

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law, and Part 673 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

RULING

- by -

DEC Case No.
CO3-20070201-9

**ROBERT BERGER,
KAREN BERGER,
DAVID COOK and
JODY COOK,**

Respondents.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding against respondents Robert and Karen Berger (Berger respondents), and David and Jody Cook (Cook respondents), by service of a notice of hearing and complaint, both dated April 27, 2007. The complaint alleges that respondents are owners of the Honk Falls Dam (State Dam ID No. 177-0735) and that they failed to operate and maintain the dam in accordance with the provisions of section 15-0507 of the Environmental Conservation Law (ECL).¹

The hearing on this matter was scheduled to commence on September 29, 2010. However, by letter dated August 31, 2010, Department staff advised this office and the Berger and Cook respondents that staff was about to undertake a survey of the boundary lines of parcels proximate to the Honk Falls Dam. Staff requested an adjournment to allow sufficient time for survey documents to be disseminated to, and evaluated by, the parties. By letter dated September 8, 2010, I granted staff's request. A new hearing date will be set after the parties have had an opportunity to evaluate the survey documents.

Currently before me is the Berger respondents' motion in limine, by which they seek to preclude Department staff from proffering Ulster County tax maps at hearing for the purpose of establishing ownership of the Honk Falls Dam. The Berger respondents' motion papers include the affirmation of Carl G. Dworkin, Esq. (Berger affirmation), dated August 5, 2010, and a supporting memorandum of law (Berger memorandum).² Department staff's papers in

¹ This matter has been the subject of substantial motion practice by the parties. Previously issued rulings may be viewed on the DEC website at: <http://www.dec.ny.gov/hearings/2479.html>.

² The Berger respondents supplemented their filings by email dated August 10, 2010, by which they transmitted a case that they had referenced in their original filings and provided an additional citation.

opposition to the motion include the affirmation of Robyn M. Adair, Esq. (staff affirmation), dated August 23, 2010, and various attachments, including staff's memorandum of law (staff memorandum), and the affidavit of Alon Dominitz (Dominitz affidavit), dated August 20, 2010. The Cook respondents did not file papers in relation to the instant motion.

The Berger respondents requested, and were granted, authorization to file further responsive pleadings (see 6 NYCRR 622.6[c][3]). Accordingly, the Berger respondents filed a reply affirmation (Berger reply affirmation), dated September 3, 2010. Department staff filed a sur-reply affirmation (staff sur-reply affirmation), dated September 13, 2010.

SUMMARY OF THE PARTIES' POSITIONS

By their motion, the Berger respondents request a ruling that "[b]ars from the hearing any and all testimony, documents and argument arising from, addressing or otherwise concerning the tax map with respect to the ownership issue as giving rise to responsibility for Honk Falls Dam" (Berger affirmation at 2-3). The Berger respondents argue that "Staff has claimed that [the Berger respondents] are within the ECL § 15-0507(1) universe [of owners of the Honk Falls Dam] by virtue of the tax map" (id. ¶ 3). They further argue that because "the tax map is not material to the threshold issue of ownership . . . the Administrative Law Judge, as the trier of fact, should never see it or hear about it on the record" (Berger memorandum at 4).

Department staff argues that, by ruling dated September 19, 2007, this office already determined that staff may use the Ulster County tax maps to establish ownership of the Honk Falls Dam and, therefore, the Berger respondents are precluded from relitigating the issue by the doctrine of law of the case (staff memorandum at 1). Alternatively, staff argues the tax maps meet the standards for admissibility in this proceeding and should not be excluded (id. at 2-5).

DISCUSSION

Law of the Case

Department staff's argument that the doctrine of law of the case precludes the Berger respondents from seeking to exclude the tax maps must be rejected. Staff misquotes my ruling (2007 ruling) of September 19, 2007, upon which its law of the case argument is premised. Staff sets forth the following quote, purportedly from the 2007 ruling, "On the record before me, I am satisfied that the tax maps filed by staff are of sufficient probative force to warrant consideration in the determination of line [sic] for parcel 83.6-1-11 as extending past the shoreline and into Roundout Creek, generally following the contours of the shoreline. As such, parcel 83.6-1-11 would include a portion of the dam" (staff memorandum at 1). The language quoted by staff appears to demonstrate that, pursuant to the 2007 ruling, the tax maps were determined to be probative with regard to establishing the location of the subject parcel's boundary line. That, however, is not the holding of the 2007 ruling.

Department staff misquotes the 2007 ruling by combining language from part of footnote 4 on the bottom of page 7 of the ruling with the beginning of the main text on the top of page 8. The sentence from footnote 4 that staff quotes in fact reads, "On the record before me, I am satisfied that the tax maps filed by staff are of sufficient probative force to warrant consideration in the determination of the instant motion [i.e., Berger respondents' motion for summary judgment]." The 2007 ruling concludes that "[o]n the basis of the affidavits and documents submitted by the parties, the Berger respondents have failed to establish that no material facts are in dispute" (2007 ruling at 9).

In addition to misquoting the 2007 ruling, Department staff's law of the case argument must fail because, as to use of the tax maps, the 2007 ruling merely held that the tax maps were to be considered in the determination of the Berger respondents' motion for summary judgment. In contrast, the instant motion seeks to preclude the use of the tax maps at hearing in relation to the issue of ownership of the dam. The doctrine of law of the case is given narrow application and it does not necessary follow from the 2007 ruling that the tax maps must now be accepted into evidence for the purpose of establishing ownership of the Honk Falls Dam (see Itamari v Giordan Dev. Corp., 298 AD2d 559, 559-560 [2d Dept 2002] [holding that "[a] prior order of the same court . . . did not address the precise question [then before the court] . . . and therefore did not constitute the law of the case" (citations omitted)]).

Admissibility of Tax Maps

By their motion, the Berger respondents seek to preclude staff from introducing the tax maps into evidence "with respect to the ownership issue as giving rise to responsibility for the Honk Falls Dam" (Berger affirmation at 3). As the proponents of the instant motion, the Berger respondents bear the burden of proof (see 6 NYCRR 622.11[b][3]).

The rules of evidence observed by civil courts are not strictly applied in administrative hearings before the Department (see e.g. Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 2 [holding that hearsay evidence is admissible in matters before the Department and may form the basis of the Department's determination provided that it is "sufficiently reliable, relevant and probative"]; see also State Administrative Procedure Act ["SAPA"] § 306[1] ["Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law"]; 6 NYCRR 622.11[a][11] ["All written statements, charts, tabulations and similar data offered in evidence at the hearing must, upon a showing satisfactory to the ALJ of their authenticity, relevancy and materiality, be received in evidence and constitute a part of the record"]).

The parties dispute whether the tax maps are admissible per se under the provisions of 6 NYCRR 622.11(a)(9). Section 622.11(a)(9) provides that "[a]ll maps, surveys and official records affecting real property, which are on file in the State in the office of the registrar of any county, any county clerk, any court of record or any department of the State or City of New York are prima facie evidence of their contents." Neither party has proffered evidence on this motion that would warrant a determination on the applicability of 6 NYCRR 622.11(a)(9) relative to the tax maps.

The Berger respondents' counsel argues that the maps fall outside the provisions of section 622.11(a)(9) because they "are **NOT** filed in the Ulster County Clerk's Office or in any other location listed [in the regulation]" (Berger reply affirmation ¶ 40 [emphasis in original]). He further argues that "[t]ax maps are filed in the Office of the County Director of Real Property Tax Services" (*id.* ¶ 41). Notably, the Berger respondents' counsel does not represent himself as a fact witness on this point, but rather cites Real Property Tax Law (RPTL) § 503 in support of his argument. However, RPTL 503 does not preclude the filing of tax maps in the County Clerk's office. In fact, RPTL 503(2) expressly provides that "the county director may file an additional copy of the tax map in the office of the county clerk." Moreover, where the tax maps are prepared by a city, town or village, RPTL 503(3) requires the assessor to file a copy of the tax map with the county clerk.

Department staff counsel argues that the "proper [receptacle] for filing and maintaining tax maps lies with the respective County Clerk's Office. Each County Clerk's Office contains a Real Property Services Department . . . and Staff may continue to rely on 6 NYCRR 622.11(a)(9)" (staff sur-reply affirmation ¶ 17). Staff counsel, like the Berger respondents' counsel, does not represent herself as a fact witness on this point and her argument is not evidence. Accordingly, by their submissions on this motion, neither staff nor the Berger respondents have established whether the tax maps are admissible under 6 NYCRR 622.11(a)(9).³

The Berger respondents' principal argument in favor of exclusion is "premised on the immateriality of the tax map to the issue of ownership of the Honk Falls Dam" (Berger memorandum at 4). The Berger respondents argue that "the boundaries shown on tax maps are not intended or expected to be precise" (*id.* at 7) and that a "tax map cannot be used to assert, claim, create or establish title" (*id.* at 11). These arguments are largely correct. Nevertheless, tax maps are routinely admitted into evidence, both in civil actions and in matters before the Department. In fact, in each of the cases cited by the Berger respondents on this point in their memorandum of law, tax maps were considered by the courts.

The first case cited by the Berger respondents, Levine v Jonkheer Realty Corp., involved a property line dispute, wherein the "plaintiff insist[ed] upon the right to proceed strictly in accord with the dimensions shown upon the assessment map" (17 NYS2d 926, 927 [Sup Ct, Westchester County 1940]). Although the court rejected plaintiff's argument that the boundary depicted on the tax map must be strictly adhered to, the court also noted that "[t]here is a definite relationship contemplated between the subdivision of premises for tax purposes on the one hand and the ownership and physical possession on the other" (*id.* at 927). Moreover, the court makes clear that it considered the tax map in reaching its determination on the location of the boundary (*see id.* at 928 ["The assessment map in this instance does not purport to be a survey. No buildings or lines of physical possession are delineated thereon"]).

The Berger respondents next cite Conklin v Jablonski (67 Misc 2d 286 [Sup Ct, Nassau County 1971]). That case addressed "the question of the effect of an error of the tax assessors in

³ At hearing, the proponent of an exhibit must make the necessary showing for the proffered exhibit to be received into evidence under 6 NYCRR 622.11(a)(9).

locating, on the land and tax map, the dividing line between properties" (*id.* at 287 [citations omitted]). Although the court noted that tax maps are only "a shorthand method of describing the property assessed," it also noted that "courts will take judicial notice of [such maps]" (*id.* at 291). Again, it is clear that the court considered the tax map in making its determinations (*see id.* at 289 ["Had the tax map lines been drawn consistently with the metes and bounds descriptions of the two properties, the dividing line between them would be located some 117 feet north of the line shown on the map"]).

The Berger respondents also cite Hannah v Baylon Holding Corp. (28 NY2d 89 [1971]). This case involved another property line dispute. The Appellate Division, Second Department, held for the defendant on the basis of the boundary line depicted on "a certain subdivision map . . . filed in the office of the County Clerk of Suffolk County on February 16, 1934" (Hannah v Baylon Holding Corp., 34 AD2d 792 [1970]). Clearly, not only did the Appellate Division consider the filed map, it concluded it was determinative. On appeal, the Court of Appeals reversed. The Court considered the boundary lines depicted on the filed map, but stated that "the lots and streets shown on the map in the disputed area were on paper only and nothing on the ground there indicates their location" (28 NY2d at 93). In contrast, the Court held, plaintiff's proof of the physical location of the boundary was "sufficiently reliable to sustain, as consistent with the weight of evidence, its location at [the point advanced by plaintiff]" (28 NY2d at 91).

The last case cited by the Berger respondents, Kiamesha Dev. Corp. v Guild Properties, Inc. (4 NY2d 378 [1958]), does not concern inaccuracies in a tax map, but rather addresses inaccuracies in the subject property's description on the tax assessment roll (*see id.* at 386-387).

The Berger respondents have failed to cite a civil case or a matter before the Department in which tax maps were excluded on the basis of immateriality, and I have found none. While the cases cited by the Berger respondents highlight some of the limitations inherent to the use of tax maps, they do not stand for the proposition that such maps should be excluded as immaterial.

Other cases are in accord. In Boons v Martocci (268 AD2d 616, 620 [3d Dept 2000], *lv denied* 94 NY2d 765 [2000]), the Appellate Division noted that Supreme Court had excluded a tax map proffered by the defendants. However, the tax map was not excluded because it was deemed immaterial. Rather, Supreme Court excluded the tax map because it was not certified or otherwise authenticated. Notably, the Appellate Division concluded that even if the tax map had been "properly authenticated and received in evidence, the evidence relied upon by defendants would have constituted nothing more than some evidence of the location of the property conveyed" (*id.* at 620). Accordingly, the Appellate Division did not deem the tax map immaterial, but considered the maps to be of limited probative value. In Matter of Kings Estate Ltd. Partnership v Town of Chester (162 AD2d 802, 803 [3d Dept 1990]), the court held that "to determine whether the boundary line shown on the tax map accurately reflected what was intended . . . the court [below] weighed the relevant evidence and clearly engaged in a purely judicial function." Although the tax map was in evidence, the court noted that the respondent failed to "provide any testimony as to the manner in which the tax map was prepared or concerning the data relied on in locating the boundary line as shown on the tax map" (*id.* at 804). The Appellate Division affirmed the lower court's determination that the evidence proffered by

the petitioner was sufficient to establish that the location of the boundary depicted on the tax map was in error (*id.*; see also Leary v New York, 273 NY 342, 345-346 [1937] [noting that "[a]t the trial the plaintiffs rested upon the 'Boundary Law' and did not introduce any evidence. The city introduced the city tax map, which shows the strip of land in question to be within . . . the city" and holding that "[t]he introduction of the city map in evidence created a presumption in favor of the city's contention that prior to the enactment of the 'Boundary Law' the strip of land was within the city"]; McGuire v Mazzella, 63 AD3d 421, 422 [1st Dept 2009] [holding that "[t]here is no ambiguity concerning the boundaries set forth in the tax maps, particularly as those maps comport with the descriptions contained in the pertinent deeds"]; Matter of Ramundo v Pleasant Val. Zoning Bd. of Appeals, 41 AD3d 855, 858 [2d Dept 2007] [holding that "[t]he tax map for the area, included in the record, constitutes admissible evidence that neighboring lots are in excess of 1.5 acres and have adequate street frontage"]; McLean v Ryan, 157 AD2d 928, 930-931 [3d Dept 1990] [holding that "the remaining errors assigned to Supreme Court by plaintiffs have been examined and have been found to be without merit . . . [including that] the court committed reversible error by admitting a certain tax map into evidence for the limited purpose of showing the relative locations of the property belonging to plaintiffs and defendant"]; Frampton v Indelicato, 144 AD2d 880, 881 [3d Dept 1988] [holding that "[o]ther documentary evidence supports [Supreme Court's] conclusion. Defendant introduced a 1932 tax map into evidence which indicated that the . . . predecessors in title to defendant, owned parcels on both the northern and southern side of Chodikee Lake Road"]; Dumala v State, 72 Misc 2d 687, 693 [Ct Cl 1973] [holding that "[t]here was conflicting evidence as to whether subject [was] within a village . . . Claimant introduced a tax map showing subject . . . within the Village of East Syracuse, while the State introduced a zoning map showing the front of subject . . . outside of the Village . . . I deem the tax map to be more accurate and to take precedence over the zoning map and find subject . . . to be within the Village")].

The Berger respondents have failed to meet their burden to demonstrate that the tax maps must be excluded at this stage of the proceedings. In the event that Department staff proffers the tax maps at hearing, the burden remains with staff to lay a proper foundation for their admittance.

CONCLUSION

For the reasons set forth herein, the Berger respondents' motion in limine is denied.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: October 6, 2010
Albany, New York