SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ABC

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In the Matter of the Application for a Review Under Article 7 of the Real Property Tax Law of Tax Assessments by

FeRICH LAND TRUST, INC.,

Petitioner,

-against-

INDEX NO. _____
R.J.I. No. _____

THE ASSESSOR OF THE TOWN OF XYZ, ABC COUNTY, NEW YORK, and the BOARD OF ASSESSMENT REVIEW FOR THE TOWN OF XYZ,

PETITIONER'S MEMORANDUM OF LAW

Respondents.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK:

COMES NOW Petitioner FeRich Land Trust, Inc., and submits the following memorandum of law in support of its request for an order directing Respondents to declare certain real property owned by Petitioner as exempt from taxation and/or to reassess such property:

STATEMENT OF THE CASE

The facts of this case are accurately and adequately set forth in the Petition filed by FeRich Land Trust, Inc. ("FeRLT"). Briefly stated, the Petition filed by FeRLT states that FeRLT is a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code. FeRLT was organized as a charitable organization under New York State's Not-for-Profit

Corporation Law. The purpose of FeRLT is to acquire undeveloped subdivided lots in the Mountain Park area and subject them to use restrictions that preclude such lots from being developed, improved with any structure of any type, logged, timbered, or stripped of any natural growth, except as approved by the Department of Environmental Conservation of the State of New York or a similar state agency. The properties acquired by FeRLT are available for free public access, use, and enjoyment.

The main issue in this case is whether the use to which the properties in question are currently being put qualifies them as being "used" under RPTL 420-a. The properties exist in their natural state as intended by FeRLT. They are completely undeveloped and unimproved. They have been set aside by FeRLT for free public use and enjoyment in their natural state as sanctuaries of nature. The public can hike on the properties, enjoy nature, and so forth.

ARGUMENT

REAL PROPERTY HELD IN ITS NATURAL STATE IN ORDER TO FURTHER THE PURPOSES OF A CHARITABLE ORGANIZATION DEVOTED TO PRESERVING AND PROTECTING LAND FROM DEVELOPMENT, LOGGING, TIMBERING, AND OTHER INTRUSIVE OR COMMERCIAL ACTIVITIES CAN BE DEEMED TO BE "USED" FOR TAX-EXEMPT PURPOSES UNDER RPTL 420-a. THEREFORE, IF REAL PROPERTY IS KEPT IN ITS NATURAL STATE BY A CHARITABLE ORGANIZATION THAT IS DEVOTED TO PRESERVING AND PROTECTING LAND IN ITS NATURAL STATE, SUCH LAND IS EXEMPT FROM STATE AND LOCAL PROPERTY TAXES.

Under New York law, "[r]eal property owned by a corporation or association organized or conducted exclusively for . . . charitable . . . purposes . . . and *used* exclusively

for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section." RPTL 420-a(1)(a) (emphasis added). Section 420-a goes on to say that "[s]uch real property from which no revenue is derived shall be exempt though not in actual use therefor by reason of the absence of suitable buildings or improvements thereon if . . . the construction of such buildings or improvements is in progress or is in good faith contemplated by such corporation or association." RPTL 420-a(3).

According to New York courts, RPTL 420-a must be strictly construed against a party seeking to exempt his property from taxation but should not be construed so literally and narrowly that it defeats the subtle purposes of the exemption. *Canton Human Servs. Initiatives, Inc. v. Town of Canton*, 4 Misc. 3d 413 (Sup. Ct. 2004); *Delancey St. Found. v. Bd. of Assess. Review of Town of Se.*, 112 A.D.2d 132 (2d Dep't 1985). In other words, the provisions of tax-exemption statutes like RPTL 420-a should not be interpreted so narrowly and literally as to defeat the intentions of the state legislature in providing for property tax exemptions. *Application of N.Y. Conference of Ass'n of Seventh Day Adventists*, 80 N.Y.S.2d 8 (Sup. Ct. 1948), *rev'd on other grounds*, 275 A.D. 742 (4th Dep't 1949). Thus, courts should avoid overzealous adherence to the rule calling for strict construction of tax-exemption statutes against taxpayers, so as to avoid thwarting the purposes of the legislature in providing for exemptions from property taxes. *N.Y. Catholic Protectory v. City of N.Y.*, 175 Misc. 427 (Sup. Ct. 1940).

In the case at bar, the Assessor for ABC County seems to have construed the term "used," as it appears in RPTL 420-a, as meaning that land that exists solely in its natural

state, for public enjoyment and sanctuary, can never qualify for tax-exempt status, because it is not being "used" for some tangible purpose such as generating income for its tax-exempt owner. In other words, the Assessor seems to take the position that the term "used" in RPTL 420-a must be construed as meaning that the property in question must be "actively" rather than "passively" used by its tax-exempt owner or the public in furtherance of the owner's tax-exempt purposes.

Unfortunately, there appears to be no reported New York court decision that specifically addresses the narrow issue of whether the term "used" in RPTL 420-a connotes only the "active" use of real property for some tangible purpose such as generating income for the tax-exempt owner of the property. However, numerous reported New York court decisions suggest that land existing in its natural state and set aside as a wildlife, nature, or similar sanctuary can be deemed to be "used" for tax-exempt purposes under RPTL 420-a.

For example, in a case where a nonprofit corporation devoted to the "preservation, restoration or enhancement of the natural, ecological, environmental, cultural, scenic, historical or recreational values of the Hudson River or the Hudson River Valley" sought an exemption from real property taxation with respect to 850 acres of mountaintop realty in the Town of Fishkill, a New York appellate court held that the land was "used" for tax-exempt purposes and that such use was not vitiated when the tax-exempt owner leased it to the State for use as a state park. *Scenic Hudson Land Trust, Inc. v. Sarvis*, 234 A.D.2d 301 (2d Dep't 1996). In reaching its decision, the *Scenic Hudson Land Trust* court noted that under RPTL 420-a(1)(a), "[tax-]exempt purposes included uses of real property 'for environmental and

conservation purposes which are necessary to the public good and which are open to and enjoyed by the public.'" *Id.* at 303 (citing and quoting *Mohonk Trust v. Bd. of Assessors of Gardiner*, 47 N.Y.2d 476 (1979)). The *Scenic Hudson Land Trust* court also noted that a nonprofit corporation devoted to the "preservation, restoration or enhancement of the natural, ecological, environmental, cultural, scenic, historical or recreational values of the Hudson River or the Hudson River Valley" is a corporation organized for tax-exempt purposes. *Id.* The *Scenic Hudson Land Trust* court expressly held that "as a matter of law," the mountaintop land in question was "being *used* for [tax-]exempt purposes," even though trails thereon were "overgrown and unused" and the property was "poorly marked." *Id.* (court's emphasis).

In another case involving the issue of whether undeveloped land in its natural state can qualify for tax-exempt status under RPTL 420-a, the court held that undeveloped realty designated as a sanctuary and open to the public for hiking was exempt from property tax. *Adirondack Land Trust, Inc. v. Town of Putnam*, 203 A.D.2d 861 (3d Dep't), *leave to appeal denied*, 84 N.Y.2d 809 (1994). The following facts and circumstances of the *Adirondack Land Trust* case are worth review here:

> Petitioner is a New York not-for-profit corporation organized for the purpose of, inter alia, "conserv[ing], maintain[ing] and enhanc[ing] the physical and aesthetic environment, natural resources and economy of the Adirondack area". In August 1990, in furtherance of this objective, petitioner purchased a single parcel of real property comprising approximately 168 acres of undeveloped land, with roughly 0.8 mile of shoreline on the east shore of Lake George, in the Town of Putnam, Washington County. The parcel has no reasonable means of overland access—although petitioner acquired, along with the property, a right-of-way across neighboring property, it has not yet

> developed a road or trail to take advantage of this right—but it is accessible by boat.
>
> Shortly after completing the purchase, petitioner removed several "no trespassing" signs and posted new signs along the shoreline identifying the property as a nature sanctuary and advising that certain activities were prohibited thereon. Petitioner also embarked upon an extensive publicity campaign to inform the public of the purchase, and to promote the fact that the property would henceforth be open for hiking and other compatible activity. Public gatherings were held, with over 600 invitations sent to area residents, and a press release was issued to "all major newspapers in New York State", as well as to all local papers.

Id. at 861-62 (alterations in original).

In reaching its final conclusion that lack of overland access to the subject realty did not preclude it from being tax-exempt under RPTL 420-a, the *Adirondack Land Trust* court expressly ruled that "[u]se of property as a wildlife or nature sanctuary is a *use* in keeping with charitable purposes[.]" *Id.* at 862 (emphasis added) (citing *N. Manursing Wildlife Sanctuary v.City of Rye*, 48 N.Y.2d 135 (1979)). The *Adirondack Land Trust* court went on to say that as long as the restrictions on access to undeveloped land "are not inconsistent with maintaining the habitat in its natural state and protecting the wildlife . . . from undue interference," the access restrictions will not preclude the subject land from being exempt from taxation. *Id.*

In a seminal case involving the issue of the tax-exempt status of undeveloped land in its natural state, the Court of Appeals of New York noted at the outset the argument by counsel to one of the parties that "[t]he conservation by a charitable organization of its undeveloped land for public use *is a use* for charitable and educational purposes within the meaning of [New York's real estate tax-exemption statutes,] and the tax-exempt status of

such land is not forfeited by virtue of its recreational use." *Mohonk Trust*, 47 N.Y.2d at 478 (emphasis added). Accordingly, the *Mohonk Trust* court held that "the use of real property for environmental and conservation purposes as a wilderness area open to the public constitutes a charitable use exempt under the [property tax exemption] statute." *Id.* at 479. The facts and circumstances of the *Mohonk Trust* case are instructive here:

> The Trust owns some 5,000 acres of undeveloped wilderness land located in the upper reaches of the Shawangunk Mountains. The land is heavily wooded with hardwood and evergreens and contains a variety of geological formations. It includes some of the most beautiful land in New York State. Most of this property was originally owned by members of the Smiley family, who sold the land to the Trust at considerably less than market value. The Smiley's own a resort and hotel called Lake Mohonk, which is situated on some 2,500 acres adjacent to the Trust property. The creator of the Trust was a member of the Smiley family, as are several of the trustees.
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> . . . .
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> The Trust lands are primarily used for a variety of environmental, conservation, educational and compatible recreational purposes. The land is maintained in its natural state in an attempt to preserve some part of our natural heritage for the enjoyment and benefit of present and future generations. The Trust has created a system of trails through the wilderness areas, and provides guide and informational services while at the same time maintaining and protecting the unique plant and animal life found on the Trust lands. . . . The Trust itself maintains records on the development and growth of the plant and animal life in the area, and numerous scientific studies are conducted on Trust property. In addition, members of the public are allowed to use Trust land for activities such as rock climbing, backpacking, camping, birdwatching and nature hikes.

Id. at 480-81.

The *Mohonk Trust* court's reasoning in ruling that the wilderness land in question was tax-exempt is also instructive here:

> [I]n this case the use of the lands reflects the primary purpose of the organization. It is plain that the actual primary purpose of the Trust is the preservation of wilderness areas for the benefit of the public. Incidental to this use and this purpose are a variety of related activities, many of which are educational or scientific in nature. . . . We conclude that it is, however, used primarily for an assortment of "charitable * * * educational, [and] moral improvement of men, women or children" purposes, for we see no reason why these categories should not encompass lands used for environmental and conservation purposes which are necessary to the public good and which are open to and enjoyed by the public.
>
> It is, of course, within the power of the Legislature to establish and to modify tax exemptions, subject only to constitutional limitations. . . . As it is, however, the Legislature has not seen fit to remove environmental and conservation purposes from the broad category of charitable, educational, or mental or moral improvement of man purposes within which they so neatly fit. Hence, we conclude that such purposes are exempt and thus land used for such purposes by an exempt organization is not subject to the property tax.
>
> Finally, we reject the suggestion that simply because the Smiley family may receive some benefits by reason of the fact that their hotel is adjacent to the Trust property, the Trust thereby is converted into a commercial organization. The Trust itself is plainly a nonprofit organization which serves an essential public need. Hence, in the absence of any indication that the Trust is merely a device used to shield a profit-seeking enterprise, which is not the case here, the fact that nearby landowners in fact do benefit by the existence and operation of the Trust is irrelevant to its tax-exempt status.

Id. at 484-85 (citation omitted).

In another case involving the tax-exempt status of wildlife sanctuary property, a New York court said the following with respect to the desirability of keeping such land in its natural state:

> It would seem apparent that the principal elements in a wildlife sanctuary are the natural habitat and the wildlife that it attracts, and that the principal activities which make these features available for maximum use are those which preserve the habitat as nearly as possible in its natural state, and protect the wildlife from the depredation of the indiscriminate hunter and the vandal. Suitable trails giving access to all the areas of the sanctuary would

> undoubtedly assist those availing themselves of its use. Unduly elaborate trails, on the other hand, might well prove self-defeating, by changing the character of the habitat.

Wildlife Pres., Inc. v. Scopelliti, 66 Misc. 2d 611, 613-14 (Sup. Ct. 1971).

Finally, it should be noted that, in several New York cases involving unimproved land owned by tax-exempt summer camps and not used for anything other than occasional hiking activities, the courts recognized that even land used so infrequently as to be in a state of "non-use" is not necessarily precluded from being exempt from taxation under RPTL 420-a. *Hapletah v. Assessor of Fallsburg*, 172 A.D.2d 950 (3d Dep't), *aff'd*, 79 N.Y.2d 244 (1992); *Nassau County Council of Boy Scouts v. Bd. of Assessors of Rockland*, 84 A.D.2d 862 (3d Dep't), *leave to appeal denied*, 55 N.Y.2d 607 (1982).

The authorities cited suggest that real property held in its natural state in order to further the purposes of a charitable organization devoted to preserving and protecting land from development, logging, timbering, and other commercial activities can be deemed to be "used" for tax-exempt purposes under RPTL 420-a. If the term "used," as it appears in RPTL 420-a, were to be construed as meaning only the active use of real property, rather than the passive use of holding land in its natural state, such a construction of the statute would be far too literal and narrow. Such an overly literal reading of RPTL 420-a would operate to deprive tax-exempt status for lands that are protected from development, commercial enterprise, and other intrusive activities and discourage organizations like FeRLT from setting aside lands for ecological protection and preservation.

In sum, the real properties that are owned and used by FeRLT in its effort to preserve and protect land in its natural state are exempt from state and local property taxes as a matter of law.

RESEARCHER'S NOTE

1. Counsel should know that a New York appellate court once ruled that "[t]he fact that an exempt organization has purchased lots with the purpose of utilizing that property for tax-exempt purposes is not sufficient to entitle it to exemption under RPTL 420-a or 420-b." *Chautauqua Rails to Trails, Inc. v. Assessors of Chautauqua*, 231 A.D.2d 878, 878 (4th Dep't 1996) (mem.) (citing and quoting *Congreg. K'Hal Torath Chaim v. Town of Ramapo*, 72 A.D.2d 804, 804 (2d Dep't 1979)). The *Chautauqua Rails to Trails* court held that since abandoned railroad property that had been purchased by a tax-exempt organization with the intent of converting the land into a trail "was not in *actual use* for exempt purposes due to the absence of suitable buildings or improvements thereon," the subject realty was not exempt from property taxes. *Id.* (emphasis added).

2. New York courts follow the general rule that "[t]he mere ownership of realty by a tax exempt organization does not *ipso facto* entitle it to remission of realty taxes on the property." *Religious Educ. Ass'n v. City of N.Y.*, 123 Misc. 2d 786, 787 (Sup. Ct. 1983) (citations omitted). According to the *Religious Education Association* court, "[t]he determinative factor is the use or non-use of the [subject] property." *Id.*