with the statutory directives contained in Section 603 of the County Government Law.³¹ Failure to comply with the statute, the taxpayer argued, rendered the assessment illegal. The court agreed, striking the assessment on the condominium units for 1990, 1991, and 1992.³² Further, the court directed the Board of Assessors to adopt statutorily compliant rules and regulations, and to reassess in accordance with these new rules and regulations within ninety days.³³

The *Greens* case closed the loop from *Chasalow* and *Acorn Ponds*. The damning evidentiary material required to establish the

23. See RPTL § 1802(1) (McKinney 1993).

24. *Acorn Ponds*, No. 22584/87 at 1.

25. See RPTL § 1805(1) (declaring that "[t]he assessor . . . shall not increase the assessment of any individual parcel classified in class one in any one year . . . by more than six percent").

26. *Acorn Ponds*, No. 22584/87 at 1.

27. The court stated that:

[T]he fairness of [Acorn Pond's] share of the total tax burden can only be meaningfully measured by comparison with other similarly situated properties. It is in this context that [the County's] system takes on an unconstitutional dimension since they have not seen fit to review all properties within the class.

Acorn Ponds, No. 22584/87 at 8-9.

28. *Id.* at 9. This case has yet to be argued in the Appellate Division. Although we can but speculate on the results of this appeal, we harbor sincere suspicions that the reviewing court will generally agree with the findings of the court below.

29. No. 12992/90 (Sup. Ct. Nassau County Sept. 30, 1992).

30. See N.Y. CIV. PRAC. L. & R. § 7801 (McKinney 1992).

31. *Greens*, No. 12992/90 at 1. The parties stipulated that evidence regarding construction grading of the condominium would be adduced on one unit only, the Secof unit, which was given a construction grade of "A+10". *Id.*

32. *Id.* at 8.

33. *Id.*

total illegality of the residential assessment process in Nassau County was at hand; the trial court eagerly pounced. We review below the controlling statute, the taxpayer's arguments at the *Greens* trial, the *Greens* court's decision and some suggestions for a painless revaluation which can be implemented by the County Assessor at a reasonable cost in time and municipal dollars.

II. SECTION 603 OF THE NASSAU COUNTY GOVERNMENT LAW

Section 603, enacted in 1946,³⁴ contains specific mandatory directives to the Board of Assessors concerning the methodology to be followed in the assessment of residential property.³⁵ Despite the statutory directive that "[i]t shall be the duty of the board of assessors to adopt such rules and regulations for the guidance of its deputy assessors in the performance of their duties as will establish an equitable and scientific system of assessing property for taxation," it was not until 1959, thirteen years later, that these Rules and Regulations were finally adopted.³⁶

The statute further states: "[T]he board of assessors shall . . . further adopt rules for the determination of . . . the value of buildings and structures which shall include the *factors of cost of construction on some unit basis for each type of construction* based on either area or content, *depreciation, obsolescence, and market value.*"³⁷

What was finally drawn up were six pages of Rules and Regulations, containing, *inter alia*, the following directives to deputy assessors: (1) Field personnel will determine and record the grade of each building in accordance with approved grade specifications; (2) Field

34. What transpired in the assessment process between 1938 and 1946, we can only guess. The Cleminshaw material was in place as to price charts. There were no written rules and regulations, nor have we been able to unearth any written grading specifications. Some glorified system of anarchy no doubt prevailed.

35. The statute covers all real property in Nassau County, but we deal here solely with residential parcels.

36. The Rules and Regulations were adopted as a result of a legal challenge to their non-adoption. See *Carlson v. Podyen*, 24 Misc.2d 317 (1960), where Judge Meyer held that such rules and regulations, when adopted, were not merely office guidelines but were directives having the force and effect of law. *Id.* at 319. His findings remain uncontradicted and unreversed. It is notable that at the *Greens* trial, we argued that the County is today, thirty odd years later, collaterally estopped from arguing to the contrary. The *Greens* court did not rule on this issue specifically, but rejected the Board of Assessors' argument that the petition should be dismissed upon the grounds that there was a rational basis to support the grading assigned to the condominium units. *Greens*, No. 12992/90 at 8.

37. COUNTY CHARTER § 603 (emphasis added).

personnel will note and record variations from basic specifications; (3) Pricers will price cards, using appropriate price charts.³⁸

These directives in turn required the preparation of twelve pages entitled, Residence Schedules and Specifications.³⁹ The specifications divided residences into five classes, AA, A, BB, B and C.⁴⁰ Variations from basic specifications were apparently covered on a chart entitled "Grade Differentials". The price charts were concededly the legacy of the Cleminshaw people, consisting of 1938 labor and material costs of construction. At some point these charts were entered into the assessor's computer; they are not known in any other form.⁴¹

III. THE *GREENS* LITIGATION

During the *Greens* litigation, the parties agreed to try one unit (called the Secof unit) of the seventy-five making up the condomin-

38. Rules and Regulations of the Department of Assessment, County of Nassau 1 (adopted Sept. 29, 1959) [hereinafter Regulations] (copies on file with author and HOFSTRA PROPERTY LAW JOURNAL).

39. Copies of the Specifications are on file with the author and HOFSTRA PROPERTY LAW JOURNAL.

40. Briefly stated, the Specifications define each grade in the following way:

Grade "AA": High to highest grade construction found chiefly in custom-built, architect designed and supervised residences. . . .High quality materials and first class workmanship throughout.

Grade "A": High grade construction. Architect designed and supervised. High quality materials and a good class of workmanship throughout. . . . [I]n recent years many homes of this class have been erected and sold in high class communities by speculative builders and developers.

Grade "BB": Modern, slightly better than ordinary construction. This type of construction embod[ies] practically all of the up-to-date features and conveniences shown in the Grade A specifications. The quality of this construction, however, is not Grade A. Materials are only slightly better than ordinary materials found in Grade B dwellings, but more material is used as you readily see by comparing the BB and B specifications. The quality of workmanship in BB dwellings is also only slightly better than on B dwellings.

Grade "B": Typical ordinary construction. This type of construction usually comprises more than 50% of all dwelling construction within the average municipality. It is practically standard in two-family flats. The one-family houses of this type are generally *constructed for the middle class of people*. . . .Materials are ordinary; workmanship only fair.

Grade "C": Cheap construction, found chiefly in houses costing \$2,500 to \$4,000. Cheap materials and poor workmanship usually prevailing, but often architecturally attractive.

Greens, No. 12992/90 at 4.

41. Copies of the price charts are on file with the author and HOFSTRA PROPERTY LAW JOURNAL.

ium.⁴² The taxpayer took the position that, since the Specifications were replete with subjective and outmoded guidelines and ancient price charts, her assessment was violative of Section 603 of the County Government Law and, therefore, illegal.⁴³ The trial delved deeply into the illegality of the assessment process utilized in costing out the taxpayer's unit. The argument and evidentiary material introduced at the trial in its support are summarized below.

A. *The Assessment Process Examined*

The statutory requirements under section 603 for determining the value of structures and buildings, are that assessments *shall* be made to include the following: (a) factors of cost of construction on some unit basis based on either area or content; (b) factors of depreciation; (c) factors of obsolescence, and; (d) factors of market value.⁴⁴ The assessment process used by the County fails to comply with these requirements.

1. Factors of Cost of Construction on Some Unit Basis, Based on Either Area or Content

The Rules and Regulations direct the field personnel to determine the grade of each building in accordance with approved grade specifications, and to note and record variations from basic specifications.⁴⁵ The field personnel are required to make a physical inspection of each building and record all appropriate data on the record card.⁴⁶ The pricer must then price the assessment cards, using appropriate price charts.⁴⁷

On the assessment card, dwellings are costed out in sections starting with the largest segment, with add-ons for additional portions of the dwelling (such as smaller segments of the main structure); extra costs are tacked on for the basement, porches, terraces and garages. Each of these dwelling components is priced *differently*

42. *Greens*, No. 12992/90 at 4. The petitioner in *Greens* was the management body of the condominium complex known as The Greens of North Hills, located in Manhasset, New York. *Id.* at 1. The complex is comprised of 75 individually-owned condominium units classified as Class One real property. *Id.*

43. *Id.* at 3. The taxpayer argued that "the grade assigned by the Board of Assessors should be lowered from 'A+10' to 'B' which would cause the assessed value to decrease because grade 'B' construction prices are less than grade 'A' prices." Respondent's Affidavit in Support at 7, *Greens* (No. 12992/90).

44. COUNTY CHARTER § 603 (emphasis added).

45. Regulations, *supra* note 38, at 1.

46. *Id.*

47. *Id.*

for each of the five grades of construction.

We learn nothing further about these dwelling segments except what may be gleaned from the price charts. The price charts, which comprise composite 1938 prices of material and labor for each of these segments, are also used to produce construction costs for items not specifically built into the basic dwelling segments. These components are either add-ons or subtractions from the total of the segmented dwelling, and seem to be divided into two classes. One group, consisting of the deduction for a dwelling (1) containing less than a full basement, (2) constructed of wallboard instead of plaster, (3) lacking or containing fireplace and stack, (4) containing extra bathrooms, (5) with extra toilets and bathroom tiles, are costed differently for each of the five grades of construction. Another group of add-ons or deductions, consisting primarily of (1) pine floors, (2) air conditioning, (3) stall showers, (4) brick veneer and (5) party walls, are all costed the same for all five grades.

Why one group of add-ons or deductions is costed differently for all five construction grades, and another group is costed the same for each grade, remains a deep mystery to this day. Nothing in the Rules and Regulations enlightens us as to why.

Significantly, attempts to find any updating of the price charts for any of the years subsequent to 1938 have proved futile. Without a method in place to annually update these price charts for the cost of labor and materials, no depreciation can be deducted from the stagnant 1938 cost which could result in a sound value for the dwelling. Without an appropriate methodology available to the assessor to arrive at an annual sound value of the dwelling, no valuation by use of the cost approach can be lawfully accomplished.⁴⁸

2. Factors of Depreciation

A careful review of the Rules and Regulations and the Residential Grading Specifications reveals no mention of depreciation. Similarly, the price charts do not provide cost figures for any factors of depreciation.

The sole reference to physical depreciation appears on the assessment card, where we find a three percent deduction taken from the replacement value. Does this reference satisfy the statutory directive that "the board of assessors shall further adopt rules for the

48. The sound value when added to the land value produces the depreciated cost approach to value; New York Courts have long held this to be the value ceiling in tax certiorari proceedings. *People ex rel Parklin Operating Corp., v. Miller*, 287 N.Y. 126 (1941).

determination of . . . the value of buildings and structures which shall include factors of . . . depreciation"? Aside from the ".03" notation under the heading "physical depreciation" on the assessment card, we find no rules, regulations or guidelines directing the assessor to take "depreciation" into consideration on an annual basis. The one-time three percent depreciation taken on the test unit from the replacement value is all there is.

According to the assessment card of the Secof residence, the age of the building at the last "maintenance" date listed was eight years. If this one time 3% depreciation is meant to cover this eight-year period, the math produces .00375% depreciation per annum, $(0.03 \div 8)$, or a physical life of 267 years! While a physical life of 267 years may sound absurd, (most dwellings do not have much life in them at the 100 year mark), to take a realistic annual deduction for physical depreciation, without the required annual costing increase for labor and materials, would produce an even more absurd result. Were the field person to assign a 33 year physical life to the dwelling (what else can the notation of .03 mean on the assessment card?) the assessment would be reduced to *zero* by the year 2016 (1983 + 33)! Factors of depreciation, (as well as depreciation factors other than physical depreciation), simply do not exist in the Nassau County assessment methodology.

3. Factors of Obsolescence

There is nothing in the Rules and Regulations, Residential Grading Specifications or Price Charts concerning factors of obsolescence.⁴⁹ Further, there are no definitions in the Rules and Regulations for *functional obsolescence*, nor does the equally familiar appraisal term, *economic obsolescence*, get a mention on the assessment card. To adequately comply with the statutory mandate, fairly extensive objective guidelines should be in place for the assessor to review the dwelling for signs of obsolescence; however, such guidelines were simply never written.

4. Factors of Market Value

Section 603 commands that the value of buildings and structures shall be determined, *inter alia*, by including factors of cost of construction, depreciation and obsolescence. These three items are

49. There are two references to this term, one, on the old-type assessment card, which contains a blank panel entitled: "FUNCT DEP". The new assessment card has shortened the term to one word: "FUNCT."

integral parts to what is known as the cost approach to value, and, when properly applied with appropriate objective guidelines for the assessor to follow, the terms produce on an annual basis what is known as the *depreciated cost* or *sound value* of the dwelling. Add this sound value to the land value, and you have determined value by the cost approach.⁵⁰

The statute further directs that value of dwellings in Nassau County are to be determined using *factors of market value*. Since the statute specifically directs that a proper cost approach be implemented, *factors of market value* must, then, be other criteria or methods used by appraisers to arrive at market value. The classic definition of "willing buyer/willing seller" need not be repeated here. The other methods to arrive at market value are known in appraisal terminology as the *income approach*⁵¹ and the *market approach*.⁵²

However, there are no directions in the Rules and Regulations that the assessor take into consideration sales of completed dwellings (pure market data), or reported rentals for such dwellings. Had there been compliance with the statutory directive, the assessor would have been given guidelines to review his basic cost approach (assuming *its* defects were corrected as we suggest) annually with sales data and, absent good sales data, rental data (income) for these dwellings as well. The total failure to provide guidelines for the assessment department to arrive at a fair market value, voided the assessment of the test unit at the Greens, since "factors of market value" have systematically been excluded from the guidelines laid down for the assessor.

5. The Adjustments Between Selected Grades

The test case condominium unit at the Greens was designated on the assessment card by the field person as a Grade A dwelling. The field person then went one step further and added to the assessment already found for the structure, a "plus 10%"; thus the assessor said, this dwelling is not a true Grade A dwelling, but is ten percent better than a Grade A unit, on its way to becoming a Grade

50. See *supra* note 8.

51. The income approach "measures the present value of the expected future benefits of ownership. The approach is based on anticipation and change and the principles of supply and demand, substitution, balance, and externalities." THE AMERICAN INST. OF REAL ESTATE APPRAISERS, *supra* note 8, at 348.

52. The market approach "reflects a synthesis of the ideas about the value of a property likely to be held by its typical sellers and purchasers, a synthesis that partly depends on an appraisers ability to understand the motivations of those sellers and purchasers." *Id.* at 555.

AA.

This “plus or minus” system was in place when the Cleminshaw Company revalued the County in 1938. Cleminshaw initiated a sophisticated system of grading houses, and did in fact use the plus or minus system between grades in 1938. However, in 1959, when the assessment department was forced to adopt rules and regulations by court order, no provision was made for objective standards so that a field assessor could opt for an assessment between any two of the five grades. Accordingly, there exists no objective measuring chart or standards whereby the field assessor can make a meaningful choice between grades, in the event that he feels that the dwelling doesn’t exactly match one of the five grades for which there exist written specifications. The plus or minus system now in place, is, in fact, *a non-system*. It is totally subjective, lacking any objective standards whatsoever, and leaves the choice of any assessment change between grades solely to the subjective view of the field personnel.⁵³

B. *The Findings of the Trial Court*

Judge Leo McGinity, completing the last of the trilogy of his rulings of unconstitutionality and illegality in this assessment process, made the following findings:

(1) *As to the Price Charts*: “Suffice it to say, many of today’s modern conveniences, construction material and architecture, particularly as they relate to condominiums, simply have no relationship to the 1938 pricing charts.”⁵⁴

(2) *As to the Residence Specifications*:

Petitioner challenges the “A+10” designation to the Secof unit and asserts that these grading specifications fail to present objective guides and standards for the field assessor, [as a result of which] grade selection by the field personnel has become so subjective as to seriously impact on the taxpayer’s equal protection and due process rights under both the Federal and State constitutions. With too many non-objective guidelines, the grade selection process has been rendered little more than a guessing game and thwarts the statutory directive that [these rules and regulations] ‘establish an equitable and scientific system of assessing property for taxation.’⁵⁵

53. Actually, it really is not possible to write objective standards for the plus or minus system, since there potentially exists an infinite number of adjustments between grades.

54. *Greens*, No. 12992/90 at 2-3.

55. *Id.* at 3.

Moreover, a perusal of the explanatory material contained in the "Specifications" grades,⁵⁶ . . . reveals that the "Specifications" cite inappropriate references to "high class communities" (Grade A), "middle class of people" (Grade B) and inferentially a logical conclusion to be drawn in that a lower class of people or lower class community which, in effect, stigmatizes a vast number of the residents of this county. Such references have no place in regulations implementing "an equitable and scientific system" of assessment.⁵⁷

(3) *As to grade differentials:*

These grades are subject to "Plus" or "Minus" Differentials based upon ratios between grades if found to be applicable to the property by the assessment personnel. . . . In the instant proceeding, a plus 10% was added to the "A" designation. Guidelines or criteria to be applied by field personnel when assessing a "Plus" or "Minus" Differential to a property are noticeably lacking.⁵⁸

(4) *As to lack of objective criteria:* "A cursory review of [the testimony] . . . and a review of the specifications and pricing charts underscores the lack of objective criteria in the guidelines in that many of the items graded span the five grade classifications without distinguishing factors, e.g.: floors, stall showers, brick veneer and party walls."⁵⁹

(5) *As to no market value criteria:*

Notwithstanding the dramatic changes that have occurred since the adoption of these regulations by respondents in 1959 not only in the regional Long Island economy but also in the national and world financial markets, the subject regulations suffer from the very same infirmities that Justice Meyer so pointedly noted in the *Podeyn* case, to wit, lack of consideration of such factors as market value, depreciation and obsolescence (cf. § 603 of the County Government Law of Nassau County) as well as a lack of objective criteria when applying a grade differential. It should be emphasized that the subject regulations contain no standards relative to market value in clear contravention of §603 of the County Government Law thereby rendering respondents' compliance with § 305(2) of the Real Property Tax Law that "all real property in each assessing unit . . . be assessed at a uniform percentage of value"

56. See *supra* note 39.

57. *Greens*, No. 12992/90 at 7-8.

58. *Id.* at 5.

59. *Id.*

illusory.⁶⁰

IV. THE AFTERMATH

A. *Some Problems Posed*

The Chairman of the Board of Assessors has recommended an appeal. The Nassau County Attorney has defended the assessment process and complained that to reassess in accordance with the statutory guidelines would "take years and would cost taxpayers between 30-50 million dollars."⁶¹ Due to calendar congestion, the appeal itself will, unfortunately, run to two years before an appellate ruling is made.

Further, the taxpayer was, regrettably, afforded no dollar refunds as a result of the claimed illegal overassessment. Such relief must await the new statutorily directed Rules and Regulations and the new (now legal) and predictably lower assessment of the units at the Greens.

While this decision has application to the Greens for tax years 1990, 1991 and 1992, it also applies for those years for other condominium clients who instituted the same proceedings.⁶² Moreover, the

60. The trial court noted on page seven of its opinion that:

a taxpayer who feels aggrieved by his or her assessment may protest only the total final assessment, that is, the combined assessment for land and building improvements. The taxpayer may not challenge separately the assessment of the improvement without challenging the assessment placed on the land underneath the improvement as well.

The RPTL Section 305, subd (2) provides that "[a]ll real property in each assessing unit shall be assessed at a uniform percentage of value," value meaning market value (cf. *Hellerstein v. Town of Islip*, 37 NY2d 1). Section 603 of the County Government Law requires that the board of assessors adopt rules and regulations as well as establish "an equitable and scientific system of assessing property for taxation" and "record separately the value of each parcel of land and the value of any building or structure thereon." The board adopted rules to value buildings and such rules provide for five grades of residential dwellings, "AA", "A", "BB", "B" and "C" and *inter alia* denote high-class communities, middle class of people and cheap construction found in homes costing \$2,500 to \$4,000. The Regulations stress quality of building materials and improvement and indicate the highest quality of improvement would be located in high-income areas of the County. Yet, paradoxically, when assessing the land component of those very same dwellings situate in the so-called high-class communities to arrive at a land value, the assessor does not suitably account for one of the most important factors in real estate appraisal, location, thereby contravening the directions contained in §305 of the Real Property Tax Law and rendering the resulting assessment of doubtful validity.

61. Diana Shaman, *A Tilt With the Tax Assessment Goliath*, N.Y. TIMES, October 25, 1992, § 10 (Real Estate Desk) at 9.

62. There are some 20 other condominiums awaiting their day in court directly behind

decision, if and/or when upheld on appeal, has application to *all* Class I properties from 1993 onward; over 325,000 residential parcels must be reassessed accordingly.

B. *Some Suggested Solutions*

For the system to work, (and as structured it simply cannot work), each of the 325,000 houses on the rolls in Class I should be assessed on the same basis as every other. The theory, where 1938 construction costs are brought into play, is that if each house is assessed embodying construction costs for that very same year, then all dwellings will be assessed fairly and equally. This sounds fair on the surface; however, the theory is not correct. The system does not work simply because the price chart contains no provision for annual updates of labor and material costs. Without such a provision in place, there is no fair way to compare a house built in 1938 with houses built in 1950, 1960, 1970, 1980, or 1990.

The failure to annually update renders the provision for depreciation totally meaningless. For instance, where the assessor selects a useful life of a dwelling at thirty-three years, were a three percent physical depreciation taken annually, the building assessment would be zero in the thirty-fourth year! Since many of our homes are not doing quite well after fifty years or more, there must, then, be something seriously wrong with the system.

For the cost system to work, amendments to the price charts must be made available to the field personnel on an annual basis, so that a sound building value can be found for each year. There are several indices published by authoritative engineering experts such as Means and Marshall Swift. From these lists, an annual appreciation can be obtained for housing construction in Nassau County from 1938 onward, against which the field person can take an annual figure for physical depreciation.⁶³

the Greens.

63. For example, let us take the test case assessment made in 1983—but at the Grade B level as claimed by the taxpayer and see if one can produce a fair assessment.

Reproduction cost new (1938 figures)	\$ 11,840
--------------------------------------	-----------

Let us assume an increase of 13.635 times (using engineering indices such as Means and Marshall Swift) between 1938 and 1990 (52 years)	× \$ 13.635
--	-------------

Thus we have a reproduction cost new of	<u>\$161,438</u>
---	------------------

Let us further assume a thirty year life of this building. We can now compute physical depreciation (3.3% per year from 1983 to 1990) of seven years, or 23.1%.

To this proper costing method, market value must also be considered. The County keeps sales records of all houses sold each year; it is not a difficult task to analyze these sales as a check against the new improved cost formula and to make annual adjustments where indicated. This is the *only* cost pricing system that can work. The time and money needed to put the new figures in the computer and selecting the appropriate depreciation rate is minimal—it could be working in less than a year.

One word of caution. There are housing construction items, common today, which did not exist in 1938. As a result, they are not included in the base price cost, nor have they been added separately. Consequently, the grade specifications must be redrawn and updated. This can readily be done, even at 1938 costs, for such items as cathedral ceilings, jacuzzis, walk-in closets, Anderson windows and a host of other modern items of construction; a simple mathematical formula based on the engineering indices can be applied to current costs to transport such costs back to 1938. Thus, appropriate add-ons can be made for these modern components.

Moreover, the price charts should be corrected to eliminate the difference in the pricing of identical items for different construction grades.

C. *The Best Solution*

Should the cost of making the system work in full compliance with the Section 603 mandate prove to be beyond something reasonable, another solution presents itself. Amend the statute—Section 603 of the County Government Law—and eliminate any references to the cost approach to value; *assess all property by the use of market value factors, that is, actual sales of residential properties.* Sales from developments such as the Levitt houses⁶⁴ can be fitted in

Thus, the correct and up-dated building assessment, to keep it in line with 1938 building costs and all other structures assessed using this correct method, should be made as follows:

Reproduction cost new in 1990	\$161,438
-------------------------------	-----------

Less 23.21% depreciation from 1983 (year of construction) and 1990 (7 years at 3.3% per year)	-
---	---

	\$ 37,292
--	-----------

1990 Sound Value and Correct Building Assessment	\$124,146
---	-----------

This building would be paying its fair share of the tax burden, as long as the other 325,000 Class I buildings have been assessed using the same formula.

64. The "Levitt houses" are those houses built by William J. Levitt in the late 1940s, and early 1950s. These homes later constituted the town of Levittown, Long Island. See

rather simply and with very little adjustment. Assessment of other residences will require that actual sales be adjusted to the house being assessed for features of similarity and dissimilarity; a simple enough task with which appraisers and assessors have much experience. The cost, via this route, is relatively low, and the end result will be more realistic and fairer than the now statutory prescribed combination of the cost and market value approaches.