Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32809
C/prt

_____AD3d_____ Argued - October 11, 2011

A. GAIL PRUDENTI, P.J.
PETER B. SKELOS
RUTH C. BALKIN
SANDRA L. SGROI, JJ.

2010-01440 DECISION & ORDER
2010-09189

In the Matter of Baldwin Yacht Basin, Inc., et al., appellants, v Board of Assessors, et al., respondents.

(Index No. 403177/08)

Schroder and Strom, LLP, Mineola, N.Y. (Michael T. Schroder of counsel), for appellants.

John Ciampoli, County Attorney, Mineola, N.Y. (Gerald R. Podlesak of counsel), for respondents.

In related proceedings pursuant to RPTL article 7 to review the tax assessments of the petitioners' real property for the tax years 2004/2005 through 2006/2007, the petitioners appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Nassau County (Adams, J.), entered September 17, 2009, as denied that branch of their motion which was, in effect, for summary judgment, and (2) so much of an order of the same court entered July 15, 2010, as, upon reargument, adhered to the original determination.

ORDERED that the appeal from the order entered September 17, 2009, is dismissed, as that order was superseded by the order entered July 15, 2010, made upon reargument; and it is further,

ORDERED that the order entered July 15, 2010, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

The petitioners sought, inter alia, to reclassify their real property from Class Four commercial to Class One residential for the tax years 2004/2005 through 2006/2007. The petitioners relied on a resolution passed by the Village of Freeport's Board of Trustees which conditionally rezoned the subject property from industrial to "Marine Apartment-Boatel, Condominium and Cooperative District" and included an additional prohibition of any commercial use of the property. The resolution, however, was conditioned, among other things, upon the execution and recording of a Declaration of Restrictions. The petitioners failed to submit evidence establishing that the Declaration of Restrictions was executed and recorded, and thus, failed to establish, prima facie, that it was entitled to the relief sought (*see Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 106). Moreover, contrary to the petitioners' contention, there is an issue of fact as to whether the subject property was vacant as required for a Class One designation under RPTL 1802(1) (*see Matter of Richmond County Country Club v Tax Commn. of City of N.Y.*, 53 AD3d 661, 662). Accordingly, the Supreme Court, upon reargument, properly adhered to its original determination denying that branch of the petitioners' motion which was, in effect, for summary judgment.

PRUDENTI, P.J., SKELOS, BALKIN and SGROI, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court