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Kahr Notes

Vol. 2, No. 2 * April 15, 2003 * Issue #4

"Kahr Notes" is an electronic newsletter from Kahr Real Estate Services LLC that carries interviews, news, and original research.

This month's issue is going to 568 readers.

If you know of someone who would enjoy receiving this newsletter, please pass it along.

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In "Kahr Notes" this month:

1. Opening Shot - I'm never moving.
2. An interview with David Wilkes about "Certiorari" and other hard to spell words.

1. Opening Shot

Welcome to the latest issue of Kahr Notes. I know it's been a while since my last issue, but I'm back to producing them again. Teaching a class at the graduate level at NYU was pretty demanding and it threw off my production cycle.

In this issue, I have a great interview with David Wilkes about tax certiorari and other land use issues. I hope you enjoy it. Real estate law is one of those subjects you can never know too much about. Real estate is highly regulated and knowing about the law makes good business sense.

My other item this month is to suggest that you take a look at an interesting new 8 story, 128-unit condominium development at 1400 5th Avenue (located between 115th and 116th). The web address is www.1400on5th.com.

In a city where the biggest topic of real estate discussion is whether or not we're in a bubble (the \$/SF sale price for condominiums last quarter was over \$750 according to Miller Samuel - check millersamuel.com for the complete data set), the fact that a new project is going up in Harlem for \$300-350/SF for unsubsidized market rate units is remarkable.

This uptown project has many of the downtown amenities such as a 24- hour concierge, laundry rooms on each floor, high-speed internet access in each unit, a health club, and parking.

Will the high prices in downtown Manhattan hold? Perhaps they will, but condominium developers in Harlem are doing their best to give downtown

Manhattanites a more wallet-friendly option.

That said, I'm not moving anytime soon. As all New Yorkers know, if you have a good deal on a rental, you NEVER move. They'll probably end up burying me in the laundry room.

Good luck in all your endeavors and you'll hear from me again in a month.

Regards,

Joshua Kahr
Editor/Publisher, Kahr Notes

2. Interview with David C. Wilkes, Partner, Huff Wilkes, L.L.P.

KN: This is Joshua Kahr, publisher of Kahr Notes, and I'm sitting here with David Wilkes. David is a partner at the law firm of Huff Wilkes, L.L.P., based in White Plains, and his firm concentrates its practice in real estate law throughout the Hudson Valley and Long Island as well as Manhattan. Today, we're going to talk about real estate law and some of the issues concerning land use, property taxes, and condemnation in New York State today.

To start us off, could you give us a brief description of your practice?

DW: We're a young firm that has developed into a full service real estate law practice. If you're a commercial property owner or if you're a municipality the chances are that we will have handled most of the kinds of real estate matters that you might face, from a management, operational, development, transactional and even crisis standpoint.

Our firm really started out with a concentration in valuation related disputes. This includes property tax appeals and eminent domain work. This has continued to be a core part of our practice, but as we've grown and our clients have seen what we can do, our practice is broader. A significant concentration of the practice includes land use work, by which I mean planning, zoning matters, and environmental matters. We also handle general real estate litigation, which might include for example a lawsuit over a contract of sale or a lease, commercial rent collection on behalf of a landlord, and so on.

KN: In general, are you representing the municipality or the private owner?

DW: In most land use matters and general real estate lawsuits we typically are representing the owner. In eminent domain work, also known as condemnation, we only represent owners. We also maintain a significant amount of owner representation in property tax appeals, usually on behalf of institutional and other sophisticated investors, but a significant portion of our property tax representation includes ongoing municipal defense work for a number of major local governments. In those cases, we're split a bit more evenly between representing owners and the municipality.

KN: OK. When you're working on a land use case where the municipality chooses not to grant a building permit, what would you say drives the decision? Is it often the case that there are small, unsophisticated towns that are abusing what they can legally control in the permitting process?

DW: The reasons for that really cover a pretty broad spectrum. Our lead land use attorney formerly served as the Corporation Counsel for a major Westchester City,

and most of us have previously worked in-house in local government, so usually we have a pretty good insight into the municipal mindset. That's actually why a lot of owners hire us, because we tend to know what the adversary is thinking. To a certain extent, even on a gut level, we understand very well what drives a local board to grant or deny a permit.

In terms of the range of board sophistication, for example, we have one locality where, in our opinion, the board tends to need a lot of explanation as to what the applicable law is and they need a lot of guidance. We have another situation where it seems to be the case that the building inspector is acting beyond his authority and there seems to be some real personal animus towards the applicant. We are trying to get over that but sometimes it seems that the only way is through litigation.

In other cases, and this tends to be the situation in the larger municipalities, the boards are very sophisticated and they know and understand the law and their own guidelines very well, but they are also taking into consideration the fact that there may be a lot of community opposition to a particular proposal.

The Planning Board may be concerned about broader issues such as whether or not a particular application really fits within the town's master plan. There may be significant community opposition to a proposed development. There may be a real showdown between an owner's interest in achieving the highest and best use of its property and a local interest in preserving the status quo. So, in some cases, it's really a matter of the town not being on the same page as the developer, and then it comes down to a question of whether or not the developer is entitled to do what he wants to do and can convince the Board of this, or must resort to the courts to render a decision.

It really can cover a broad spectrum but those are some basic examples.

KN: What are the big land use issues that you are seeing in the State of New York today?

DW: The biggest issue that faces a lot of municipalities in the five counties of southern New York in which we do most of our work, which is Westchester, Putnam, Dutchess, Orange, and Rockland, is that a lot of people are migrating up from New York City and even from Westchester. This is significantly changing the housing dynamics and market analysis, which effectively also impacts commercial development and supply and demand. A lot of people have been in Westchester for years but primarily because of property taxes and the current cost of homes, the lower counties are no longer affordable for the average wage earners. There is a tremendous push to move north. We are seeing significantly heightened levels of development - and related tension - in the counties north and west of Westchester, while much of Westchester is at a near standstill because of a shortage of land and opportunities.

You've got these little towns that never had much going on in the way of development suddenly confronted with massive projects that will put heavy demands on local infrastructure. In many cases these projects are in demand by the increased population, and they add significantly to the local tax base, but the local municipalities are not always equipped to grapple with the issues that might arise. There is one location around Interstate Route 84 and State Route 9 that used to be a fairly rural type of town. They now have something like seven brand name hotels, malls, and a multitude of restaurants. The entire character of the town has changed over a period of 10 or 15 years, yet many of the municipal officials are the same people, or their relatives, that presided when it was a much smaller town.

In Westchester, some towns are putting into place moratoriums so they can slow

down growth and figure out how to deal with sprawl and intensive development. This can only last so long, legally.

KN: Legally?

DW: The generally accepted timeframe for a moratorium is about six months.

The municipality can generally renew that period for a bit but they really can't go on for an extended indefinite moratorium because then it starts to amount to a regulatory taking. The more sophisticated towns know that and keep the use of this power in check, but moratoria always create problems, particularly for developers or people who own land and are looking to utilize it. It places a lot of uncertainty on those properties.

KN: It seems that the best solution isn't the blunt axe of moratoriums but instead the towns should have the developers pay impact fees.

DW: There have been a number of creative proposals. I know that the Town of Greenburgh, the largest town in Westchester, has been doing a lot of positive things such as utilizing state, county, and town money to buy up open space and keep it forever green. They are one of the more sophisticated municipalities in terms of trying to manage this process well.

Greenburgh is a good example of an area that is built up with a real mix of commercial development and residential development and they certainly have their hands full in terms of trying to manage this whole process. Having served as an in-house Deputy Town Attorney in Greenburgh several years ago, I'm pretty familiar with their approach to land use, as well as property taxation.

KN: Could you describe some of the other real estate work that you are doing other than land use work?

DW: We are doing a high volume of tax certiorari, eminent domain, and some more generalized real estate litigation.

KN: The other two major practices for you are eminent domain work and tax certiorari. Right?

DW: Right.

KN: Let's talk about tax certiorari. What is it? A lot of people have no idea.

DW: If you presented tax certiorari to me as an option coming out of law school, it would have been near the bottom of my list of choices, near criminal law and matrimonial law. The only difference being that I knew absolutely nothing about tax certiorari while at least I knew something about criminal and matrimonial law from law school.

The running joke among tax certiorari lawyers is that the way you get into this field is that you're the only person at the firm who can spell the word 'certiorari'. What it refers to is the process of reviewing a local property assessment, which is supposed to represent a designated fraction of actual market value, to see whether or not the assessment is fair and equitable. Since your property taxes are a direct result of the assessment, you're ultimately trying to figure out whether your taxes are in line with the rest of the community.

I fell into this field by chance. As it happened, early on I was working for a law firm that had a heavy real estate litigation practice. I was a commercial litigator and was

representing Home Depot in a case against one of their shopping center landlords. It was discovered that the owner had not paid its real estate taxes for a number of years.

It fell to me to figure out how we could purchase those tax liens from the municipality and then foreclose on the open tax liens to take over the shopping center. There is a very technical process on how to do that and I became pretty knowledgeable on this specialized part of the law. We purchased the liens, foreclosed, and took over the shopping center in the name of a different entity.

From there on, I was known locally as the guy who knew something about property taxes. Actually, the foreclosure of tax liens has almost nothing to do with tax certiorari but it was close enough. That opened up the door to a number of interesting things for me. What caught my attention most about the foreclosure was that there are a lot of broad constitutional issues that crop up again and again, much more frequently than in many other areas of law. These are the kinds of things that you read about in law school I never expected them to come up in property taxation.

KN: It also rarely occurs in general practice. A lot of lawyers never deal with constitutional issues.

DW: Right, exactly. I wrote an article for the New York State Bar Journal shortly after that assignment and the next thing I knew I discovered a job listing for a deputy town attorney specializing in property tax and condemnation for the largest town in Westchester. There is probably no better opportunity to get experience than working in-house in government. You really get a lot of freedom and you're not so focused on the kind of cost-benefit analysis that you might use for a private client. Often a case that may be small in terms of dollars may contain broad issues that can have an impact on every other case, so you pursue the case even through appeals if necessary. So, you get the opportunity to really learn and go after things you couldn't go after in private practice. I also decided at that time to complement what I was learning about taxation and condemnation with a master's degree in real estate valuation from New York University's Real Estate Institute.

KN: I imagine one of the nice things of not being in private practice is that you're not spending time selling yourself to clients.

DW: That's true, but you spend a lot of your time doing other things like meeting with taxpayers and counseling people and local residents and municipal boards on the laws and what their options might be. I always tried to have an open door and tried to help people who couldn't pay their taxes and gave them advice on how they could save their homes or commercial properties.

KN: As far as tax certiorari work goes, you do work for both sides now, correct?

DW: I got my start in tax certiorari by working for the municipality and what ended up happening with me and my partner, who had a similar background, is that we have a pretty broad network of relationships with municipal officials. So, early on for my partner and then myself, when we went out into private practice we started getting calls from municipalities that wanted us to defend them in their tax cases.

We reached our maximum in terms of municipal representation. Right now, we defend eight municipalities in Westchester and frankly, that is a little more than enough. We don't want to end up spread too thin and we always want to make sure that no client ever suffers from a lack of attention. We have beefed up our staffing with some phenomenal attorneys so that we can continue to be effective at this level. At the same time, I am happy to know that our representation has been so effective that word quickly spread to significant property owners all across the

country who have property located in New York State, and it resulted in a very impressive list of property owner clients. Owners started coming to us and, so long as we had no conflicts with our municipal clients, asking us to reduce their taxes or work on development matters and general litigation. We represent a number of institutional portfolios in tax certiorari matters. We'll take on the whole New York portfolio, for example, and whittle away at the taxes each year.

KN: Most of this work is on a contingency basis?

DW: For the most part, the arrangement that we have with a private owner is that we are paid a percentage of what we save them in taxes.

KN: That sounds perfectly equitable.

DW: It can be kind of tough on us but it's certainly fair. Anyone who has ever had a tax case in New York State can tell you it is a very long process. In Texas, where it looks like we'll be opening an office soon for property tax work, everything is revalued every year. Usually, you get the relief you are hoping for within the year.

For New York, the typical turnaround time is about four years based on the court system. We are pretty aggressive about trying to get things resolved early on, sometimes right from the time an assessment is being set. Many of the firms we know of have tax cases outstanding for 10 years or more. There can be a number of reasons why that occurs, but I don't frankly understand it. We certainly have never had a case that would go on nearly that long and I hope we never do. There are a lot of problems with the New York system and an inherent complexity that baffles many people.

As we are paid on a contingency, we don't get paid during those years that we're trying to get a result. On the positive side for the owner at least, as soon as they start filing they can preserve their rights on the cases and they can generally get refunds back from the filing date.

KN: Why does it take so long?

DW: A lot of it has to do with the current backlog of cases that nobody can cut through. Some cases are not pursued as aggressively as they could be. There is also a major backlog in the court as the court has thousands of cases with one part-time judge. Our current judge in Westchester handles both guardianship cases and the tax part. Guardianship and taxes have nothing in common as far as I can see.

KN: Guardianship?

DW: That's where the court is trying to figure out what to do for an incompetent person.

KN: Or a minor? Wow. That does have nothing to do with taxation.

DW: The court is overloaded. I believe there were roughly only one or two tax trials in Westchester last year out of some 8,000 cases. Things seem to be improving, but marginally. You have a problem in terms of getting relief. What happens 99% of the time is there is a negotiated settlement. There too, you have a problem because there is only one assessor in these municipalities to deal with, with the exception of New York City. The one assessor is just as overwhelmed as the court is. That assessor may have hundreds of cases pending. So you're also constantly straddling a line between being aggressive but also trying to preserve relationships with your adversaries, since without their cooperation you could suffer tremendous delays. A lot of it comes down to the relationships you have with the court and the assessors.

You have to go in and be very persistent and attentive but still be as aggressive as you can and maintain a good relationship.

KN: Do both sides want to make a settlement?

DW: In general, yes, but each case has its own dynamics. As a general rule, the owner wants a resolution quickly, both for its own sake as well as the sake of any tenants, or a prospective purchaser. Even that I've found is not always true. Sometimes the owner just wants to know that the proceeding is out there and he has other objectives that keep the case moving along slowly.

A municipality might prefer to let the proceeding ride for a few years because once a settlement is reached, the municipality will be on the hook for a refund of taxes. The payment back usually is without interest so they have effectively borrowed the money without having to paying for the use of it. I wouldn't say that this is consciously done, but it could in some cases remove a possible motivation for reaching a quick settlement.

KN: As a follow up question, why would the owners not be interested in moving quickly?

DW: We've had a number of situations, some of which I can't figure out myself. I've had a number of cases where an owner calls me upset with the assessment. We race to get the papers in and set up meetings and then we ask the owner for the information that we need in order to pursue the case and nothing comes. I have several cases like this where the owners will not release information for a period of years.

I think in those cases where the owner will not provide valuation-related information, the municipality has every right to say, "Why should we make a settlement offer if you won't provide the information we need to value the property?" Except in certain cases of illegal assessment, if I'm not provided with valuation information I probably can't do much, just like an appraiser. I think that unfortunately following the New York City assessors scandal, many owners seem to think that everything is done on a wink and a nod, without much substance. What's valuable about our municipal experience is that we have a very solid grasp of the types of documents an assessor is going to need to have in his or her file to justify a settlement offer, particularly for covering their own back. In many cases there is a real lack of understanding of the assessor's situation and motivations.

I've had other situations where the owner is filing a tax case and at the same time they are applying for municipal approvals. They say, "Maybe this is not the right time to pursue the tax case, let's wait on it" or something like that.

KN: Do they find that this helps with the approval process?

DW: It's true sometimes and sometimes in other municipalities there is no relevance to the approval process. We can usually advise the client as to whether or not it is a good idea to hold back.

KN: Eminent domain is probably the most exciting of what you do. What kind of eminent domain work have you done?

DW: In eminent domain, we only represent the proper owners. A typical assignment might be where the municipality is widening a road and they are taking some of the frontage of a property from a particular owner and thereby decreasing the value. They could be taking away parking area or the full building. Sometimes, the State is going to do something that will affect the neighboring property owner and this

might have a direct impact on our client.

An interesting case that I'm getting started up on involves the condemnation of the main access route to a valuable parcel of property, although the buildable parcel itself is not being condemned. The access route runs right through two parcels that are owned by a school district. The school district is interested in condemning this roadway and so our argument might be that it is substantially decreasing the value of the buildable parcel by taking away the main access route.

KN: What if the State's action increases the value of the remaining land by the improvements that it has made?

DW: The answer to that question is that I'm the lawyer, not the appraiser. I look to the appraiser's expert judgment as to the effect of the taking on value.

That's not to say that I'm not very critical of our own appraisal and don't exercise an oversight role in what the appraiser is doing. I have enough appraisal experience to tell if the appraiser is doing something that doesn't make sense. If the appraiser comes in and does a legitimate valuation and there has been no diminution of value then that may not be a case for us to pursue, and I would advise the client accordingly.

There is not an automatic reaction to pursue a condemnation case whenever there is a taking. In most cases though, the result of a taking is a devaluation of the property.

KN: I was trying to draw out the role of the appraisers from my previous question. Basically, both sides produce dueling appraisals and you beat each other up and finally, pick a number.

DW: To some extent that's often true.

KN: If you're unable to settle and the eminent domain case goes to the court system, it'll take years?

DW: It can, though not always. It depends on the local court system.

KN: How are you paid in an eminent domain matter?

DW: Fees are generally charged in eminent domain cases on a contingency basis. It's a reverse of the tax certiorari case, since we are paid on an increase in value for the owner. There is a statutory requirement that the condemning authority offer based on its best appraisal. That's what we use as a baseline for the calculation of our fees. The owner brings us in to try to increase that offer, hopefully by a substantial amount.

To the extent that we increase the offer made by the condemning authority or get a better result from the court, we are entitled to percentage of that increase. Here also, like with tax certiorari, the owner is in a good position because they will not pay us anything unless we produce something for them.

KN: Thanks for your time.

DW: Thank you.

