

**Nassau County  
Office of the Comptroller**



**Limited Review of  
the Nassau County Attorney  
Assessment Litigation Bureau  
Tax Certiorari Business Operations**

**HON. GEORGE MARAGOS**

*Comptroller*

October 3, 2011

**NASSAU COUNTY  
OFFICE OF THE COMPTROLLER**

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## Executive Summary

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### Background

The County Attorney's Assessment Litigation Bureau ("Bureau") is responsible for defending the County against taxpayers' lawsuits protesting their assessed valuations. The success of the Bureau's operations in successfully representing the County's interest in tax certiorari matters is crucial. The business operations of the Bureau were the subject of a previous report by this Office issued in 1999.<sup>1</sup> At that time, we found that:

- Processing of property tax grievances had an average claim processing time of six years;
- There was a lack of prioritization of cases for larger claims that would have resulted in lower costs to the County; and
- Staff shortages, a lack of a computerized database and a lack of an appraiser on staff contributed to the management inefficiency.

Tax Certiorari refunds have long been recognized as a significant cause of impairment of Nassau County's financial condition. For the five years from 2006 to 2010, tax certiorari expenditures as reported in Nassau County's Comprehensive Annual Financial Reports have averaged over \$90 million annually as detailed in the chart below:

Tax Certiorari Expenditures \$ in Millions <sup>2</sup>			
Year	Amount	Financed from	
		Operating Funds	Bond Issuance
2006	\$ 70.6	\$ 70.6	\$ 0.0
2007	\$ 87.1	\$ 87.1	\$ 0.0
2008	\$ 98.8	\$ 40.0	\$ 58.8
2009	\$ 114.5	\$ 50.0	\$ 64.5
2010	\$ 79.4	\$ 36.9	\$ 42.5
Total	\$ 450.4	\$ 284.6	\$ 165.8

The amounts reflected in the table are presented on an accrual basis of accounting and totals include payments made each fiscal year and the change in the accruals for future settlement liabilities on open Writs. It does not include the debt service cost of outstanding debt issued to pay for refunds. As of December 31, 2010, the County's outstanding debt related to tax certiorari settlements was approximately \$1.2 billion and it recorded a liability of \$152.3 million for future settlements and judgments. A review of the Assessment Review Commission's ("ARC") 2009/10 Annual Report Draft shows that, over the years 1999-2008, approximately \$1.225 billion was paid in refunds of

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<sup>1</sup> Report of Examination –Tax Certiorari & Condemnation Bureau Office of the County Attorney Issued by County Comptroller, September 29, 1999.

<sup>2</sup> Comprehensive Annual Reports of the Comptroller for the Fiscal Years Ended December 31, 2006 – 2010.

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## Executive Summary

which approximately \$1.1 billion or 88% were paid to commercial property owners. It therefore follows that the County's financial exposure primarily lies in the commercial properties. Owners of more than two-thirds of commercial parcels file for reductions. Statistics for the 2009/10 tax year were as follows:

<b>Appeals for Assessment Reductions on Commercial Property</b>			
<b>Number of Parcels and Parcels Appealed</b>			
<b>2009-2010 Tax year</b>			
	Parcels on Tax Roll	Parcels Appealed	Percentage
Class 2 - Apartment	5,529	4,685	84.7%
Class 3 - Utility	1,754	455	25.9%
Class 4 - Other	19,602	13,334	68.0%
	<u>26,885</u>	<u>18,474</u>	<u>68.7%</u>

Until recently, according to the Nassau County Administrative Code (“Administrative Code”) “...any deficiency existing or hereafter arising from a decrease in an assessment or tax.... or by reason of exemption or reductions of assessments shall be a County charge.”<sup>3</sup> Under this county guarantee, when a property owner successfully grieves an assessment and receives a reduction, the County refunds not only the overcharge of the County portion of the taxes, but also the overcharge of the town, school and special district taxes. For the 2008/09 tax year, the County's share of real estate taxes levied totaled \$973,193,661 while town, school and special district taxes totaled \$4,195,497,504.<sup>4</sup> Therefore, if a taxpayer is entitled to a refund of \$5,000 in property taxes paid the County is responsible for the entire amount even though it originally collected less than \$1,000. This provision occurs nowhere else in the state and there is no mechanism for a chargeback. In November 2010 this provision of the Administrative Code was amended by Local Law 18-2010 which would enable the County to charge back, in accordance with New York State law, the proportionate share of tax to the other taxing jurisdictions. This provision is being challenged in the courts by the Towns, Schools and special districts.

A petition for administrative review is the first step in the grievance process and it is filed with ARC. If the decision of ARC is unsatisfactory to the taxpayer, judicial recourse is available through filing a certiorari writ with the New York State Supreme Court. The Assessment Litigation Bureau (“Bureau”) of the County Attorney's Office is responsible for defending the County against the taxpayers' writs.

Commercial property owners who do not reach a stipulation of settlement with ARC usually file writs seeking judicial relief. The number of writs filed over the past three years was as follows:

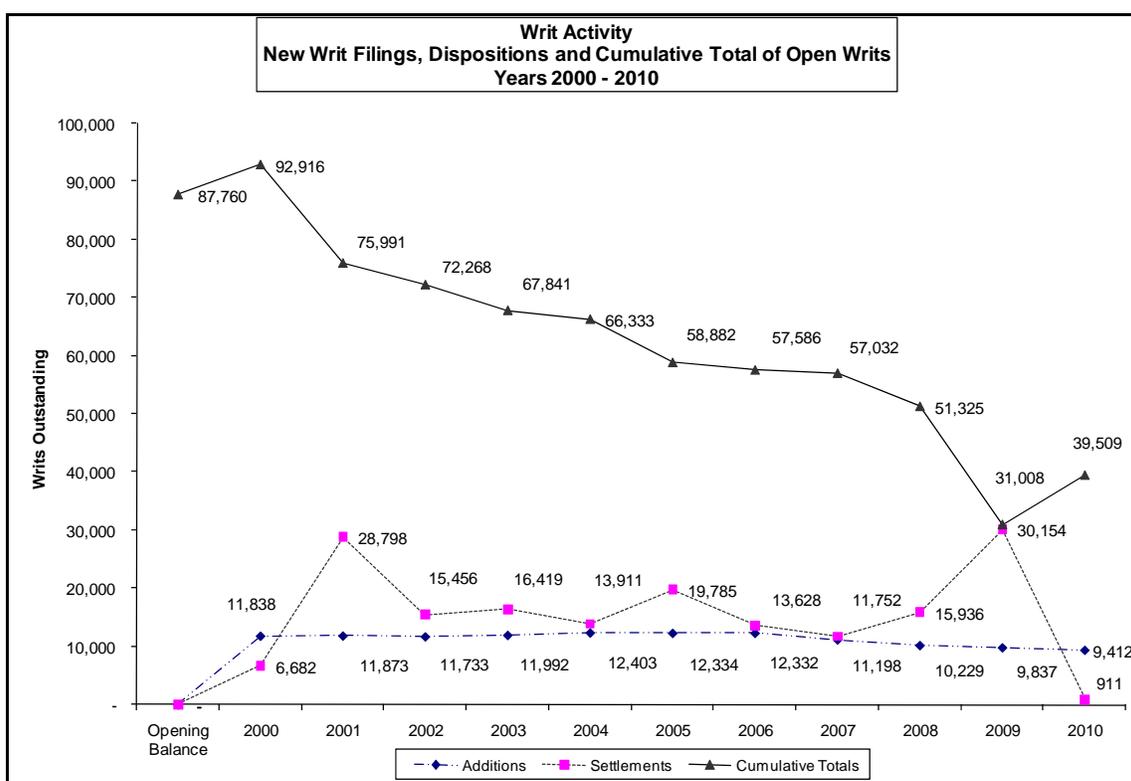
<sup>3</sup> Nassau County Administrative Code § 6-26(b)(3)(c)

<sup>4</sup> Draft ARC Annual Report 2009-10, Taxes Levied in Nassau County 2008-09, page 7.

## Executive Summary

<u>Year</u>	<u>Number of Writs Filed</u>
2008	10,229
2009	9,837
2010	9,412

As can be seen in the chart below, although the number of new writ filings has remained relatively constant, the Bureau has made progress over the past ten years in reducing the number of open writs from 87,760 at the beginning of the year 2000 to 39,509 as of March 10, 2010. Over the same time span the estimate of future liabilities for certiorari refunds decreased from \$400 million to \$164.3 million.



<sup>5</sup> Source: File of Writs as of March 10, 2010 provided by Department of Assessment

Timeliness in settling grievances is critical for a number of reasons:

- In addition to refunding the overpayment of taxes, the County must also pay the taxpayer interest from the date the taxes were paid by the petitioner to the date of

<sup>5</sup> This includes \$1,586,196 in refunds for Class 1 (residential) properties upon which writs were filed. Residential property settlements are not within the scope of this review.

## Executive Summary

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payment of refund.<sup>6</sup> For 2009, the total of refunds paid plus settlements approved, but awaiting payment by the Treasurer's Office, totaled \$116,888,142 including \$9,194,810 in settlement interest (interest from payment of tax to the date of settlement) and \$1,828,910 in demand interest (interest from settlement date to payment date of the refund).

- Information obtained by the Bureau, such as income and expense information and appraisals prepared for the County or for the petitioner may contain useful information for Assessment or ARC in ensuring that the properties are properly assessed in current and future years. This may help prevent additional refunds.
- Taxpayers are entitled to refunds of tax overpayments without undue delay.

As such, it is important that adequate resources be provided to address tax certiorari grievances in a timely manner.

### Scope of Review

The scope of our review was the Bureau's business process in place during 2009. We compared the conditions found in 2009 to those we found when we last performed an audit of the Bureau in 1999 to determine if our recommendations made in that report had been implemented. Our comments and observations on the processes in place during 2009 are based on a series of interviews with the current Chief Deputy County Attorney ("CDCA"). While the CDCA was assigned to the Bureau during years prior to 2009, she was assigned elsewhere during 2009 and the 2009 Bureau Chief was no longer employed by the County when we commenced our audit in February 2010.

The process was reviewed using a sample of commercial property settlements and judgments during the year 2009.<sup>7</sup> Our sample of settlements included seven commercial properties with refunds totaling almost \$10 million. The settlements included in the sample were judgmentally selected from a list of refunds paid during 2009 and our selection included various property types: two office buildings, two large stores, a shopping mall, a small retail store and vacant land. Our scope was limited due to attorney-client privilege. Files containing settlement documents and correspondence were reviewed by the Bureau and any documents that would have violated that privilege were removed from the files before the files were provided to us.

As a result, our review was limited to only those documents provided to us. Therefore, we could not review the settlement and negotiation process. Also, the Bureau did not have written policies and procedures or use a case management system and the

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<sup>6</sup> §726(2) and §556(9) of the Real Property Tax Law.

<sup>7</sup>The test sample included 711 Stewart Ave. (Garden City), 50 Charles Lindberg Boulevard,( Uniondale). Sears (Hicksville), Target (Westbury), Rockaway Realty Associates (Woodmere), Henry Street Investors (Hempstead), and Westbury Property Investors (Westbury). See Limited Review of Tax Certiorari Appraisal Reports of Real Property and Legislative Reform issued by County Comptroller, July, 2011.

## Executive Summary

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documentation provided was limited due to the attorney-client privilege. Therefore, as noted above, our comments and observations on the process are based on a series of interviews with the CDCA.

### **Significant Audit Findings**

#### Inadequate Senior Staffing

In January 2010, the newly appointed County Attorney faced serious understaffing and case backlogs due to key positions being vacated in 2009 which were not replaced by the prior administration. The positions of Bureau Chief, Deputy Bureau Chief, and two of the three Senior Counsels representing four of the six most senior positions were vacant. Given a case load in 2009 of some 2500 cases, we found that the Bureau was understaffed at the senior level. The CDCA informed us that the lack of staffing had resulted in the adjournment of cases and impeded the settlement approval process. A review of 2009 court decisions also showed that inadequate staffing may have compromised the County's success in defending levels of assessment.

#### Lack of Policies and Procedures Manuals

The Bureau did not have formal policies and procedures to document its activities, policies and responsibilities. Written policies and procedures are tools in an effective internal control environment. A management-approved policy and procedures manual should address significant activities, employee responsibilities, authorization levels and limits, control procedures, reporting responsibilities and performance standards. Policy and procedure manuals can also be helpful to a department in ensuring that the process is uninterrupted should an employee be absent for a lengthy period.

#### Lack of Case and Document Management Systems

Prior to 2009, the Bureau used a computerized case management system known as Pro-Law. We were informed that the former Bureau Chief instructed the Bureau's staff to stop entering certiorari information into ProLaw. Without entering information into a case management system, a comprehensive database cannot be developed to monitor critical information and produce computerized management reports to track operating efficiencies. We were unable to determine if any management reports were issued in 2009. The current administration reinstated the use of Pro-Law for new cases in January 2010. However, because the system was not used during 2009, the system now includes incomplete data regarding pending and settled cases.

We also found that the Bureau did not have a computerized document management system whereby documents are maintained as scanned images and filed electronically. The Bureau's files are paper intensive, with all documentation related to each settlement maintained in Redweld folders by case number or by section/block/lot. We found that the CDCA sometimes had difficulty retrieving information such as appraisals and final

## Executive Summary

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settlements, perhaps because documents may have been misfiled, were not filed at all or may have been discarded. The difficulty with retrieving documents may have been due to its not being entered into Pro-Law.

### Delays in Settlement

Delays in settlement result in higher interest costs paid by the County. In 2009, the prior County Attorney submitted 78 cases for settlement. In the same year, refunds totaled \$116,888,142 including \$9,194,810 in settlement interest (interest from payment of tax to the date of settlement). Our sample of seven cases included a settlement for Henry Street Investors Ltd. that covered 15 years. Leaving that settlement out, the remaining six cases still covered an average of 5.67 years, only slightly better than the six year delay found in our 1999 audit.

One of the major causes of delay is the period of time afforded petitioners to file a Note of Issue after filing a petition. After filing a petition, the property owner has four years to file a Note of Issue to put the case on the court calendar.<sup>8</sup> The CDCA told us that while the four-year window is a state-wide statute, it has been modified based on statute<sup>9</sup> to allow either side after at least two years from the date of commencement of the proceedings to demand that a trial appraisal be filed within 120 days; however, the County did not take advantage of this provision by filing Notes of Issue to move cases along.

We were informed by the CDCA that the petitioner's failure to file a Note of Issue within the four-year window acts as a statute of limitation and any Note of Issue not filed within the required time period would be dismissed. The CDCA told us that there was a list of approximately 3,000 cases deemed "Black Hole" cases that the County had once considered closed because they were abandoned by the petitioner, but that the court later determined to be still viable. Over the years, the County has negotiated these cases with the Certiorari Bar and at the time this review was conducted, there were less than 100 open cases.

### Delay in the Approval of Settlements

All settlements resulting in a refund of \$100,000 or greater require the approval of the Nassau County Legislature. As the County pays the petitioner's interest on refunds from the date the taxes were paid to the date of the refund, the County can minimize its interest expense by paying refunds owed as soon as possible. We found that there may have been delays in presenting settlements to the County Legislature for approval, or in the County Legislature voting on settlements. In June 2010, the CDCA provided a listing of the legislative calendars which indicated that there were 78 cases submitted to the Legislature for approval during 2009; ten of the 78 failed to pass. She also wrote that, "no tax

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<sup>8</sup> NY CLS RPTL § 718.

<sup>9</sup> Ibid.

## Executive Summary

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certiorari settlements appeared on the February 23<sup>rd</sup>, March 9<sup>th</sup>, May 4<sup>th</sup>, May 13<sup>th</sup>, and all of July, August, October and November calendars” of 2009.<sup>10</sup>

In addition, the CDCA provided a list of 24 cases, representing refunds of \$8,590,939 that were settled in 2009, but that were not sent to the Legislature for its approval. The Bureau indicated that it had re-submitted 14 of these cases with estimated refunds of \$3,396,273 but that as of June 14, 2010, the Bureau had not resubmitted ten of the cases with refunds estimated to be \$5,194,656. The CDCA was not certain as to why the previous administration’s County Attorney did not pursue approval of these settlements, but thought that part of the reason may have been that settlements may have been tabled as a result of a lack of staff available to answer legislator’s questions. The CDCA was not part of the Bureau during this timeframe and was unaware as to why the cases were not called.

### Lack of In-House Appraiser

The Bureau does not have any appraisers on staff, and instead relies solely on outside appraisers who are under contract with the County at a cost of about \$1.5 million for 2009. In the case of joint settlements with ARC, the Bureau relies on ARC’s commercial appraisers for preliminary appraisals.

Our review of the appraisals prepared by the outside appraisers found that they were subjective in nature and that the valuations seemed influenced by the needs of the party who hired the appraiser. As such, a review performed by an in-house appraiser of both the petitioner’s and the County’s appraisals could be useful to analyze, compare and contrast the two appraisals, point out the underlying assumptions that cause the difference between the final valuations, evaluate the comparable properties used, the adjustments applied thereto and identify to the Bureau’s attorneys any possible flaws in the appraisals. Additionally, an in-house appraiser could assist the Bureau in prioritizing cases to be addressed by identifying those cases with the highest exposure to the County.

### Audits of Income and Expense Statements

According to the CDCA, before filing a Note of Issue, the petitioner must file a certified and verified Income & Expense (“I&E”) statement for all income producing property. The County has the right to audit these verified or certified I&E statements for each tax year that a petition was filed. These I&Es are not used directly to value the subject properties, but are used to establish a benchmark for the property that may be useful in supporting the County’s estimates of income and expenses or refuting the petitioner’s estimates. In addition, these audited I&Es can be used to build a database for evaluating comparable properties and can be effective in minimizing the claimant’s reduction requests.

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<sup>10</sup> We found that several cases were included on the October 5, 2009 Calendar, but were not voted upon.

## Executive Summary

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The CDCA said that in the past, an audit process and check list had been developed to be used to determine whether I&E's should be subject to audit, seven audits were performed in 2009. It was our understanding that a checklist developed in 2007 and 2008 was used, however the results of the seven audits could not be located. The CDCA said that she would like to resurrect audits in 2010, selected based on pre-determined criteria, and that random audits would also be useful. The risk of an audit might serve as a deterrent to frivolous claims and might encourage the petitioner's attorneys to ensure that the petitioners report verifiable information.

### Reporting Costs of the Assessment Litigation Bureau

In addition to the direct cost of paying refunds and interest on tax certiorari claims, the County incurs substantial administrative costs in defending the assessments established by Assessment and reviewed by ARC. The Bureau's costs are not discernable by the taxpayers because they are not disclosed separately in the County financial statements or budgets or are charged to other departments.

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The matters covered in this report have been discussed with the officials of the County Attorney's Office during this review. An exit conference was held on September 9, 2010. On December 9, 2010 we submitted a draft report to the County Attorney's Office for its comments. Based on the comments received on January 20, 2011, we submitted a revised draft to the County Attorney on May 17, 2011. The County Attorney's written comments and our responses to those comments are included as an Appendix to this report.

## Table of Contents

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<b><u>Review Finding</u></b>	<b><u>Page Number</u></b>
<b>Inadequate Senior Staffing .....</b>	<b>1</b>
<b>Lack of Policy and Procedures Manuals .....</b>	<b>4</b>
<b>Lack of Case and Document Management Systems .....</b>	<b>5</b>
<b>Delays in Settlement.....</b>	<b>8</b>
<b>Delay in the Approval of Settlements.....</b>	<b>12</b>
<b>Lack of In-House Appraiser .....</b>	<b>14</b>
<b>Audits of Income and Expense Statements.....</b>	<b>15</b>
<b>Appendix – County Attorney Response and Auditor’s Follow-up.....</b>	<b>18</b>

## Review Findings and Recommendations

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### **Review Finding (1):**

#### **Inadequate Senior Staffing**

Given the financial impact to the County and taxpayers and the backlog of current and past year grievances, it is important that the Bureau be adequately staffed. Staffing levels in the Bureau have long been deficient.

In the August 1991 report, “Bursting at the Seams: Real Property Tax Litigation in Nassau County” prepared by the Office of Counsel of the State Board of Equalization and Assessment, it was recommended that, “The County Attorney should allocate sufficient resources to enable the Certiorari Division to analyze the pending certiorari caseload and move aggressively to resolve cases without resort to the courts.”<sup>11</sup>

We commented on the Bureau’s deficiency in staffing levels in our 1999 audit report and stated that insufficient resources have caused deficiencies, which have directly resulted in increased costs to the County. The Bureau’s reply to our finding regarding procedural inefficiencies” stated, “With additional staff we could make motion on the thousands of cases and with the staff and computers we could monitor delays in the submission of appraisals.”<sup>12</sup> “...with additional staff and computers each of the various steps in the negotiation process could be monitored to determine where there are any backlogs.”<sup>13</sup> Yet, during 2009 although the Bureau had been provided with personal computers, it still faced a lack of staffing to operate efficiently and effectively. Due to the tremendous financial burden resulting from the tax certiorari refunds, it is imperative that the County allocate funds to enable sufficient staffing.

The caseload handled by the Bureau is enormous. Once a Note of Issue is filed, the case is put on the court calendar. The CDCA informed us that during 2009, five court calendars consisting of 500 cases each were called. These 2,500 cases were divided among ten attorneys plus the Bureau Chief. Of the attorneys, six provided support for trials, such as trial preparation, and settlement negotiations but did not try cases.

The Bureau’s 2009 organization chart called for the following positions:

- One Bureau Chief
- One Deputy Bureau Chief
- Three Senior Counsels
- Six Deputy County Attorneys
- Eight Support Staff

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<sup>11</sup> “Bursting at the Seams: Real Property Tax Litigation in Nassau County” State Board of Equalization and Assessment, August 1991.

<sup>12</sup> Report of Examination –Tax Certiorari & Condemnation Bureau Office of the County Attorney Issued by County Comptroller September 29, 1999, page 61.

<sup>13</sup> Ibid, page 63.

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## Review Findings and Recommendations

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We found that by the end of 2009, the Bureau's staff was reduced to a level wherein it was not adequately staffed at the senior level. The CDCA provided an Organization Chart for 2009. At the time of our entrance conference, February 4, 2010, four of the six most senior positions in the Bureau were vacant, including:

- The Bureau Chief
- The Deputy Bureau Chief (vacated in June 2009)
- Two of the three Senior Counsels
  - One Senior Counsel resigned in October 2009
  - One Senior Counsel transferred in November 2009

The third Senior Counsel did not try cases.

The Bureau was also staffed with six Deputy County Attorneys, however only one of the six tried cases. By the end of 2009, the Bureau had only one trial attorney. In 2010, the CDCA was assigned to oversee the Bureau, however her other responsibilities within the County Attorney's Office precluded her from devoting all of her time to this function. The CDCA said that at a minimum, an additional two trial attorneys are needed.

We asked the CDCA if the shortage of staffing had resulted in cases not being able to be brought to trial and thus forcing settlement, or in other instances defaulting on a case. She informed us that they had to adjourn many cases in 2009 and 2010 due to the shortage of trial attorneys. These cases are still pending and therefore the County may incur additional interest expense should a reduction in assessed value be warranted. The CDCA also told us that the shortage of staff has also impeded the County Legislature's settlement approval process, as there were instances where there was insufficient staffing to answer questions on pending settlements brought before the Legislature.

We were provided with, and reviewed, court decisions for 2009. There appeared to be many instances where staffing may have compromised the County's success in defending tax challenges.

Quotations from these decisions include:

### Evans Avenue Realty Corp.

- In the Judge's decision denying the County's request for a copy of the petitioner's appraisal he wrote:
  - "The County has not shown good cause for its failure to file a timely appraisal. Nor does it appear that the County ever had any intention of filing an appraisal. NC had ample opportunity to procure its own independent appraisal of the subject property. For whatever reason respondents made a decision not to do its own appraisal."
  - "Policy that in the long run may be penny wise and pound foolish. Nevertheless it is disingenuous for the County to now suggest that it was "blind sided" by the petitioner's independent appraisal report, as if it were

## Review Findings and Recommendations

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presented to the Court on the eve of the trial as a surprise witness in a grade B detective movie.”

- In a discussion of the petitioner’s appraisal he wrote:
  - “Respondent did not call a real estate expert to the stand nor did it introduce any expert testimony. Respondent merely cross-examined Mr. Chang in an attempt to discredit his prior testimony and his expert witness.”
  - “No evidence was introduced contradicting any of petitioner’s adjustments.”
  - “No contrary evidence of value was submitted by respondent. Respondent did not call any witness. Respondent did not discredit Mr. Chang or his appraisal.”
  - “Since the respondent presented no evidence to the contrary, the Court accepted the petitioner’s findings of value.”

### FC Properties Inc.

- In the Judge’s decision to deny a motion to set aside an oral decision he wrote:
  - “. . .the respondents did not offer their real estate appraisal into evidence, the respondents did not call their real estate appraiser as a witness and the respondents did not proffer an expert on contamination.”
  - “. . .the petitioner was the only party to proffer testimony of expert witnesses. . .”
  - “. . .the petitioner was the only party to put into evidence a real estate appraisal and an environmental remediation report. Therefore, the only evidence of market value before this Court was that submitted by the petitioner.”
  - “Furthermore, this Court finds and determines that the discrepancies set forth herein above were not the product of fraudulent misrepresentation, the exploration of which was always available to the respondents throughout the proceedings herein and of which they failed to avail themselves.”

### CLK HP 225 Froehlich Farm LLC/Lake Park 225 Froehlich Farm LLC

- In the Judge’s decision denying a motion for a summary judgment to dismiss a petition he wrote:
  - “Civil Practice Law & Rules Section 3212 (a) requires that a motion for summary judgment be made within 120 days of the filing of the Note of Issue. The time to move expired on May 15, 2007, whereas the Order to Show Cause is dated October 28, 2008, almost one and one half years later. It is untimely and is subject to denial on that basis alone.”
  - The unexplained 1-½-year delay could require this Court to award sanctions if requested. Herein, none were sought.

### INIP CO.

- In the Judge’s decision to deny Respondents’ request to for an audit he wrote:
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## Review Findings and Recommendations

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- “Respondents’ request for an audit pursuant to 22NYCRR 202.59 [c] is denied as respondents did not serve a cross motion demanding such relief. CPLR 2215.”

### Peninsula-Baldwin Masonic Lodge

- In the Judge’s decision to deny Respondents’ request for a continuance for additional time in which to review the appraisal report produced by the petitioner at a January 15, 2009 trial:
  - “Here, it is conceded by the Respondent that they elected not to partake in appraisal exchange which occurred on December 18, 2008 and therefore in accordance with the above-cited Court Rules were never entitled to a copy of the report produced by the petitioner. Accordingly, as the arguments posited by the Respondents are devoid of merit and given that the evidence produced at trial was sufficient to warrant the relief granted by the Court, the Respondents’ instant application which seeks leave to renew and reargue the Order and Judgment of this Court dated March 16, 2009 is hereby DENIED.”

### **Recommendation:**

The County Attorney should re-evaluate staffing in the Assessment Litigation Bureau and ensure that adequate resources are provided to settle cases expeditiously.

### **Review Finding (2):**

#### **Lack of Policy and Procedures Manuals**

Written policies and procedures are tools in an effective internal control environment. A management-approved policy and procedures manual should address significant activities, employee responsibilities, authorization levels and limits, control procedures, reporting responsibilities and performance standards. Policy and procedure manuals can also be helpful to a department in ensuring that the process is uninterrupted should an employee be absent for a lengthy period.

The Bureau does not have formal policy and procedure manuals to document its activities, policies and responsibilities. When the auditors requested copies of the department’s policies and procedures, the Bureau provided four e-mails issued in 2009 by the former Bureau Chief that included some instructions to staff covering:

- Conferencing cases with ARC, the County Attorney and the petitioner’s attorney;
- The need to obtain information for the March 2009 calendar;
- The need to advise the Bureau Chief of any proposed settlements over \$100,000; and

## Review Findings and Recommendations

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- A requirement to fill out negotiation worksheets completely and sign them.

These e-mails are not an adequate substitute for an official policy and procedure manual for the department and are not sufficient to enable comprehensive supervisory review or to require adequate documentation and justification for a proposed settlement.

Without written policies and procedures, there is a greater chance that processes may be changed without due consideration to the impact. For example, prior and post 2009, the cases were assigned using four criteria:

1. Geographic region;
2. Prior attorney experience;
3. Complexity of the project; and
4. Prior experience with the property.

During 2009 there was no specific process to assign cases to attorneys and that during 2009 cases were assigned based on whoever was available, resulting in a random distribution.

Having formal departmental policies and procedures would have insured that a process was in place to assign cases in the most beneficial manner.

### **Recommendations:**

The Bureau should:

- a) Create and promulgate policy and procedure manuals outlining all activities, policies and responsibilities; and
- b) Periodically review and update, as required, all policies and procedures outlined in the manuals.

### **Review Finding (3):**

#### **Lack of Case and Document Management Systems**

At the time of the last audit of the Bureau (formerly the Tax Certiorari & Condemnation Bureau) in 1999, the Bureau manually maintained settlement checklists indicating each step in the settlement process, along with each document required and when it was requested and received. The date of completion of each step in the settlement process was noted, along with the initials of the person completing the step. In 2003/04, a computerized case management system called ProLaw was implemented and utilized until 2008. Although the ProLaw system was in place as of 2003/04, the Bureau continued to use the manual checklists until it was abandoned in 2006. As such, there was an overlap of at least three years where the Bureau continued to manually monitor the settlement process even though there was a more efficient system in place. The CDCA told us that the former Bureau Chief instructed the Bureau's staff to stop entering certiorari information into ProLaw.

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## Review Findings and Recommendations

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Without entering information into a case management system, a comprehensive database cannot be developed to monitor critical information such as the status of information or documentation requests. For example, a system would be helpful in monitoring the receipt of Notes of Issue (“NOI”) within the four year required time frame from the filing of the petition. It could also be used to monitor the receipt of verified income and expense information. By using the system to determine instances where financial information and/or the NOI is not received timely, the Bureau can take steps to dismiss the claim and perhaps reduce the County’s liability for refunds. Without a tracking system, follow-up may not be performed on a timely basis to ensure that required documentation is received.

The lack of an up-to-date case management system also prevents the Bureau from producing management reports from the system that could be used to track operating efficiencies. The 1999 audit report comment regarding Management Efficiency noted that the Bureau did not issue any management reports related to the number of open cases, exposure information on cases, cases assigned to each attorney, cases assigned to each appraiser, status of each case, settlement data (such as the number of settlements or trials), settlements approved or rejected, settlement amounts against assessed values or appraised values. Based on our review it appears that no management reports were issued in 2009. While she attempted to be responsive to our audit requests for operational data, she believed that some of the information provided to us was incomplete because information was not maintained in ProLaw.

The 1999 audit comment on Management Efficiency also stated that as a result of the lack of a case management system, “The Bureau is unable to maintain a data base of valuation information. Information regarding appraisal methodologies, capitalization rates utilized, comparable rents and value per square foot (by type of property) are not maintained for comparison purposes. Data on comparable properties’ income and expense information and recent property sales are not maintained. This information would be useful in determining the validity of petitioner’s requests and for determining the appropriate value of properties.”<sup>14</sup> A comprehensive database might also reduce the reliance on outside appraisers because valuation information for the subject and comparable properties may be available within the Bureau.

A case management system could be used to:

- monitor attorney workloads and help in the prioritization and assignment of cases;
- better ensure that writs filed seeking substantial reductions are prioritized by the Bureau;
- document the negotiation process;

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<sup>14</sup> Report of Examination –Tax Certiorari & Condemnation Bureau Office of the County Attorney Issued by County Comptroller September 29, 1999, page 75.

## Review Findings and Recommendations

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- document the basis of settlements;
- facilitate the supervisory review of settlements; and
- detail the potential exposure to the County and provide a better estimate of the time or expense which might be incurred.

The CDCA told us that in 2010 she reinstated the use of the system for new cases. However, because the system was not used during 2009, the system has incomplete data regarding pending and settled cases.

As a result of a lack of written policies and procedures and the lack of a case management system, we could not determine if settlements were reached in a timely or orderly fashion, with proper review and approval of documents and authorizations for decisions reached. The document files provided for each settlement were not uniform as to the documentation contained in each file. Without an up-to-date case management system or settlement checklist, we could not determine if information or documentation was missing, unnecessary, misfiled, redacted, or never received by the Bureau.

We also found that the Bureau did not have a computerized document management system whereby documents are maintained as scanned images and filed electronically. The Bureau's files are paper intensive, with all documentation related to each settlement maintained in Redweld folders by case number or by section/block/lot. We found that the CDCA sometimes had difficulty retrieving information such as appraisals and final settlements, perhaps because documents may have been misfiled, were not filed at all or may have been discarded. For example, the County's and petitioner's appraisals covering the 15 years of the Henry Street Investors Ltd. Settlement could not be located. The difficulty with retrieving documents may have been due to its not being entered into ProLaw. It is our understanding that the ProLaw system has the capability of scanning documents.

The CDCA informed us that a system known as ADAPT, represents “. . . an integrated Countywide Real Property Assessment Administration, Appeals, Tax Billing, collection and Refunds solution. . .”<sup>15</sup> and has been under development over the last four years. This system will be used by Assessment, ARC, Treasury and the County Attorney as a centralized database for information regarding all facets of assessment. At the time of our review it was projected that the County Attorney portion of the system might be completed in 2011. The system will include an interface with ProLaw and include document-scanning capabilities.

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<sup>15</sup> Nassau County Legislature Office of Legislative Budget Review Fiscal Year 2007 Outlook & Review of the Updated Multi-Year Plan, page 10.

## Review Findings and Recommendations

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### **Recommendations:**

The Bureau should:

- Reinstigate the use of ProLaw or research other case management systems to determine if there is an alternative that is more efficient than ProLaw. The case management system should be used to produce management reports to monitor the Bureau's efficiency and should include data such as:
  - a. number of open cases
  - b. exposure information on cases
  - c. cases assigned to each attorney
  - d. cases assigned to each appraiser
  - e. status of each case
  - f. settlement data
    - i. number of settlements
    - ii. number of trials
    - iii. settlements pending approval
    - iv. settlements rejected
  - g. refund information
  - h. stratification of cases as to size and age
- Consider the use of a computerized document management system for storage and retrieval of all documents related to case settlements.
- Ensure that documents are maintained in a manner so that they can be readily retrieved.

### **Review Finding (4):**

#### **Delays in Settlement**

Our 1999 audit found that there were delays in the settlement of cases and it was recommended that additional resources should have been made available to minimize the delays. We compared the average length of settlement for our test sample to the average length of settlement during our previous audit. Our audit of the Tax Certiorari Bureau for 1999 reviewed a sample of 13 cases and found that the average case took six years to settle. Our 2009 review, covering a sample of seven cases, found the average settlement covered 7 years. These seven cases included a settlement for Henry Street Investors Ltd. that covered 15 years. Leaving that settlement out, the remaining six cases still covered an average of 5.67 years, only slightly better than in 1999. The CDCA told us that the average span from the filing of the writ to the refund is now three to three and one half years.

These delays in settlement result in higher interest costs paid by the County. Interest is currently paid at the lower of stipulated interest rates as negotiated by the County and the

## Review Findings and Recommendations

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Tax Certiorari Bar or as set by the Commissioner of Taxation and Finance pursuant to subsection (j) of Section 697 of the Tax Law. Over the past three years, the interest rates were as follows:

Interest Rates on Refunds	
Period	Interest Rate per annum
1/1/07 – 12/31/07	7%
1/1/08 – 3/31/08	6%
4/1/08 – 6/30/08	5%
7/1/08 – 9/30/08	4%
10/1/08 – 12/31/08	5%
1/1/09 – 3/31/09	4%
4/1/09 – 12/31/09	3%

If a case is not settled, the statutory rate is used, which can be as high as 9%. During this period of time, interest expense is still accumulating.

For 2009, refunds of \$116,888,142 included \$9,194,810 in settlement interest (interest from payment of tax to the date of settlement). In the example of Henry Street Investors Ltd., the earliest year settlement included interest equal to 67% of the taxes refunded.

One of the major causes of delay is the period of time afforded petitioners to file a Note of Issue after filing a petition. After filing a petition, the property owner has four years to file a Note of Issue to put the case on the court calendar.<sup>16</sup> For cases in our test sample where we had copies of both the writs and the Notes of Issue we found the following delays:

	<u>Writ Filing</u>	<u>Note of Issue Filing</u>	<u>Time Span</u>
Sears	4/25/03	3/13/07	3 years 11 months
Target	4/01/05	7/31/08	3 years 4 months
50 Charles Lindbergh Blvd.	4/25/03	4/11/06	3 years

The CDCA told us that while the four-year window is a state-wide statute, it has been modified based on statute<sup>17</sup> to allow either side after at least two years from the date of commencement of the proceedings to demand that a trial appraisal be filed within 120 days. Upon the filing of the trial appraisals the court can order a pretrial conference and after the pretrial conference is completed, the County can demand that the petitioner file a Note of Issue within 30 days. We questioned whether the County had taken advantage of

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<sup>16</sup> NY CLS RPTL § 718.

<sup>17</sup> Ibid.

## Review Findings and Recommendations

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this by filing Notes of Issue to move cases along but the CDCA told us that they had not. She said that the Notes of Issue filed by the County were to dismiss particular tax years because of faulty petitions or jurisdictional defects.

The CDCA also provided a flow chart showing that during 2009, cases were not assigned to attorneys until they were called on the court calendar. From the date the case is placed on the court calendar, six months are allowed to conduct discovery. At this six-month point a “status report” is prepared which identifies the viable tax years and any outstanding discovery that has not been provided. The petitioner then has 30 additional days to produce Income and Expense Statements and any additional Notes of Issue needed. At this point it may be as much as four years and seven months after the petition was filed.

Even the petitioner’s failure to file a note of issue within the four-year window does not necessarily prevent the petitioner from seeking judicial relief at a later date, and thus increasing the delay in settlement. The CDCA told us that at one time there was a list of approximately 3,000 cases deemed “Black Hole” cases that the County had once considered closed because they were abandoned by the petitioner, but that the court later determined to be still viable. However, over recent years, the County has negotiated with the Certiorari Bar to settle these cases and currently there are less than 100 cases.

According to the CDCA, in 1991, A Supreme Court Justice instituted a policy whereby matters called on tax certiorari calendars would be marked fictitiously as settled before trial at the calendar call. The County and Petitioner would have three years from the calendar call to conduct discovery, settlement discussions and/or settle the proceedings. If the matter was not resolved within the three-year period, the petitioner would have to restore the matter to the trial calendar. In the case of Cento Properties, the County successfully argued that the matter had been marked off and had not been restored within the three-year period and the matter should be dismissed with prejudice as an abandoned proceeding.<sup>18</sup>

However, the petitioner made an application to re-argue the Cento case and it was granted. Another Supreme Court Justice reversed the decision in Cento and ruled that the proceedings could not be dismissed with prejudice as an abandoned proceeding as a matter of law on the basis of an unwritten policy instituted by the other judge. If the petitioner could make an offer of proof that the proceeding had not been abandoned and the proceeding had merit, the proceeding and all subsequent tax years could be considered viable. In addition, the court concluded that the petitioner’s failure to file a Note of Issue in accordance with RPTL § 718 did not result in the cases being abandoned. The appellate division agreed and found that the proceeding could be considered viable. The appellate court also found that the calendar stipulations acted as a

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<sup>18</sup> CPLR § 3404 provides that “A case in the supreme court or a county court marked ‘off’ or struck from the calendar or unanswered on a clerk’s calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute.”

## Review Findings and Recommendations

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complete waiver and not a partial waiver to the requirement of filing a Note of Issue under RPTL § 718.

According to the CDCA, the former County Attorney took a position that the County would not settle any of these cases, but instead would appeal. The County Attorney's Office is now negotiating with the Certiorari Bar, as a condition of the County not appealing the decision; the Certiorari Bar would agree to eliminate most of the open cases by eliminating those where the petitioner did not file a Note of Issue. An agreement was reached whereby the cases would only go back to 1998/99 and that there would be no interest on years prior to the County's revaluation (2002/03). This agreement reduces the 3,000 open cases down to a list of 128.

The County Attorney did not know what the County's liability might be on these cases and the CDCA told us that the Assessment Review Commission did not consider any potential liability for years open prior to 2005.

Another cause of delay was the adjournment of cases. We were provided with a list of 381 cases that had been adjourned under the prior administration. The cases were adjourned for reasons as follows:

- 60% of the cases – The County either had exchanged trial appraisals or was ready to exchange the appraisals.
- 10% of the cases – The Attorney needs to make decisions as to whether to go to trial or settle.
- 30% of the cases – The County Attorney has not negotiated these cases and no decisions have been made.

The CDCA told us that a number of these cases represented contaminated property and that a unified trial strategy had not been developed. She did not quantify the number of properties that were contaminated. However, we noted that 11 of these properties were "Black Hole" cases. Assessment had valued the contaminated properties as if they were clean and therefore the cost to cure the properties was not considered as a reduction in fair market value. She said that it is now difficult to address these properties because the trial appraisals may have shown a value of zero due to the offset of the cost to cure the properties. The valuation of these properties without consideration of the impact of contamination increases the County's exposure to refunds.

Due to the scope limitations that prevented us from examining all documents, and the fact that the case management system was not maintained up to date (see Review Finding (3)) or settlement checklists used, we could not establish average timelines for each step in

## Review Findings and Recommendations

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the settlement process for the test cases.<sup>19</sup>

### **Recommendations:**

We recommend that the Bureau:

- a) Assess each case as to potential exposure, and in those cases considered high exposure, file Notes of Issue after the two year period has lapsed in order to expedite the case;
- b) Pursue legislation to require petitioners to file Notes of Issue within a period of time shorter than four years;
- c) Continue to pursue the resolution of the “Black Hole“ cases and provide guidance to the Assessment Review Commission as to the potential liability so that it can be considered in the year-end certiorari liability; and
- d) Take action on the adjourned cases to determine and execute settlement or trial strategies.

The Bureau’s objective should be to settle open cases by correcting the assessments as soon as possible and minimizing the interest expense incurred by the County.

### **Review Finding (5):**

#### **Delay in the Approval of Settlements**

All settlements resulting in a refund of \$100,000 or greater require the approval of the Nassau County Legislature. As the County pays the petitioner’s interest on refunds from the date the taxes were paid to the date of the refund, the County can minimize its interest expense by paying refunds owed as soon as possible.

We found that there may have been delays in presenting settlements to the County Legislature for approval, or in the County Legislature voting on settlements. The CDCA wrote in a June 14, 2009 email that there were 78 cases submitted to the Legislature for approval during 2009; ten of the 78 failed to pass. She also wrote that, “no tax certiorari settlements appeared on the February 23<sup>rd</sup>, March 9<sup>th</sup>, May 4<sup>th</sup>, May 13<sup>th</sup>, and all of July, August, October and November calendars”.<sup>20</sup>

In addition, the CDCA provided a list of 24 cases, representing refunds of \$8,590,939 that were settled in 2009, but that were not sent to the Legislature for its approval. The

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<sup>19</sup> Our prior audit found the average delays as follows:

Filing of Writ to Placement on the Court Calendar	4.3 years
Receipt of Court Calendar to Receipt of Appraisal	2.0 years
Preliminary Appraisal to Settlement Conference	6 months
Settlement Conference to Stipulation of Settlement	3 months
Stipulation of Settlement to Transmittal to Legislature	6 months

<sup>20</sup> We found that several cases were included on the October 5, 2009 calendar, but were not voted upon.

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## Review Findings and Recommendations

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Bureau indicated that it had re-submitted 14 of these cases with estimated refunds of \$3,396,273, but that as of June 14, 2010 the Bureau had not resubmitted ten of the cases with refunds estimated to be \$5,194,656. She was not certain as to why the previous administration's County Attorney did not pursue approval of these settlements, but thought that part of the reason may have been that settlements may have been tabled as a result of a lack of staff available to answer legislator's questions.

It appears that even if cases are submitted for legislative approval, they might not be voted on. Several cases were listed on the agendas, some several times, but not voted on. These cases and the dates they were on the legislative calendar were:

- We're Associates, Co. 9/21/09,10/5/09, (approved 12/7/09);  
Burger King Corp. 9/21/09, 10/5/09;  
East Meadow Stores, Inc. 9/21/09, 10/5/09;  
GGW Properties, Inc. 9/21/09, 10/5/09 and  
Marvin L. Lindner Assoc. LLC. 9/21/09, 10/5/09  
These five cases totaled \$1,465,725 in refunds (prior to interest).

Several of the settlements, East Meadow Stores, GGW Properties, Inc., Marvin L. Lindner Assoc. LLC. and Burger King Corp. were put back on the July 19, 2010 calendar for approval.

- The December 21, 2009 calendar included: Sunshine Care Corp.; Matthew S. Degiaino; Martin D. & Barbara Sass; Robert Birnbaum and Fairhaven Apartment #1. These five cases totaled \$1,550,482 in refunds (prior to interest). We noted that Matthew S. Degiaino; Martin D. & Barbara Sass; Robert Birnbaum and Fairhaven Apartment #1 were included on the March 22, 2010 Legislative Calendar. The settlement for Sunshine Care Corp. (refund owing of \$638,470) was included on the agenda for August 2, 2010 under the heading "The Following Items May be Untabled".
- At the time this review was conducted, two settlements, Spa 79 with a refund owing of \$124,737 and 160 Hilton Associates with a refund owing of \$200,000 (plus interest) were included on the September 9, 2009 Calendar and failed. Spa 79 was put back on the Calendar as of July 19, 2010 after a delay of ten months and was approved; 160 Hilton Associates was approved as of September 20, 2010.

The CDCA was not part of the Bureau during this timeframe and was unaware as to why the cases were not called. She said that all of these cases will be re-submitted.

It appears that the Legislature has begun to vote on proposed settlements. A review of the July 19, 2010 legislative calendar showed that 14 cases with refunds totaling almost \$5.9 million (excluding interest) were scheduled to be voted upon. The tax years settled

## **Review Findings and Recommendations**

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by these cases averaged 6.21 years and included two “Black Hole” cases, one covering 13 years and the other covering 8 years. Another case, which was not on the list of Black Hole cases provided, covered 11 years.

The delay in submitting or re-submitting cases that fail, or that are not called to a vote when scheduled, results in additional interest expense to the County and in an unnecessary delay in providing the petitioner with a refund for overpaid taxes.

### **Recommendations:**

- a) The Bureau should ensure that all cases where settlements have been reached are included on the legislative calendars as soon as possible. Those that are rejected by the Legislature or that are tabled for want of additional information should be timely addressed and re-submitted. Those that were not called should be re-scheduled for the soonest possible meeting. This will minimize the County’s interest expense and serve the best interest of the taxpayers and petitioners.
- b) We recommend that the Bureau establish a mechanism with its case management system to track all settlements to ensure that they are scheduled for legislative approval as soon as possible. Steps should be taken to re-structure settlements or obtain information needed to enable the Legislature to reconsider those cases that fail to obtain legislative approval.

### **Review Finding (6):**

#### **Lack of In-House Appraiser**

The Bureau does not have any appraisers on staff, and instead relies solely on outside appraisers who are under contract with the County. In the case of joint settlements with ARC, the Bureau relies on ARC’s commercial appraisers for preliminary appraisals.

One of the recommendations from the 1999 Audit was for the Bureau to hire staff appraisers. The then Bureau Chief agreed with the recommendation and stated that the Bureau was in the process of hiring staff appraisers. In 2008 there was an appraiser hired on a contractual basis for a term of approximately one year, but that the contract was not renewed for 2009.

Our review of the appraisals<sup>21</sup> prepared by the outside appraisers found that they were subjective in nature and that the results of the appraisals seemed influenced by the needs of the party who hired the appraiser. As such, a review performed by an in-house appraiser of both the petitioner’s and the County’s appraisals could be useful to analyze,

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<sup>21</sup> Limited Review of County Attorney Tax Certiorari Appraisal Reports of Real Property and Legislative Reform issued by County Comptroller, September 29, 1999.

## **Review Findings and Recommendations**

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compare and contrast the two appraisals, point out the underlying assumptions that cause the difference between the final valuations, evaluate the comparable properties used, the adjustments applied thereto and identify to the Bureau's attorneys any possible flaws in the appraisals. This information could then be used by the Bureau in negotiating settlements or for trial purposes.

Additionally, an in-house appraiser could assist the Bureau in prioritizing cases to be addressed by identifying those cases with the highest exposure to the County. These cases could then be addressed first to minimize the interest that will be owed on the refund and to ensure that valuation information is provided to both ARC and Assessment. The information would be useful to ARC in reviewing any years over which it has jurisdiction and in ARC's determination of year-end certiorari liability estimates to be used in the County's financial statements. Assessment may also find the information useful in establishing current and future year's assessments.

### **Recommendation:**

The Bureau should consider hiring in-house appraiser(s) to:

- a) Review the validity of petitioners' claims and provide evaluations of the County's potential exposure to be used in prioritizing those claims;
- b) Review the petitioner's and the County's appraisals for reasonableness and report any information to the Bureau's attorneys that should be challenged or where more information is needed to fully support the appraisal. The in-house appraiser should then assist the Bureau's attorneys in negotiations or in preparing for trial; and
- c) Ensure that the Department of Assessment is provided with any appraisal information that may be of use in setting current and future years' assessments.

### **Review Finding (7):**

#### **Audits of Income and Expense Statements**

According to Section 202.59, of the New York State Court Rules, before a Note of Issue is filed, the petitioner must file a certified and verified Income & Expense ("I&E") statement for all income producing property. (If the income producing property is owner-occupied, the petitioner does not need to provide verified or certified income and expense statements.) Under the court rules, the municipality has the right to audit verified or certified income and expense statements for each tax year that a petition was filed.<sup>22</sup>

These I&Es are not used directly to value the subject properties, but are used to establish a benchmark for the property that may be useful in supporting the County's estimates of income and expenses or refuting the petitioner's estimates. In addition, these audited

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<sup>22</sup> New York State Court Rule 202.59 (a) and (b).

## Review Findings and Recommendations

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I&Es can be used to build a database for evaluating comparable properties and can be effective in minimizing the claimant's reduction requests.

In the 1999 audit discussion of the Bureau's "Audit of Income and Expense Information" we noted that "...the Bureau does not always obtain the income and expense in a certified or a verified manner and, except in isolated cases, does not request an audit of the books and records." "Cost savings of several million dollars could be achieved if the Tax Certiorari Bureau requested an audit on a regular basis of the claims that fall within the audit criteria to be developed by the Bureau."<sup>23</sup> In our report, we cited just one case where the savings achieved were about \$1 million. In their reply, the Bureau stated that it will "...remind appraisers to require verified or certified Income and Expense Statements, when necessary, prior to preparing any appraisal. In addition, we will remind appraisers to submit any questionable Income and Expense item to this Bureau for audit."<sup>24</sup>

In prior years, an audit process and check list had been developed to be used to determine whether I&E's should be subject to audit. Only seven audits had been performed in 2009. We were provided with copies of the audit parameters which included ranges for market rents, vacancy rates expenses and capitalization rates. Tables were provided showing ranges (expenses as a percentage of gross revenue) of different types of expenses for different types of properties. The tables were designed to allow the auditor to check a box showing if the expenses fell within or outside the predetermined range, whether further investigation was recommended, and whether additional information was required.

We found deficiencies in the form in that:

- there were no specific guidelines as to when an audit should or should not be performed;
- the forms did not appear to require the reviewer to provide a rationale for the recommendation made; and
- there was no space on the form for the auditor's signature, or for a supervisor to indicate review and approval.

Using financial information reported by the petitioners as a basis to determine if an audit should be performed may lead to faulty conclusions as to the need for an audit. The income and expense items reported may fall within guidelines, but may have been inaccurately reported.

The CDCA said that she would like to resurrect audits in 2010, selected based on pre-determined criteria, and that random audits would also be useful. The risk of an audit

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<sup>23</sup> Report of Examination – Tax Certiorari & Condemnation Bureau Office of the County Attorney Issued by County Comptroller, September 29, 1999, page 39.

<sup>24</sup> Report of Examination – Tax Certiorari & Condemnation Bureau Office of the County Attorney Issued by County Comptroller, September 29, 1999, page 41.

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## Review Findings and Recommendations

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might serve as a deterrent to frivolous claims and might encourage the petitioner's attorneys to ensure that the petitioners report verifiable information.

There was no evidence that the results of these audits were shared with the County's appraisers.

### **Recommendations:**

The Bureau should:

- a) Re-instate the use of audits of income and expense statements as a means of ensuring the accuracy of information provided and as deterrence to frivolous claims;
- b) Develop written criteria to be used in the decision as to which properties should be subject to audit and require the reviewer to provide the basis for their decision to audit, or not to audit the petitioners;
- c) Establish a program of performing audits of petitioners selected on a random basis; and
- d) Share the results of these audits with ARC and with Assessment so that they can maintain accurate Income and Expense information on as many properties as possible.

Response to Limited Review of the Nassau County Attorney Assessment Litigation Bureau Tax Certiorari Process.

**Response to Recommendation to Review Finding (1)**

1. The understaffing of the Tax Certiorari or Assessment Litigation Bureau was due to the prior administration of the bureau. The prior Bureau Chief and prior County Attorney removed two of the senior counsel/deputy county attorneys; the deputy bureau chief took another position in 2009. These vacant positions were never replaced nor filled despite the increase in the bureau’s case load, i.e. 2,500 cases in 2009 court calendars. There was no plan in place to deal with this burgeoning case load. As a result the current County Attorney was faced with hundreds of court cases that had been adjourned by the prior bureau chief and no attorneys either to try the cases or to address the litigation posture. Moreover, under the prior administration there were a significant number of settled cases that were not processed and/or that were not submitted to the Nassau County Legislature.

Beginning in 2010 the County Attorney’s office addressed these issues immediately and re-established a dialogue with the Judiciary so that the County of Nassau would not default or fail to address pending court matters. As per the County Executive’s executive order #2-2010 a 120 day moratorium was called for so that the County of Nassau could effectively assess the merits of cases, settle matter including tax year 2010/11 (2011) so as to avoid liability by reducing the assessed values before this tax year was finalized in April 2011 and to also include settlement(s) of tentative tax roll 2011/12.

The Bureau organized and conducted dual conferences with ARC; dual conferences with the Assessment Review Commission maximized the County’s ability to assess the merits of the numerous cases, and if settling a matter, settle the pending administrative tax year of 2011/12.

In addition, all matters were negotiated at a reduced stipulated interest rate of 3% rather than the current stipulated interest rate of 4%. This was in accordance with executive order #3-2010.

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## Appendix – County Attorney Response and Auditors' Follow-up

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Our department is re-evaluating the staffing of the bureau. The department is filling the vacancies in the bureau and all settled cases are systematically being processed as quickly as possible.

We concur with the recommendation.

### **Auditor's Follow-Up:**

*We concur with the corrective action being taken by the Department.*

### **Response to Recommendation to Review Finding (2)**

2. The Bureau concurs with recommendation of creating and promulgating policies and procedures. The Bureau has already instituted several policies and procedures regarding processing settlements, audits and review of cases.

### **Auditor's Follow-up:**

*We concur with the corrective action being taken by the Department.*

### **Response to Recommendation to Review Finding (3)**

1. The Bureau concurs with recommendation of creating and promulgating policies and procedures. In fact, the use of a case management system Pro Law was reinstated in January 2010. The scanning of documents requires additional equipment which the County Attorney's office is seeking to obtain. Our office is working with IT (Information Technology) Department to maximize technological resources to aid in the management of tax certiorari claims.

### **Auditor's Follow-up:**

*We concur with the corrective action being taken by the Department.*

### **Response to Recommendation to Review Finding (4)**

1. While the Bureau agrees with the objective to settle by correcting assessments as soon as possible to minimize exposure we do not concur that that the recommendation set forth necessarily achieves this goal.

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## Appendix – County Attorney Response and Auditors’ Follow-up

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2. The conclusion of the comptroller’s preliminary report regarding addressing Notes of Issue as by the County Attorney’s office indicates the lack of understanding of the Article 7 tax certiorari process. The commencement of the lawsuit begins with the filing of a grievance with ARC when the tentative assessment roll is promulgated at the beginning of each year in January. After exhausting administrative remedies the taxpayer files an Article 7 petition or “writ”. After the petition is filed the collection of data such as income and expense statements begins and the New York State Court Rules Section 202.59 dictates how this information is to be gathered.

The County Attorney’s office prior to 2009 and during 2009 worked with the ARC to receive this information/discovery and to attempt to resolve cases. Income and expense statements are provided to ARC at the time of the filing of the grievance and again the County Attorney’s office prior to the filing of the Note of Issue or simultaneously with the Note of Issue. Speeding up the filing of Notes of Issue does not resolve the cases sooner necessarily unless the County is prepared to try cases with trial appraisal reports. It was the policy of the prior County Attorney and Bureau Chief to work with ARC to resolve cases that not only included open tax years but also to include the tentative assessment roll.

Moreover, in 2003 the County discontinued the use of calendar stipulations which stipulated when Notes of issue were to be filed. The calendar stipulation outlined the discovery procedure for the parties as well as the filing of Notes of issue. With regard to the Notes of Issue in the calendar stipulation the Notes of Issue had to be filed for the first tax years at issue and could and subsequent Notes of Issue could be filed at the time of settlement. Again, the County abandoned this calendar practice. The result was that the court calendars doubled from 1,500 cases per year to over 3,000 cases per year. Prior to 2009 County Attorney’s office handled the cases and kept liability down. In calendar year 2008 the County Attorney’s office settled twice as many cases however the refund liability was approximately the same as 2007 with half the number of cases settled. (In 2008 DCA Lisa LoCurto was Bureau Chief).

3. The focus of the report on “black hole” cases is to focus on the exception not the rule. In 2003 the County Attorney’s office ended the practice of master petitions and calendar stipulations which provided that a single Notes of Issue could be filed and subsequent Notes of Issue could be filed at the resolution of a case. By stopping this practice, cases with potentially more than four tax years at issue could no longer remain viable. When calendar stipulations were discontinued in

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## Appendix – County Attorney Response and Auditors’ Follow-up

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2003, the number of Notes of Issue on the court calendars doubled. Again, despite the fact that the number of Notes of Issue prior to 2009 doubled the County Attorney’s office resolved the cases on the court calendar. In 2009 the County Attorney’s office was unable to address the volume of cases in order to meet the court directed and scheduled trial appraisal exchange dates or six month status calendars.

4. The objective of settling cases at the soonest possible stage is a worthy goal; however, this goal would be best served by addressing the matters at the administrative level, i.e. while the tax assessment is in the tentative phase. After an article 7 petition is filed, which is the first and only time the County Attorney’s office can address the matter results in liability. Once a matter reaches the court house any settlement of a case is a refund.

### **Auditor’s Follow-up:**

*We reiterate our recommendation regarding obtaining preliminary trial appraisals which will deter the filing of frivolous grievances and expedite the process.*

### **Response to Recommendation to Review Finding (5)**

1. We concur with the recommendation to ensure settlements that require legislative approval should be submitted as soon as practicable. The Bureau is utilizing procedures and case management system to track matters that require legislative approval.

### **Auditor’s Follow-up:**

*We concur with the corrective action being taken by the Department.*

### **Response to Recommendation to Review Finding (6)**

1. We concur with the recommendation to utilize the services of an in-house appraiser to assist in the review and evaluation of tax certiorari challenges. This Administration is taking steps to make the Department of Assessment, the Assessment Review Commission and the County Attorney’s office work seamlessly. The Bureau currently has an in-house appraiser to assist the Bureau.

**Auditor's Follow-up:**

*We concur with the corrective action being taken by the Department.*

**Response to Recommendation to Review Finding (7)**

1. As the auditor's report indicates there were seven audits conducted in 2009. The use of audits of income and expense statements may be a useful tool in assessing the merits of case. The Bureau has re-instituted the use of audits and the Bureau is evaluating their effectiveness.

**Auditor's Follow-up:**

*We concur with the corrective action being taken by the Department.*