

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Articles 15 and 25 of the Environmental
Conservation Law (“ECL”) of the State of New York and Parts
608 and 661 of Title 6 of the Official Compilation of Codes, Rules
and Regulations of the State of New York (“6 NYCRR”),

- by -

PETER W. PLAGIANAKOS and MADELINE FELICE,

Respondents.

DEC Case No. R2-20120613-353

INTERIM DECISION AND ORDER OF THE COMMISSIONER

October 3, 2017

INTERIM DECISION AND ORDER OF THE COMMISSIONER

In this administrative enforcement proceeding, respondents Peter W. Plagianakos and Madeline Felice (respondents) appeal, by permission of the Commissioner, from an April 3, 2017 ruling of Administrative Law Judge (ALJ) D. Scott Bassinson, in which the ALJ, among other things, denied respondents' motion to dismiss six causes of action charging respondents with violations of the Tidal Wetlands Act (Environmental Conservation Law [ECL] article 25) and its implementing regulations. The issue is whether the Department of Environmental Conservation (Department) complied with the requirements of ECL 25-0201(4), which requires that the Department's wetland inventory maps be filed in the office of the clerk of the county in which the subject wetland is located, when it filed the maps in the Kings County office of the City of New York, Office of the City Register. For the reasons that follow, I conclude that the Department complied with the requirements of ECL 25-0201(4). Accordingly, the ALJ's ruling is affirmed.

Facts and Procedural Background

Department staff commenced this administrative enforcement proceeding by service of an April 14, 2015 notice of hearing and complaint. In the complaint, Department staff alleges that respondents own or occupy residential waterfront property adjacent to East Mill Basin in Brooklyn, New York (site) that is mapped as part of the official tidal wetlands inventory, panel number 592-494 and, thus, is regulated as a tidal wetland (see Complaint ¶¶ 4-18). Staff further alleges that in June 2012, staff observed that respondents had "undertaken, caused, or allowed" several regulated activities at the site without obtaining permits from the Department, in violation of ECL 15-0503(1)(b), ECL 25-0401(1), and 6 NYCRR 608.4 and 661.8 (Complaint ¶¶ 26-27, 38-89). Consequently, staff seeks an order of the Commissioner holding that respondents violated the statutes and regulations charged, imposing on respondents jointly and severally a civil penalty of no less than \$200,000, and directing respondents to perform certain remedial activities.

Respondent filed a May 29, 2015 answer and a June 12, 2015 first amended answer. The matter was referred to the Department Office of Hearings and Mediation Services and assigned to ALJ Bassinson. The ALJ proceeded to conduct four days of adjudicatory hearings in the matter.

During the first day of hearings, Department staff's witness George Stadnik identified respondents' site on a copy of the official tidal wetlands inventory map for Kings County, panel number 592-494 (see Testimony of George Stadnik [Stadnik test], Dec. 20, 2016, Tr at 61-62; DEC Exh 10). During cross examination, Mr. Stadnik testified that the tidal wetlands map panel number 592-494 is filed in the Kings County Clerk's office (see Stadnik test, Dec. 21, 2016, Tr at 262-263).

Prior to the third day of hearings, on March 2, 2017, respondents moved, among other things, for dismissal of the second, third, fourth, sixth, seventh, and ninth causes of action pleaded in the complaint charging violations of the Tidal Wetlands Act (ECL 25-0401[1]) and its implementing regulation (6 NYCRR 661.8). Respondents argued that the Department lacked jurisdiction over the alleged wetland violations because the tidal wetlands inventory maps for Kings County, which includes respondents' site, were not filed in the office of the Kings County Clerk as required by ECL 25-0201 and 6 NYCRR 661.4(o) and (hh). In support of the motion, respondents offered a letter from respondents' counsel to the Kings County Clerk requesting to inspect the tidal wetlands inventory map for Kings County on file in the clerk's office or, in the event the map was not filed in that office, a certification to that effect (see Letter from Robert M. Lustberg, Esq., to Nancy T. Sunshine, Kings County Clerk, dated Feb. 23, 2017, Affirmation of Robert M. Lustberg, March 2, 2017 [Lustberg Affirm], Exh A). Respondents also offered a certification from the Kings County Clerk stating that she carefully examined the records of the office "for an [sic] search to tidal wetlands and fail to find the same on file therein" (Certification [2-28-17], Lustberg Affirm, Exh B).

Respondents asserted that the Tidal Wetlands Act requires the Department to file the final tidal wetlands inventory map with the relevant county clerk, and that the filing of the map is a prerequisite for enforcing the Act. Respondents argued that because the Department failed to file the inventory maps for Kings County with the Kings County Clerk, the Department lacked jurisdiction over the tidal wetlands in Kings County as a matter of law, and is precluded from enforcing the Act against respondents. Accordingly, respondents sought dismissal of the six causes of action charging violations of ECL article 25 and its implementing regulations.

Department staff submitted its written response to the motion to dismiss at the beginning of the third day of hearings on March 8, 2017. Staff's response included a memorandum of law in reply to respondents' motion, and an affidavit with exhibits of Sam Yee Chan, Habitat Manager in the Department's Region 2 office and custodian of records maintained by the Region's Fish and Wildlife Division (Chan Affid). Attached to the Chan affidavit is a September 21, 1977 letter from Thomas F. Breden, Engineering Technician, to Kathleen Morrison, Office of Counsel, New York State Department of Environmental Conservation, stating that on September 16, 1977, Mr. Breden filed two volumes of tidal wetlands maps and a copy of a Commissioner's order with the Kings County office of the City Register (see Chan Affid, Exh 1). Also attached to the Chan Affidavit is a September 16, 1977 receipt of the City of New York, Office of the City Register, Kings County office, stating that two volumes of tidal wetland maps were received from the Department on that date (see id., Exh 2).

In opposition to respondents' motion, Department staff noted that within the City of New York, the tidal wetlands inventory maps for the counties of New York, Bronx, Queens, and Kings were not filed with the county clerks, but with the City Register. Department staff argued that the filing of the inventory maps with the City Register was authorized by New York Constitution, article XIII, § 13, General Construction Law § 42, and Real Property Law § 372 which, in sum, provide that the filing of an instrument with the county register in those counties that have them is deemed to be in compliance with laws requiring the filing of the instrument

with the county clerk.

At the close of testimony and argument on the fourth day of hearings, counsel for respondents moved to strike the testimony of two witnesses and several hearing exhibits relating to the tidal wetlands violations charged in the complaint (see March 9, 2017, Tr at 621-622). Subsequently, by leave of the ALJ, respondents filed a March 13, 2017 cover letter and reply memorandum in further support of their motion to dismiss.

In an April 3, 2017, ruling, the ALJ denied the motion to dismiss the six causes of action, denied the motion to strike witness testimony and exhibits, and denied respondents' request for costs and fees (see Matter of Plagianakos, ALJ Ruling on Respondents' Motion To Dismiss and To Strike, April 3, 2017 [ALJ Ruling], at 9). The ALJ concluded that the filing of the tidal wetlands inventory maps in the county offices of the City Register was authorized by the New York Constitution, General Construction Law, and Real Property Law, and complied with the filing requirements of ECL 25-0201(4). In support of this conclusion, the ALJ cited both judicial and administrative precedent (citing Mills v New York State Dept. of Envtl. Conservation, Sup Ct, Queens County, May 26, 1992, Rutledge, J., Index No. 919/92, at 1-2; id., July 10, 1992; Matter of Mills, Order of the Commissioner, Nov. 5, 1992, at 1; Matter of Breezy Point Cooperative, Order of the Commissioner, May 13, 1993, at 1). Having concluded that the wetlands maps were properly filed, the ALJ denied the motion to dismiss the six causes of action charging tidal wetlands violations and the motion to strike witness testimony and exhibited related to those violations. The ALJ denied the request for costs and fees on the ground that they were not authorized.

By letter dated April 6, 2017, respondents moved for leave to file an expedited appeal from the April 3, 2017 ALJ ruling, which motion was granted by the Commissioner (see Letter from Louis A. Alexander, Assistant Commissioner, to Robert M. Lustberg, Esq., June 3, 2017). Respondents thereafter filed a June 16, 2017 memorandum of law in support of the appeal. Department staff filed a July 6, 2017 reply to respondents' expedited appeal.

On July 10, 2017, respondents requested leave to reply to staff's opposing memorandum. The Commissioner granted respondents' request and accepted the July 10, 2017 reply as filed (see Letter from Louis A. Alexander, Assistant Commissioner, to Robert M. Lustberg, Esq., July 12, 2017). The Commissioner also authorized Department staff to file a sur-reply, which staff filed dated July 20, 2017.

Discussion

Under New York Real Property Law, instruments affecting real property are recorded in either the office of the county clerk or, in the counties that have a register, in the office of the county register (see generally Real Property Law [RPL] art 9). The official charged with the responsibility of maintaining records affecting real property is "the county clerk

of the county, except in a county having a register, where it [is] the register of the county” (RPL § 290[4]; see also RPL § 372 [“County clerks in the several counties of the state, except the counties that may have registers, and in the latter counties the registers of said counties shall be ‘registrars’ of titles in their respective counties”]). The records affecting real property to be recorded with the county clerk or the county register include any written instrument by which an estate or interest in real property is created, transferred, mortgaged, or assigned, among others (see RPL § 290[3]).

The General Construction Law, which applies to all statutes, subject to certain exceptions not applicable here (see General Construction Law § 110), provides that the terms “county clerk” and “county register” are interchangeable. General Construction Law § 42 states:

“Any act done in pursuance of law by the register of a county shall be deemed to be a compliance with any provision of law authorizing or requiring such act to be done by the county clerk of such county, and any instrument or writing filed, entered or recorded in pursuance of law in the office of a register of a county, shall be deemed to be a compliance with any provision of law authorizing or requiring such paper to be filed, entered or recorded, as the case may be, in the office of the clerk of such county. The term county clerk when used in relation to conveyances of real property or the filing or recording of instruments which are or may be filed in the office of the register of a county, shall include the register of each county in which there is a register”

(see also II Report of Board of Statutory Construction at 2152 [1907] [for certain purposes, this provision makes “register of the county” synonymous with “county clerk”]). Thus, pursuant to section 42, statutes that require the filing of records with the county clerk may be satisfied by filing the records with the county register in those counties that have registers.

In New York City, the role of the county registers is performed by the Office of the City Register. As a result of reforms to the State’s municipal home rule law in the early part of the Twentieth Century, the New York Constitution authorizes the City of New York to abolish certain county officers, including the county register, and assign any or all of their functions to city officers (see e.g. 1938 NY Const, art IX, § 8; see also NY Const, art 13, § 13[c], as amended [current version]). Pursuant to this authority, the New York City Charter was amended to establish the office of the City Register, and the functions, powers, and duties formerly exercised by the registers of the counties of New York, Bronx, Kings, and Queens were transferred to the City Register (see NY City Charter former §§ 1051, 1052, adopted Nov. 7, 1961, eff Jan. 1, 1963; see also NY City Charter current § 1525; Burke v Kern, 287 NY 203 [1941] [upholding 1941 amendments to the City Charter creating the City Register]). Thus, in New York City, the City Register is responsible for the general recording of instruments affecting real property except in Richmond County, where the Richmond County Clerk holds that responsibility (see Ashland Equities Co. v Clerk of New York County, 110 AD2d 60, 63 and n 1, 65 [1st Dept 1985]; see also Administrative Code of City of NY § 7-624 [“Any law, rule, regulation, contract, or other document which refers or is applicable to the register, register of deeds or registrar of

any of the counties within the city shall refer to the city register.”)).

It was against this legal framework that the Legislature adopted the Tidal Wetlands Act in 1973 (added L 1973, ch 790, as amended). Pursuant to the Act, the Commissioner was required to map and inventory all of the State’s tidal wetlands (see ECL 25-0201[1], [2]). After holding public hearings, the Commissioner was directed to establish the final boundaries of the wetlands by order (see ECL 25-0201[4]). Upon finalization of the maps, the Act directs that “[a] copy of the order, together with a copy of the map depicting such final boundary lines, shall be filed in the office of the clerk of the county in which each such wetland is located” (*id.*). The Act further provides that “[a]fter completion of the inventory prescribed in [ECL 25-0201] with respect to any tidal wetland, no person may conduct any of the activities set forth in [ECL 25-0401(2)] unless he has obtained a permit from the commissioner to do so” (ECL 25-0401[1]).

Respondents argue that by failing to file the subject tidal wetlands maps with the Kings County Clerk, the Department failed to satisfy the requirement in ECL 25-0201(4) directing the Department to file the maps in the office of the clerk of the county in which the subject wetlands are located. Respondents assert that because the maps were not properly filed with the county clerk, the wetland designations in Kings County are inoperative, and the Department lacks the power to enforce those designations.

Respondents arguments are unpersuasive. As an initial matter, respondents cite no authority holding that the failure to satisfy one of the filing and notice requirements of ECL 25-0201(4) invalidates an otherwise duly finalized tidal wetland inventory and map. In any event, no such failure occurred with respect to the tidal wetlands maps for Kings County. The record on this motion establishes that the subject tidal wetlands inventory maps and the Commissioner’s order adopting those maps were filed in the Kings County office of the City Register (see Chan Affid and Exhs). By operation of the plain and express terms of the General Construction Law, the Department’s filing of tidal wetlands inventory maps in the Kings County office of the City Register, which exercises the functions, powers and duties formerly exercised by the Kings County register, is deemed to be in compliance with any provision of law requiring that the inventory maps be filed in the office of the Kings County Clerk (see General Construction Law § 42). Accordingly, the Department satisfied the filing requirements of ECL 25-0201(4) (see also Matter of Mills, Order of the Commissioner, Nov. 5, 1992, at 1, citing Mills v New York State Dept. of Env’tl. Conservation, Sup Ct, Queens County, May 26, 1992, Rutledge, J., Index No. 9197/92; *id.*, July 10, 1992 [concluding that inventory maps for Queens County were properly filed in the Queens County office of the City Register]; Matter of Breezy Point Coop., Order of the Commissioner, May 13, 1993, at 1 [same]).

Respondents makes several additional arguments, none of which warrant diverting from the plain application of General Construction Law § 42. First, respondents argue that the Department is bound by staff’s mistaken testimony that the subject inventory maps were on file in the Kings County Clerk’s office and that in order to be “official,” a tidal wetland map has to be filed with the county clerk. Respondent also relies on staff counsel’s “concession” that

the maps were not filed with the county clerk. A party is entitled, however, to correct the mistaken testimony of a witness and prove a material fact with another witness, even if the incidental effect is to contradict the prior witness (see People v Reed, 40 NY2d 204, 207-208 [1976]; People v Figueroa, 153 AD2d 576, 584 [2d Dept 1989]; see also Jerome Prince, Richardson on Evidence § 6-419 [Farrell 11th ed 1995]). Here, Department staff corrected the mistaken testimony of Mr. Stadnik with the affidavit of Mr. Chan and attached exhibits, and corrected the legal conclusions to be drawn therefrom. Moreover, given the operation of General Construction Law § 42, staff counsel's concession that the inventory maps were not filed with Kings County Clerk is of no moment. The Department complied with ECL 25-0201(4) by filing the inventory maps with the Kings County office of the City Register.

Second, respondents contend that the State Constitution, General Construction Law, and Real Property Law are inapposite in this proceeding. Respondents contend that the Legislature would have been aware of the existence of the City Register when it adopted the Tidal Wetlands Act, but nevertheless expressly required the filing of tidal wetlands inventory maps in the county clerk's offices. Respondents assert that if the Legislature had intended that the inventory maps for the New York City counties be filed with the City Register rather than the county clerks, it could have so provided.

Again, respondents' argument is unpersuasive. Under settled principles of statutory construction, the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject when passing later acts (see McKinney's Cons Laws of NY, Book 1, Statutes § 222). Thus, earlier enactments are properly considered in determining the intent of the Legislature in passing later acts (see id.). When enacting ECL 25-0201(4)'s requirement for filing inventory maps in the office of the clerk of the county in which each wetland is located, it is presumed that the Legislature was aware of the statutes governing county clerks and county registers in those counties with county registers, the enactments establishing the City Register, and the General Construction Law, which makes the terms "county clerk" and "county register" synonymous for the purpose of the filing of documents affecting real property. Given the existing statutory framework governing county clerks and registers at the time of the adoption of the Tidal Wetlands Act, it may be presumed that the Legislature intended the wetland inventory maps to be filed in the offices of the county register in those counties with registers, or in the offices of the City Register, which serves as the county register for four of the five counties in the City.

Moreover, interpreting ECL 25-0201(4)'s filing requirement as including filing with the City Register office is consistent with the legislative purpose of subdivision 4. The manifest purpose of subdivision 4 is to provide notice to the owners and potential purchasers of real property that a parcel is designated a tidal wetland under ECL article 25. As conceded by respondents, the office of the City Register is where deeds and other instruments such as mortgages or easements that affect or restrict title are recorded. Because a tidal wetland designation imposes permit requirements on certain activities that may be undertaken on a parcel of real property, filing the inventory maps in the offices where owners and potential purchasers of real property would search for such restrictions is consistent with the purpose of ECL 25-

0201(4). In contrast, the county clerks within the City of New York function primarily as the clerk of the Supreme Court for their respective counties; they no longer perform any of the functions of a county register with respect to the filing of instruments affecting real property (see Ashland Equities Co., 110 AD2d at 63). Accordingly, because an affected property owner would be less likely to search the county clerk's records for restrictions on real property in those counties that have a register, filing the inventory maps in the county clerk's office would not provide the notice the Legislature intended by enacting ECL 25-0201(4).

Respondents note that the county clerks record judicial and administrative orders and argue that the Commissioner's order accompanying the wetlands inventory maps should be filed in the clerk's office. The Commissioner's order accompanying the wetlands inventory maps was not an order issued after an adjudicatory proceeding. Instead, the order is in the nature of a quasi-legislative rulemaking order. Thus, the order was appropriately filed in the office in which the inventory maps were filed. Again, by operation of General Construction Law § 42, it may be presumed that the Legislature intended the adopting order to be filed in the office of the county register in those counties that have registers and, therefore, in the offices of the City Register, which serves the function of the county register in Kings County.

Third, respondents argue that by adopting 6 NYCRR 661.4(o), the Department by regulation has limited the official wetlands maps to only those filed in the county clerk's offices. However, General Construction Law § 42 applies to all "laws," not just statutes. Nothing in 6 NYCRR part 661 or its regulatory history evinces an intent by the Department to alter the legislatively-enacted statutory scheme and limit by regulation where the tidal wetlands inventory maps and adopting order were to be filed.

Finally, respondents argue that the tidal wetlands map proffered by staff at the hearing lacks an evidentiary foundation because it is not a copy of a map on file in the Kings County Clerk's office. However, the ALJ correctly held that the Tidal Wetlands Act requires only that a copy of the map and adopting order be filed with the appropriate recording office, in this case, the Kings County office of the City Register (see ALJ Ruling at 8). Nothing in the Act requires that the official maps and adopting order be filed with the county clerk or register's office. Rather, the official maps and adopting order remain on file with the Department, and Department staff produced both the original and a copy of the official map at the hearing (see Dec. 20, 2016 Tr at 58-62). Accordingly, staff provided the proper foundation for the copy of the relevant tidal wetland map received into the record in this matter (see id.; DC Exh 10).

In sum, the plain application of General Construction Law § 42 provides that filing a record with a county register is deemed to be in compliance with any law requiring the record to be filed with a county clerk. In the City of New York, the City Register serves the functions of the county register for Kings County. By filing the subject tidal wetlands inventory maps and the Commissioner's adopting order in the Kings County office of the City Register, the Department satisfied the filing requirements of ECL 25-0201(4). Accordingly, the ALJ Ruling denying respondents' motion to dismiss the six causes of action charging violations of the Tidal Wetlands Act and regulations and for other relief should be affirmed.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that the April 3, 2017 ruling of the Administrative Law Judge is affirmed, and the matter remanded for further proceedings consistent with this order.

For the New York State Department of
Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: October 3, 2017
Albany, New York

TO: (Via Email and Regular Mail)

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