No. 16239

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of STEVEN WHITE from action of the Board of Education of the East Ramapo Central School District and Congregation Yeshiva Avir Yakov regarding the sale of real property.

Minerva and D'Agostino, P.C., attorneys for respondent East Ramapo Central School District, Roslyn Z. Roth, Esq., of counsel

Shebitz Berman Cohen & Delforte, P.C., attorneys for respondent Congregation Yeshiva Avir Yakov, Julia R. Cohen, Esq., of counsel

In Appeals of Luciano and Hatton, 50 Ed Dept Rep __, Decision No 16,153, I dismissed a challenge to the decision of the Board of Education of the East Ramapo Central School District ("board") to close Hillcrest Elementary School ("Hillcrest") and designate it as surplus property. In this appeal, petitioner challenges the board's subsequent decision to sell Hillcrest to Congregation Yeshiva Avir Yakov ("Congregation") (collectively "respondents"). The appeal must be sustained in part.

On April 19, 2010, the board voted to close Hillcrest and deem it surplus property. Also at this meeting, the board voted to obtain an appraisal for purposes of selling or renting the school. That appraisal, hereinafter referred to as the "first appraisal," received in May 2010, valued Hillcrest at $5.9 million.

On June 8, 2010, the board adopted a resolution authorizing the sale or lease of Hillcrest and further authorized the superintendent to solicit proposals via a "formal request for proposals" ("RFP") to be opened on July

7, 2010. The RFP was issued on June 16, 2010, and was advertised in both a local newspaper (the Journal News) and on the district's website.[1] In response to the RFP, the board received three bids for Hillcrest, including one for $1.65 million, one for $4.6 million,[2] and one from the Congregation for $3.1 million. According to the board, in view of the discrepancy between the range of bids and the first appraisal, it authorized its attorney to obtain another appraisal (hereinafter referred to as the "second appraisal") which was received on July 26, 2010,[3] and valued Hillcrest at $3.24 million.[4] On July 28, 2010, the board voted to accept the Congregation's bid. This appeal ensued. On August 31, 2010, I granted petitioner's request for interim relief prohibiting the sale of Hillcrest pending a final decision in this appeal.

Petitioner contends that the sale of Hillcrest should have been put to a public vote. In addition, petitioner asserts that the board did not make a good faith attempt to obtain the best price for Hillcrest, which he contends is worth $13.2 million. Petitioner also asserts that certain board members acted out of personal interest rather than in the best interests of the district. As relief, petitioner requests an order directing a public vote prior to the sale of Hillcrest, "a review" of communications between certain board members and bidders, and that I "act on any ethics or legal violations."

Respondents generally deny petitioner's allegations and assert the sale of Hillcrest is authorized by Education

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[1] Although petitioner initially contended that there were no newspaper advertisements, he appears to concede in his reply that this may not have been the case. Accordingly, for purposes of this appeal, I have accepted the board's contention that the RFP was advertised in the Journal News as well as on the district's website.

[2] According to the board, this bid required both a purchase money mortgage from the district for 80 percent of the purchase price and demolition of the building.

[3] The second appraisal is dated July 23, 2010, but was transmitted to the district clerk for distribution to the board at 12:26pm on July 26, 2010.

[4] The board indicates that it directed its attorney to obtain this second appraisal on July 13, 2010. In support of this contention, the board points to its August 4, 2010 meeting minutes which state, in pertinent part, that "the Board of Education hereby confirms and ratifies the authority and direction given to board counsel on July 13, 2010; and further, the Board of Education ratifies counsel's actions in connections (sic) with ordering a current appraisal of the Hillcrest School ...."

Law §1804(6)(c) and no public vote is required. In addition, respondents argue that the purchase price is consistent with the "appropriate appraised value" of the school and reflects fair market value. Respondents also raise a number of procedural issues, including the board's contention that petitioner failed to join the Congregation as a necessary party and the Congregation's contention that the petition that was served on it was untimely and incomplete.

I must address a number of procedural issues, beginning with petitioner's reply. The purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR §§275.3 and 275.14). A reply is not meant to buttress allegations in the petition or to belatedly add assertions that should have been in the petition (Appeal of Caswell, 48 Ed Dept Rep 472, Decision No. 15,920; Appeal of Hinson, 48 id. 437, Decision No. 15,908; Appeal of Baez, 48 id. 418, Decision No. 15,901). Therefore, while I have reviewed the reply, I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the answer.

In addition, the board contends that the petition must be dismissed for failure to properly join the Congregation as a respondent. Specifically, the board argues that, although petitioner was directed to join the Congregation as a necessary party, the board never received an amended petition.

By letter dated September 1, 2010, from my Office of Counsel, petitioner was directed to amend the caption of his appeal and, pursuant to §275.1 of the Commissioner's regulations, join the Congregation as a respondent by September 10, 2010. The record reflects that petitioner complied with this directive by serving the Congregation with, among other things, a notice of petition and verified petition on September 7, 2010. Service of a notice of petition secures jurisdiction over an intended respondent (see e.g. Appeal of a Student Suspected of Having a Disability, 44 Ed Dept Rep 311, Decision No. 15,184). Thus, the Congregation was properly joined as a respondent. Furthermore, although petitioner should have provided the board with copies of the pleadings served on the Congregation, I find the omission de minimus because there is no substantive difference between the two sets of

pleadings. Rather, the notice of petition and verified petition served upon the Congregation simply add the Congregation to the caption and the verified petition includes a handwritten notation indicating that it was amended to include the Congregation as a respondent.

The Congregation maintains that the appeal is untimely because, despite being a necessary party to the appeal,[5] it was not served with a petition within 30 days of the board's approval of Hillcrest's sale. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of Lippolt, 48 Ed Dept Rep 457, Decision No. 15,914; Appeal of Williams, 48 id. 343, Decision No. 15,879).

Although petitioner did not initially name and serve the Congregation, he was directed, pursuant to the Commissioner's sole discretion (8 NYCRR §275.1), to join the Congregation as a party no later than September 10, 2010. Petitioner compiled with that directive. Therefore, because petitioner's pleadings were initially served on the board in a timely fashion, the Congregation was served in accordance with the Commissioner's directive, and no prejudice was demonstrated,[6] I decline to dismiss petitioner's appeal as untimely (see Appeal of Gehl, et. al., 42 Ed Dept Rep 287, Decision No. 14,857; Appeal of Heller, 34 id. 220, Decision No. 13,288; Appeal of Chester Technical Services, Inc., 31 id. 229, Decision No. 12,627).

The Congregation also contends that the petition is "infirm and improperly served" because the copy that it received did not include "Attachment 4." Attachment 4 is a newspaper article. Section 275.8(a) of the Commissioner's

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[5] Here, the Congregation appears to suggest that both CPLR §1001 and 8 NYCRR §275.8(c) make it a necessary party. However, while I agree that the Congregation is a necessary party, neither CPLR §1001 nor 8 NYCRR §275.8(c) are applicable in this matter.

[6] The Congregation claims that it was prejudiced by the issuance of the stay prior to its joinder as a respondent. However, the Congregation has since been given an opportunity to appear in this matter and has responded to petitioner's claims. Moreover, I take judicial notice of the Congregation's Affirmation in Opposition to Request for Stay in another pending appeal (Appeal of Luciano) which indicates that the Congregation was unable to "consummate the sale" of Hillcrest, even before a stay was issued in this matter, due to the "cloud on the title" caused by commencement of this proceeding.

regulations provides, in relevant part, that "[a] copy of the petition, together with all of petitioner's affidavits, exhibits, and other supporting papers ... shall be personally served upon each named respondent ...."

Petitioner submits an affidavit from his process server stating that the Congregation was served with 173 pages of materials, and that pages 24 and 25 of what he served was entitled "Attachment 4 page 1 of 2" and "Attachment 4 page 2 of 2", respectively. This is consistent with the verified petition that petitioner filed with my Office of Counsel after he served the Congregation in this matter. On the record before me, therefore, I am unable to find that petitioner failed to serve the Congregation with a copy of Attachment 4. Moreover, even if the attachment had been omitted, the failure to serve a single exhibit does not, by itself, affect the service of the rest of the petition and/or require its dismissal (see e.g. Appeal of Koehler, 46 Ed Dept Rep 425, Decision No. 15,553 [petition not dismissed for failing to serve exhibit, but contents of exhibit not considered]; Appeal of Wells, 35 id. 367, Decision No. 13,573). This is especially true here, where the attachment is a newspaper article with little or no probative value. Accordingly, I decline to dismiss the petition on this basis.

Petitioner's appeal, however, must be dismissed to the extent that he requests that I "order a review" of communications between certain board members and the responsive bidders and act on any ethics or legal violations that might have occurred. An appeal to the Commissioner is appellate in nature and does not provide for investigations (Appeal of Huffine, 48 Ed Dept Rep 386, Decision No. 15,893; Appeal of D.K., 48 id. 276, Decision No. 15,857). As such, his demand for an investigation must be dismissed.

Turning to the merits, petitioner contends that the sale of Hillcrest required a public vote. I am mindful that voter approval for the sale of a school building is required in some instances (see e.g. Education Law §§402 and 1709[11]). However, Education Law §1804(6)(c) specifically authorizes a board of education of a central school district to sell any piece of real property, after at least seven years of centralization, without voter approval, unless a petition requesting a vote is signed by 10 percent of the qualified voters of the district and

filed with the district clerk. This applies to any piece of real property owned by a central school district (see Botwin v. Bd. of Educ., Half Hollow Hills Cent. School Dist., et al., 114 Misc 2d 291; Appeal of White, 28 Ed Dept Rep 560, Decision No. 12,197). Here, petitioner submitted a petition to the board with 988 signatures requesting a public vote on the sale of Hillcrest. However, the board asserts, and petitioner does not dispute, that there are over 49,000 qualified voters in the district. Consequently, the petition calling for a vote did not contain the signatures of 10 percent of the qualified voters, as required by Education Law §1804(6)(c). A public vote, therefore, was not required.

However, it is well settled that when selling real property, a board of education has a fiduciary duty to secure the best price obtainable in the board's judgment for any lawful use of the premises (see Ross, et al. v. Wilson, et al., 308 NY 605; Davis, et al. v. Bd. of Educ. of Hewlett-Woodmere Union Free School Dist., 125 AD2d 534; New City Jewish Center v. Flagg, et al., 111 AD2d 814, aff'd 66 NY2d 980; Merritt Meridian Construction Corp. v. Gallagher, et al., 96 AD2d 933). Unless a particular method of sale is prescribed by law, a board of education has broad discretion to determine the best price for which a property can be sold, to condition the sale on such terms, as in the board's judgment, will yield the maximum financial benefit for the district, and to determine the best method of sale to be utilized in a particular case (see e.g. Ross, et al. v. Wilson, et al., 308 NY 605; Merritt Meridian Construction Corp. v. Gallagher, et al., 96 AD2d 933; see also Appeal of Brown School, 24 Ed Dept Rep 393, Decision No. 11,437; Appeal of Baker, 14 id. 5, Decision No. 8833). However, a board of education may not act arbitrarily, and it must exercise its judgment and discretion in good faith (see Ross, et al. v. Wilson, et al., 308 NY 605; New City Jewish Center v. Flagg, et al., 111 AD2d 814; Appeal of Brown School, 24 Ed Dept Rep 393, Decision No. 11,437). This includes taking reasonable steps to ascertain the value of a property and/or to utilize a method of sale which is apt to bring in the best price (see Ross, et al. v. Wilson, et al., 308 NY 605; Merritt Meridian Construction Corp. v. Gallagher, et al., 96 AD2d 933; Appeal of Baker, 14 Ed Dept Rep 5, Decision No. 8833). If a board of education abuses its discretion or acts in an arbitrary or capricious manner with respect to the sale of a piece of property, the sale may be set

aside (see e.g. Yeshiva of Spring Valley, Inc. v. Bd. of Educ. of the East Ramapo Cent. School Dist., et al., 132 AD2d 27).

Petitioner claims that the board did not properly market Hillcrest or make a good faith attempt to obtain the best price for it, requiring annulment of the sale. In response, the board essentially relies on the second appraisal and contends that, based on that appraisal, the Congregation's bid was consistent with the appraised value of the property. The record before me, however, calls into question the reasonableness of the board's actions under the totality of the circumstances.

When the board made its decision on July 28, 2010 to sell Hillcrest, it had two appraisals before it; the first appraisal which valued Hillcrest at $5.9 million and the second appraisal which valued it at $3.24 million. These two appraisals were contemporaneous, yet reached two very different conclusions with respect to Hillcrest's fair market value. In the face of two substantially discrepant appraisals conducted within a short time period, the board, as public trustee of the property, was obligated to engage in a careful, deliberative process to assess whether acceptance of the Congregation's bid would secure the best price or whether another course of action, such as rebidding with broader publication of the RFP or for a longer period, was fiscally prudent. The record indicates that the board did not engage in such a deliberative process, but instead acted in haste to approve the sale almost immediately upon receipt of the second appraisal.

Initially, I find no clear indication in the record that the board considered the second appraisal prior to approving the sale of Hillcrest at its July 28, 2010 meeting. Although the board's attorney asserts in an affirmation that the board affirmatively determined that the second appraisal was "reflective of the current market value of the school" and implies that this occurred prior to approval of the sale, there are no affidavits in the record from any board member clearly stating that such a determination was made on or before July 28, 2010, nor is there any clear indication in any of the board's minutes that this was the case. These omissions are especially troubling in light of the fact that the second appraisal was first transmitted to the board less than one and a half days prior to its acceptance of the Congregation's bid.

In addition, the circumstances surrounding the second appraisal warrant further examination. First, it is not clear from the record that the second appraisal was officially authorized by the board until after the Congregation's bid was accepted on July 28, 2010. While the board contends that it directed its attorney to obtain the appraisal on July 13, 2010, there is no evidence that this actually occurred, other than a reference in the August 4, 2010 minutes - after the fact and the sale - when the board "confirmed and ratified" this direction. Moreover, I am unable to conclude on this record that the board adequately assessed its own actions or the first appraisal prior to ordering the second appraisal.

Education Law §1804(6)(c) does not prescribe a specific method of sale for a school building. Therefore, the board was free to choose any method of sale which it believed would result in the best price for Hillcrest. Here, the board chose to sell Hillcrest via an RFP process that was only locally advertised and issued less than one month before bids had to be submitted. The board provides no explanation for this restrictive method of sale. Nor is there any clear indication that the board ever considered the issue of methodology as part of a strategy to obtain the best price. Therefore, I am unable to conclude that the board took reasonable steps to ascertain the best method of sale for Hillcrest as a means of securing the best price.

Further, the board contends that it sought the second appraisal because the bids submitted in response to the RFP were "significantly lower" than the valuation in the first appraisal and, in its view, that indicated that the first appraisal was not reflective of "current market conditions." This reasoning is circular and also assumes that the board's actions with respect to the marketing and sale of Hillcrest in connection with the RFP were reasonable - a conclusion which, as noted above, cannot be drawn. The board's dismissal of the first appraisal also is problematic in that the appraisal was based upon several explicit assumptions, including that the school would be "actively exposed and aggressively marketed to potential purchasers," and that a reasonable time (estimated at 12 months) would be allowed for exposure to the open market. In reality, those conditions were not met. The board fails to explain why it chose not to implement the assumptions,

nor is there any clear indication in the record that, after opening the bids and finding them inconsistent with the first appraisal, the board gave any consideration to whether the method of sale may have affected the number or dollar amount of the bids received. Accordingly, I am unable to find that the board adequately assessed the bids against the first appraisal prior to determining that the second appraisal was required.

Nor am I able to conclude that the board adequately assessed the probative value of the second appraisal. The board contends that the second appraisal is more accurate than the first because the comparison properties are "more closely aligned" with Hillcrest than the comparison properties utilized in the first. However, there is no clear indication in the record that the board sought expert verification of this. Rather, it appears that the board reached its own conclusion by focusing solely on the physical characteristics of the comparable properties used and their dates of sale. However, many of the alleged comparable properties appear to be located a significant distance from Hillcrest's locale, including two located in New Jersey. In contrast, the first appraisal used comparable sales of school buildings in proximity to East Ramapo. As a general rule, comparable properties should not be too remote in location from a subject property (see e.g. Great Atlantic & Pacific Tea Company, Inc. v. Kiernan, et al., 42 NY2d 236, 241). Despite this, it is not clear that the location of the "comparable" properties were taken into account by the board. Because of this, I am unable to find that the board completely or accurately assessed the second appraisal before relying on it.[7]

Finally, while the board claims that it relied on the second appraisal, I note that its actions are inconsistent with that appraisal in certain material respects. Specifically, the second appraisal identifies a reasonable marketing time for Hillcrest as 9 to 18 months, and it identifies the "marketing area" for Hillcrest as the New York City Metropolitan area. As discussed above, the board only advertised its RFP locally and accepted bids for less

[7] I note that petitioner submits records which indicate, at least in one instance, another potential problem with the second appraisal. Specifically, these records indicate that one of the prior sales relied upon as "comparable" may have been for the sale of land only and not, as the second appraisal indicates, the sale of land improved with a building.

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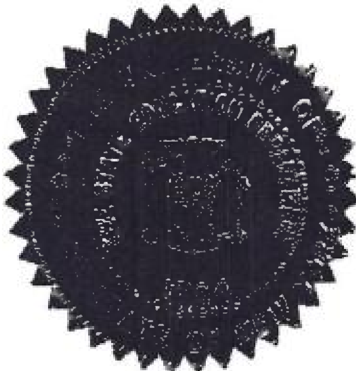
than one month. These actions, together with the issues regarding the comparison properties utilized by the second appraisal discussed above, further underscore the concerns about the sale of Hillcrest for the best price.

Given the significant difference between the two appraisals it had before it, the board, at a minimum, should have carefully considered each appraisal and taken reasonable steps to reconcile them in a rational manner. Based on the totality of the record before me, I am unable to conclude that this occurred. Nor am I able to conclude that the board gave reasonable consideration to whether the method of sale that it utilized was apt to bring in the best price for Hillcrest. Accordingly, under the facts and circumstances presented, I am constrained to find that the board abused its discretion by hastily approving the sale of Hillcrest to the Congregation and that such sale must be set aside. Further, prior to selling Hillcrest in the future, the board must take reasonable steps, consistent with this decision, to secure the best price obtainable for Hillcrest.

In light of the forgoing, I need not consider the parties' remaining contentions.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the July 28, 2010 action of the Board of Education of the East Ramapo Central School District in approving the sale of the Hillcrest property to Congregation Yeshiva Avir Yakov is hereby annulled and set aside.



IN WITNESS WHEREOF, I, David M. Steiner, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 6 day of June 2011.

Commissioner of Education