

## **Property Maintenance Charges: A Tax or Not a Tax, That Is the Question**

**by Daniel A. Spitzer, Sujata Yalamanchili,  
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## Property Maintenance Charges: A Tax or Not a Tax, That Is the Question

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In this installment of Real Assessment, Spitzer, Yalamanchili, and Zomerfeld analyze a recent New York Court of Appeals ruling that counties must

reimburse towns for unpaid property maintenance and demolition charges assessed against real property, and that these charges are legally equivalent to unpaid taxes.

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New York counties act as the collector of unpaid taxes for towns, as well as an interest-free bank, advancing monies to towns while taking on the responsibility of collecting delinquencies. Resolving a long-standing dispute between town and county governments, the New York Court of Appeals has ruled that counties must reimburse towns for unpaid property maintenance and demolition charges assessed against real property — finding that these charges are legally equivalent to unpaid taxes.

### A Dispute Over Unpaid Maintenance Charges

Like many communities, the towns of Brighton and Irondequoit passed local laws requiring property owners to maintain their properties.<sup>1</sup> Upon a property owner's failure to do so, a town could complete any required work to maintain the property. Depending on the state of the property, these tasks could be as simple as cutting the grass or as involved as demolishing the structure. Using specific state statutory authority to assess property owners for the costs incurred,<sup>2</sup> the local laws provide that those charges would be collected in the same manner as other town charges.<sup>3</sup>

Though maintenance charges were an initial expense for towns, the charges would be added to the annual tax bill. If unpaid, the tax collector would include the unpaid charges in the return of unpaid taxes submitted to the county,<sup>4</sup> which

<sup>1</sup> Brighton's provision was adopted by Local Law No. 2 of 1990 on Apr. 26, 1990 and Irondequoit's by Local Law No. 5 of 2015 on May 21, 2015.

<sup>2</sup> N.Y. Town Law section 130(16)(g) (McKinney).

<sup>3</sup> Brighton Town Code section 129-14; Irondequoit Town Code section 104-7(B).

<sup>4</sup> N.Y. Real Prop. Tax Law section 936 (McKinney).

would guarantee and credit those charges, along with unpaid taxes. In Monroe County, that practice — and this dispute — began in December 2016, when the county issued a memorandum stating that it would no longer guarantee nontax charges — including property maintenance, repair, and demolition. Monroe County also indicated that it would deduct any money wrongly credited to the towns from the then-upcoming sales tax distribution of November 2017. Disagreeing with this change in course by the county, the towns brought a hybrid action/proceeding against Monroe County to challenge its determination.

### Supreme Court Sides With the Towns

The towns sought relief, including annulment of Monroe County's tax memo and a determination concerning the reimbursement of the charges, a declaration that the county is obligated to guarantee and credit the maintenance charges, and an injunction prohibiting the county from deducting reimbursements of unpaid charges from the upcoming sales tax distribution.<sup>5</sup> Monroe County moved to dismiss on grounds that the towns failed to state a claim, and that the charges were not "taxes" or "special ad valorem levies," but instead were special assessments, which the county asserted were not subject to the county guarantee or credit provisions.<sup>6</sup>

Both local laws provided that the charges were levies on real property and would constitute a lien on the property.<sup>7</sup> Specifically, the charges "shall be collected in the same manner and at the same time as other town charges."<sup>8</sup> Therefore, the court examined the applicable statutory provisions as to what a tax was. As provided by Real Property Tax Law (RPTL) section 102(20):

"Tax" or "taxation" means a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school

district purposes, but does not include a special ad valorem levy or a special assessment. The term "tax" or "taxes" as used in articles five, nine, ten and eleven of this chapter shall for levy and collection purposes include special ad valorem levies.

Under the collection scheme, towns "make and deliver to the county treasurer an account, subscribed and affirmed by him as true under the penalties of perjury, of all taxes listed on the tax roll which remain unpaid."<sup>9</sup> The county is the sole authority to enforce tax liens in foreclosure, and it is charged with collecting the unpaid taxes.<sup>10</sup> But state law does not stop there; it saddles the county with the obligation to pay a town the difference between the tax levy and the actual tax collected.<sup>11</sup>

Parsing the various provisions of the local laws — the RPTL, the Municipal Home Rule Law, the Town Law, and the Monroe County Tax Act — the court found that "all permit the maintenance, repair, and demolition charges to be levied as taxes against the real property, for which the County is responsible for collecting, guaranteeing, and crediting."<sup>12</sup> Accordingly, the court said, Monroe County's tax memo and its attendant decision recovering prior credits from the sales tax distribution were without justification.<sup>13</sup>

The supreme court noted an important policy aspect: If towns were without recourse to combat properties in need of maintenance, repair, or demolition, they would have no incentive to take curative action, resulting in persistent blight in communities.<sup>14</sup> The policy behind the legal principle that the county is responsible to credit the towns for unpaid taxes is that the risk the county faces by covering that cost is balanced by its ability to foreclose on a property that has a tax lien, thereby making itself whole. Were Monroe

<sup>9</sup> RPTL section 936(1).

<sup>10</sup> *Town of Irondequoit*, at 13.

<sup>11</sup> *Id.* (citing RPTL section 936(1) and Monroe County Tax Act, L. 1938 ch. 448 (as amended) section 673-1(10)). Like many of the larger counties in New York, there is special legislation governing tax administration and collection in Monroe County.

<sup>12</sup> *Id.* at 15.

<sup>13</sup> *Id.* at 18.

<sup>14</sup> *Id.* at 17.

<sup>5</sup> *Town of Irondequoit v. County of Monroe*, Index No. 17/4442 (Sup. Ct., Monroe Cnty., Sept. 19, 2017) (Odorisi, J.) at 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* (citing Brighton Town Code section 51-9; Irondequoit Town Code section 94-9).

County's position correct, it could be made whole through foreclosure, but leave the towns without any repayment for the expenses. "This is not the intended outcome of the real property tax framework," according to the court.<sup>15</sup>

The supreme court therefore annulled the county's determination, compelled the continued collection of the unpaid charges, and restrained the county from decreasing the November sales tax distribution.<sup>16</sup> Monroe County appealed.

### Appellate Division Reverses, Sides With County

On appeal, the Appellate Division, Fourth Department reversed, holding that RPTL section 936 does not require Monroe County to treat the unpaid maintenance charges in the same manner as unpaid taxes.<sup>17</sup>

As below, the court's decision turned on whether the charges were taxes. As the court reasoned, "the maintenance charges are assessed against individual properties for their benefit and thus do not fall within the general definition of 'tax,' which instead contemplates 'public burdens imposed generally for governmental purposes benefiting the entire community.'"<sup>18</sup> Similarly, the court held that the charges were not special ad valorem levies because they are not a charge "used to defray the cost of a special district improvement or service."<sup>19</sup> Indeed, those charges are not assessed on an ad valorem basis because they are not based on value — but on the expense to the town.<sup>20</sup> Since the maintenance charges did not meet the definition of tax according to the court, they did not fall within Monroe County's guarantee obligations. The towns' respective laws, the Monroe County Tax Act, and the Municipal Home Rule Law "did not expand the County's obligation under RPTL 936" to require the county to guarantee or credit the

maintenance charges.<sup>21</sup> Therefore, the court reversed.<sup>22</sup>

Two justices dissented, relying on statutory interpretation and a State Board of Equalization and Assessment counsel opinion that "maintenance, repair, and demolition charges assessed by the town against real property are 'in the same nature' as taxes, and thus they are guaranteed by the county pursuant to RPTL 936."<sup>23</sup> This interpretation, according to the dissent, has been "the law in this State for decades."<sup>24</sup> On policy grounds, the dissent observed that if the majority's holding were to stand, "towns would almost never be able to recoup their costs for maintaining, repairing, or demolishing blighted properties . . . such a rule is not consistent with the statutory scheme, nor is it consistent with historical practices, nor is it good policy."<sup>25</sup> The towns appealed as of right directly to the Court of Appeals based on the two-justice dissent.

### Court: Charges Within County's Guarantee Responsibility

On appeal, the Court of Appeals reversed, holding that the law required the county to guarantee and credit the towns for the unpaid charges.<sup>26</sup> The court observed that "resolution of this dispute turns on the proper interpretation of various provisions in the Real Property Tax Law, a byzantine statutory scheme governing the imposition and collection of all types of assessments on real property."<sup>27</sup>

In dismissing Monroe County's arguments about the charges not being a tax under the general definition of tax of RPTL section 102(20), the court reasoned that that is not the only relevant provision, as RPTL section 102 "begins with the caveat that the listed terms carry the designated meanings 'when used in this chapter,

<sup>15</sup> *Id.* at 18.

<sup>16</sup> *Id.*

<sup>17</sup> *Town of Irondequoit v. County of Monroe*, 175 A.D.3d 846, 847 (N.Y. App. Div. 2019).

<sup>18</sup> *Id.* at 848 (internal quotations and citations omitted).

<sup>19</sup> *Id.* (citing RPTL section 102(14)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 850 (citing 9 Op. Counsel SBEA No. 55, 1990 WL 430914 (1990)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (ellipsis added).

<sup>26</sup> *Town of Irondequoit v. County of Monroe*, 2020 N.Y. slip op. 07689, 2020 WL 7497940 (Dec. 22, 2020).

<sup>27</sup> *Id.* at \*2.

unless otherwise expressly stated or unless the context otherwise requires.”<sup>28</sup> This distinction, the court held, is why “the question is not what constitutes a ‘tax’ in the abstract, but rather whether these charges fit within the ambit of ‘unpaid delinquent taxes’ as that term is used in section 936 of the RPTL.”<sup>29</sup>

Including the charges within the scope of RPTL section 936 is consistent with the statutory scheme that allows the county to commence in rem foreclosure proceedings and carry out enforcement for the payment of delinquent taxes under RPTL section 1123(2)(a).<sup>30</sup> Thus, the Court of Appeals, agreeing with the lower court and Appellate Division dissent, observed:

The Legislature, recognizing that towns have little power to recoup their costs for unpaid real property tax liens, has shifted the risk of loss to counties, which are in the best position to recover the funds through in rem foreclosure proceedings. The same considerations apply to blighted properties, where the Legislature may have presumed that counties are in a better position to recover charges imposed on real property pursuant to the Town Law.<sup>31</sup>

Therefore, the court held that Monroe County was required to credit the maintenance and demolition charges.<sup>32</sup>

### Insights

After the Great Recession and the rise of “zombie homes,” municipalities have expanded property maintenance enforcement efforts. Many towns have been reluctant to take action because of potentially being saddled with the compliance costs. The *Irondequoit* decision emphasizes that towns are in the best position to care for property within their jurisdictions, but that ultimately counties are legally responsible to guarantee and credit those charges, just as they do with tax liens.

This ensures that towns are not in any way hindered in their efforts to preserve the health, welfare, and safety of their communities.

Counties that have previously refused to guarantee and credit property maintenance charges will have to ensure that their policies are amended to reflect the holding in *Irondequoit*. Similarly, towns that have laws that allow for the imposition of property maintenance charges can proceed with levying those charges and reporting them to the county as they would unpaid taxes. Those charges will be guaranteed and credited in the same manner under *Irondequoit*. ■

<sup>28</sup> *Id.* at \*3 (emphasis in original).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at \*4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*