

**Matter of Emmons Realty LLC v Soliman**

2024 NY Slip Op 30880(U)

March 6, 2024

Supreme Court, Kings County

Docket Number: Index No. 530070/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6<sup>th</sup> day of MARCH, 2024.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

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In the Matter of the Application of  
EMMONS REALTY LLC,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law  
and Rules and/or for a Declaratory Judgment

-against-

Index No. 530070/2021

SHERIF SOLIMAN, in his capacity as THE  
COMMISSIONER OF FINANCE OF THE  
CITY OF NEW YORK, and CITY OF NEW YORK,

**DECISION & ORDER**

Respondents.  
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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Petition/Petition/Affidavit/Memorandum/Exhibits.....	<u>1 – 22</u>
Memorandum in Opposition/Exhibits.....	<u>27 – 32</u>
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Upon the foregoing papers, Petitioner Emmons Realty LLC (“Petitioner”), pursuant to Article 78 of the Civil Practice Law and Rules, for a judgment (1) vacating and reversing the September 3, 2021 final administrative determination (the “Determination”) of the New York City Department of Finance (the “DOF”) that denied Petitioner’s request to change the Building Class of the subject property from Building Class V1 (Zoned Commercial or Manhattan Residential) to Building Class V0 (Zoned Residential; Not Manhattan) and Tax Class of the subject property from Tax Class 4 (commercial) to Tax Class 1 (residential); (2) declaring that the subject property be taxed as a Tax Class 1 residential property with a Building Class of V0, so long as it remains

vacant and unimproved; and (3) recalculating the assessment in each fiscal year and the real estate taxes that are due as described in the petition. Respondents Sherif Soliman, in his capacity as the Commissioner of Finance of The City Of New York and City of New York (collectively, "Respondents") oppose the petition, arguing that it should be dismissed on the basis that (i) the petition is procedurally defective and (ii) the Determination was rational, reasonable and in accordance with the limited purview of New York City Administrative Code § 11-206.

Petitioner is the owner of an unimproved vacant parcel located within a residential zone at 3164 Emmons Avenue in Brooklyn. According to the petition, since 2015, the DOF had erroneously classified the property as Building Class V1 (Zoned Commercial or Manhattan Residential), which is a Tax Class 4 commercial property, when the property should have been classified, pursuant to Real Property Tax Law § 1802 (1) (d), as Building Class V0 (Zoned Residential; Not Manhattan) and Tax Class 1. On May 20, 2021, Petitioner submitted to the DOF a "CLERICAL ERROR OR ERROR IN DESCRIPTION FORM" wherein it requested that the DOF correct the alleged errors in the building and tax classification of the property. On September 3, 2021, the DOF issued a determination denying petitioner's application.

Petitioner commenced this Article 78 proceeding, alleging that Respondents acted contrary to law and arbitrarily and capriciously in (a) failing to classify the subject property as Building Class V0 and Tax Class 1 residential property and (b) failing to correct this "clerical error" under 19 RCNY § 53 et seq. and NYC Administrative Code § 11-206.<sup>1</sup> In opposition, Respondents contend that Petitioner's claims are only cognizable within an Article 7 tax certiorari proceeding and as such, the petition is procedurally defective. Accordingly, Respondents argue that its determination to deny Petitioner's administrative application, which did not allege a bona fide "clerical error" or "error of description," was rational, reasonable and in accordance with the law.

In determining an Article 78 proceeding, the Court must consider whether the challenged determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). Under this standard, courts will review the record to find whether the challenged determination had a rational basis (i.e.,

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<sup>1</sup> 19 RCNY 53-01 [b] [10] provides that an "error in description" includes, but is not limited to, "[i]naccurate building class that affected assessed value." Under NYC Administrative Code § 11-206, the DOF is authorized to "correct any assessment or tax which is erroneous due to a clerical error or to an error of description contained in the several books of annual record of assessed valuations."

whether there was some objective factual basis) (*see Matter of Gorecki v New York State Dep't of Motor Vehicles*, 201 AD3d 802, 803 [2d Dept 2022]).

Generally, challenging an allegedly excessive or unlawful real property tax assessment is done through a tax certiorari proceeding pursuant to Article 7 of the Real Property Tax Law (*see* RPTL 706; *Emunim v Town of Fallsburg*, 78 NY2d 194, 204 [1991]). However, a tax certiorari proceeding is not the sole remedy for seeking review of an excessive assessment (RPTL 700 [1] ["A proceeding to review an assessment of real property shall be brought as provided in this article unless otherwise provided by law."]); *see Matter of Better World Real Estate Group, v New York City Dept of Fin.*, 122 AD3d 27, 34 [2d Dept 2014] [holding that the errors reviewable under Administrative Code § 11-206 may include a misclassification of the building class of a property]).

There is no dispute that the subject vacant property is located in a R5 (residential) zoning district in Brooklyn with a C2-2 commercial overlay, as indicated on the Notices of Property Value and in the Zoning and Land Use Map (NYSCEF Doc Nos. 7, 11). Under RPTL 1802 (1), New York City properties classified as Tax Class 1 include one-, two- and three-family homes as well as vacant land outside of Manhattan located in a residential zone. Properties classified as Tax Class 2 are residential properties not covered by Tax Class 1, except hotels and motels and other similar commercial properties (RPTL 1802 [1]). Properties classified as Tax Class 3 are utility properties and properties exempt under former section 470 of the RPTL (*id.*). All other properties are classified as Tax Class 4 (*id.*).

The misclassification of vacant property in a residential zone with commercial overlay has been litigated in this court and in courts of coordinate jurisdiction. These courts have determined that in such circumstance, the property must be assessed and classified as Tax Class 1 and Building Class V0 (*see Matter of MLK LY LLC v Commr. of Fin. of the City of NY*, 2022 NY Slip Op 33386[U] [Sup Ct, Kings County 2022]; *In re Richmond SI Owner LLC v Soliman*, 75 Misc 3d 1211[A], 2022 NY Slip Op 50462[U] [Sup Ct, Richmond County 2022]; *LLC v Niblack (In re 205 W. 262Nd St.)*, Sup Ct, Bronx County, June 28, 2023, Guzman, J., index No. 813087/2022E; *17 Grand Ave. Corp. v Niblack*, 80 Misc 3d 1217[A], 2023 NY Slip Op 51022[U] [Sup Ct, Queens County 2023]; *Bellingham Estates 26 LLC v Niblack*, 81 Misc 3d 1224[A] 2023 NY Slip Op 51444[U] [Sup Ct, Kings County 2023]).

Nonetheless, where the Second Department or Court of Appeals has not issued a ruling on the pertinent issue, this Court is bound to follow Appellate Divisions precedent from other


departments (*see Mountain View Coach, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). In *Matter of 3061-63 Third Avenue LLC v Soliman* (--- AD3d ---, 2024 NY Slip Op 00256 [1st Dept 2024]), the First Department found that the DOF's denial of an application concerning a vacant lot's classification as commercial property was rational where, as here, the physical description of the property as vacant land was not erroneous (*id.* at \*1). The court further determined that "[a]ny effects on the assessed valuation arose from the alleged misinterpretation by DOF of RPTL 1802(1)(d) in finding that the commercial overlay rendered petitioner's vacant land not zoned residential, not from any misdescription of the property itself" (*id.*). Insofar as the DOF did not misdescribe the subject property as something other than vacant land, the provision in 19 RCNY § 53-02 allowing for corrections of an "[i]naccurate building class that affected assessed value" is not applicable (*see id.*). Therefore, the Determination denying Petitioner's request for a correction of the subject property's building and tax classifications pursuant to NYC Administrative Code § 11-206 was neither arbitrary nor capricious. In seeking relief, Petitioner must proceed under Article 7 of the Real Property Tax Law (*see Matter of Downing St LLC v Soliman*, 222 AD3d 584 [1st Dept 2023]).

Accordingly, it is hereby

ORDERED, that the instant Article 78 Petition is denied.

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the Court.

  
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HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**