

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: CONSOLIDATED CASES
William Davis
Propagating License #14

AAD NO. 07-014/F&WA

William Davis
Propagating License #100

AAD NO. 07-015/F&WA

DECISION AND ORDER

This matter came before the Administrative Adjudication Division ("AAD") on requests for an adjudicatory hearing filed by William Davis, ("Applicant") following the denial by the Department of Environmental Management ("DEM" or "Department"), Division of Fish and Wildlife ("F&WA" or "Division") of the Applicant's applications to import and keep cervids (specifically white tail deer and fallow deer) in captivity on his property. The Applicant was represented by Michael Kiernan, Esq. and Gary Powers, Esq. represented the Division of Fish and Wildlife.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 *et seq.*); the Administrative Procedures Act (R.I. GEN. LAWS § 42-35-1 *et seq.*); the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD Rules"); the Rules and Regulations Governing the Importation, Feeding and Baiting of Cervids in Rhode Island and the Rules and Regulations Governing Importation and Possession of Native Wildlife.

A prehearing conference was held on July 17, 2006 at which time counsel identified what they considered to be the issues for hearing. They are as follows:

For Applicant:

1. Not granting the renewal of licenses which Mr. Davis has held for 20 years is a deprivation of a property interest that is protected by the 14th Amendment and a violation of substantive due process.

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2. Not granting the renewal of these licenses to Mr. Davis is a violation of his equal protection rights under the US Constitution, because those who are using the cervids for scientific purposes are still able to obtain the licenses.
3. The decision not to renew Mr. Davis's license is arbitrary and capricious and based on speculation and fear, instead of legally competent evidence as required by law. (*See IDC Clambakes, Inc. v. Gordon*, 1997 WL 1051031)
4. The fact that if Mr. Davis is not granted a license to keep the cervids he now has in captivity, he will be in violation of 2.1 of the Rules and Regulations Governing the Importation, Feeding and Baiting of Cervids in Rhode Island, which provides that, "No person shall release to the wild in the State of Rhode Island any captive or wild cervid."
5. If Mr. Davis cannot release his cervids pursuant to 2.1 of the Rules and Regulations Governing the Importation, Feeding and Baiting of Cervids in Rhode Island, he will be forced to kill them, depriving him of property which is a violation of due process under the 14th Amendment.

For the Division of Fish and Wildlife:

1. Whether the denial of Applicant's Application for Renewal of Propagating License #14 and Application for Renewal of Propagating License #100 was appropriate in that the applications were incomplete.
2. Whether the denial of Applicant's Application For Renewal of Propagating License #14 and Application For Renewal of Propagating License #100 was appropriate consistent with the requirements of the Rules and Regulations Governing Importation and Possession of Native Wildlife that were duly promulgated pursuant to R.I. Gen. Laws § 42-35-1 *et seq.*
3. Whether the denial of Applicant's Application For Renewal of Propagating License #14 and Application For Renewal of Propagating License #100 was appropriate consistent with the requirements of the Rules and Regulations Governing Importation Feeding and Baiting of Cervids in Rhode Island that were duly promulgated pursuant to R.I. Gen. Laws § 42-35-1 *et seq.*

The exhibits, marked as they were admitted at the hearing, are attached to this Decision as Appendix A. In this appeal, the Applicant bears the burden of proof to demonstrate that his applications, as submitted, comply with the Rules and Regulations Governing Importation and Possession of Native Wildlife and the Rules and Regulations Governing Importation Feeding and Baiting of Cervids in Rhode Island.

At the commencement of the administrative hearing on October 1, 2007, counsel agreed to several stipulations of fact. They are as follows:

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1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant submitted to the Department an Application for Renewal of Propagating License #14 on December 12, 2006.
3. The Applicant submitted to the Department an Application for Renewal of Propagating License #100 on December 12, 2006.
4. The Applicant's Application for Propagating License #14 dated December 12, 2006 sought permission to propagate species included two types of cervids, i.e., fallow and white tail deer.
5. The Applicant's Application for Propagating License #100 dated December 12, 2006 sought permission to propagate species included two types of cervids, i.e., fallow and white tail deer.
6. Since 1981, up until the denials of 12/12/06, the Applicant, Mr. Davis, possessed licenses #100 and # 14 to propagate species of two types of cervids, fallow and white tail deer.
7. Since 1981, Mr. Davis has kept fallow and white tail deer on his property in Smithfield, Rhode Island "subject property".
8. The State has promulgated regulations pursuant to the APA and have been duly filed with the Secretary of State in response to concerns regarding Chronic Wasting Disease that has been found beginning in Colorado and elsewhere in the country and as a result of the Chronic Wasting Disease, restrictions have been imposed prohibiting the possession of white tail deer by anyone other than for certain purposes as reflected in Section 2.1 of Part 2 of the Rules and Regulations governing the Importation and Possession of Native Wildlife adopted 6/27/97 and as amended October, 2006 and the Rules and Regulations Governing Importation, Feeding, and Baiting of Cervids in Rhode Island, filed July 15, 2005.
9. Mr. Davis is not keeping deer (cervids) for a bona fide scientific purpose.

After agreeing to the above stipulated facts counsel indicated that there would be no testimony presented and the matter would be submitted to the hearing officer based upon the agreed exhibits, stipulations of fact and briefs. Counsel filed their respective briefs with AAD on October 16, 2007 and the hearing was deemed closed on that date.

Analysis

Sections 2.1 and 2.2 of Part 2 of the Rules and Regulations governing the Importation and

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Possession of Native Wildlife state in pertinent part:

PART 2
REQUIREMENTS FOR IMPORTATION AND POSSESSION OF NATIVE WILDLIFE

2.1 -- A PERMIT to import, receive, or possess in this state native wildlife and hybrids thereof shall be restricted to the Rhode Island Department of Environmental Management, United States Fish and Wildlife Service, Department of Environmental Management (DEM) and American Association of Zoological Parks and Aquariums, (AAZPA) approved zoos and research institutes with approved certification and as determined by the Director that the permit is involved in an approved bona fide experiment or project. Permittee is required to conform with all applicable federal, state and local requirements for licensure certification or permit.

2.2 -- The Director in his/her discretion may issue a permit to import, receive, or possess wild animals in accordance with these regulations. The application shall include but not be limited to the following information for each species for which a permit is requested:

(a) . . .

(b) . . .

(c) the scientific experiment(s) or cultivation programs for which the applicant intends to employ the wild animals; the education and experience of applicant pursuant to the specific animals held under this permit.

. . .
. . .

Part 3 of the Rules and Regulations Rules and Regulations Governing the Importation, Feeding, and Baiting of Cervids in Rhode Island states in pertinent part as follows:

Part 3
Feeding and Baiting of Cervids

3.1 Feeding and baiting Cervids in Rhode Island. No person shall feed cervids at anytime in the state of Rhode Island except:

3.1.1 under a license or permit issued by the Department pursuant to RI Gen. Laws §20-1-18 for bona fide scientific research;

These regulations are unambiguous. Possession of cervids, including fallow and white tail deer is allowed only by permit issued by DEM and only if the purpose involves an approved bona fide experiment or project for bona fide scientific research. Indeed, Section 2.2 of the Rules and Regulations governing the Importation and Possession of Native Wildlife requires that an Applicant state the scientific experiment(s) or cultivation programs for which the applicant intends to employ the cervids. There is no dispute regarding the facts of this case. Mr. Davis seeks renewal of his permits to continue to import and

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keep deer on his property. Mr. Davis concedes that he does not intend to keep the deer for any scientific purpose. On that basis alone, the Division was warranted in denying the Applications.

Applicant does argue, however, that the Regulations governing the feeding and baiting of cervids are more broad than necessary to accomplish their stated purpose and that a more tailored regulation could accomplish the same ends while being less restrictive. The Rules and Regulations Governing the Importation, Feeding and Baiting of Cervids in Rhode Island states as its purpose the prevention of the introduction of Chronic Wasting Disease ("CWD") into the State of Rhode Island by prohibiting persons from importing or possessing cervids or parts thereof into the State of Rhode Island as well as restricting certain feeding and baiting practices. As administrative findings, the Department has determined that these

restrictions are required in order to ensure public health, safety and welfare by preventing the introduction of Chronic Wasting Disease ("CWD") into the State of Rhode by persons importing cervids or parts thereof into the State of Rhode Island or by persons feeding or baiting cervids in this state.

The regulatory choice to allow one to import, receive, possess or feed cervids only for a bona fide scientific purpose as set forth in the Regulations reflects a policy decision made by the Department after notice and public hearing to prevent the introduction of Chronic Wasting Disease into the State of Rhode Island. While Applicant may be correct that other methods may accomplish this same goal, it is not the province of the Adjudication Division to rewrite Regulations to include alternatives which the Department might have included, but chose to omit. In *Simeone v. Charron*, the Rhode Island Supreme Court held that a court is not "entitled to write into the statute certain provisions of policy which the legislature might have provided but has seen fit to omit * * *. * * * If a change in that respect is desirable, it is for the legislature and not for the court." *Simeone v. Charron*, 762 A.2d 442, 448 (R.I. 2000), citing *Elder v. Elder*, 84 R.I. 13, 22, 120 A.2d 815, 820 (1956). In the present matter, changes to these regulatory provisions must follow the notice and adoption requirements of the Administrative Procedures Act.

With regard to the constitutional claims raised by Applicant, the AAD has consistently held that

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constitutional issues are not properly before this tribunal. As highlighted by the U.S. District Court for the District of Rhode Island in *Bowen v. Hackett*, 361 F. Supp. 854,860 (D.R.I. 1973) the "expertise of state administrative agencies does not extend to issues of constitutional law." Accordingly, this tribunal refrains from addressing Applicant's constitutional claims in this Decision and Order. Applicant's constitutional arguments are preserved for the record but will not be addressed further in this decision.

Findings of Fact

After consideration of the documentary and testimonial evidence presented I make the following findings of fact:

1. The Applicant held two licenses from the Department of Environmental Management as follows: Propagating License #14 and Propagating License #100.
2. Applicant filed an application with RIDEM for renewal of the above-referenced licenses or permits on or about December 12, 2006.
3. The Applicant's Application for Propagating License #14 dated December 12, 2006 sought permission to propagate species included two types of cervids, i.e., fallow and white tail deer.
4. The Applicant's Application for Propagating License #100 dated December 12, 2006 sought permission to propagate species included two types of cervids, i.e., fallow and white tail deer.
5. The Applicant received a denial of each renewal by letters dated January 19, 2007.
6. Applicant filed a request for hearing with the Administrative Adjudication Division for each of the two matters consolidated herein.
7. Since 1981, up until the denials of 12/12/06, the Applicant, Mr. Davis, possessed licenses #100 and # 14 to propagate species of two types of cervids, fallow and white tail deer.
8. Since 1981, Mr. Davis has kept fallow and white tail deer on his property in Smithfield, Rhode Island.
9. The State has promulgated regulations pursuant to the APA that have been duly filed with the Secretary of State in response to concerns regarding Chronic Wasting Disease that has been found beginning in Colorado and elsewhere in the country.

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10. As a result of Chronic Wasting Disease, restrictions have been imposed prohibiting the possession of white tail deer by anyone other than for certain purposes as reflected in Section 2.1 of Part 2 of the Rules and Regulations governing the Importation and Possession of Native Wildlife adopted June 27, 1997 and as amended October, 2006 and the Rules and Regulations Governing Importation Feeding and Baiting of Cervids in Rhode Island, filed July 15, 2005.
11. Mr. Davis is not keeping deer (cervids) for a bona fide scientific purpose.

Conclusions of Law

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. Applicant has failed to prove by a preponderance of the evidence that his application for renewal of Propagating License #14, as proposed, complies with the requirements of the Rules and Regulations Governing Importation and Possession of Native Wildlife, Part 2, Sections 2.1 and 2.2.
3. Applicant has failed to prove by a preponderance of the evidence that his application for renewal of Propagating License #14, as proposed, complies with the requirements of the Rules and Regulations Governing Importation, Feeding, and Baiting of Cervids in Rhode Island.
4. Applicant has failed to prove by a preponderance of the evidence that his application for renewal of Propagating License #100, as proposed, complies with the requirements of the Rules and Regulations Governing Importation and Possession of Native Wildlife, Part 2, Sections 2.1 and 2.2.
5. Applicant has failed to prove by a preponderance of the evidence that his application for renewal of Propagating License #100, as proposed, complies with the requirements of the Rules and Regulations Governing Importation, Feeding, and Baiting of Cervids in Rhode Island.
6. AAD lacks jurisdiction to determine issues of constitutional law.

Based on the foregoing, it is hereby

ORDERED

1. Applicant's appeal of the Division's denial of the Application to Renew Propagating License #14 is DENIED.
2. Applicant's appeal of the Division's denial of the Application to Renew Propagating License #100 is DENIED.

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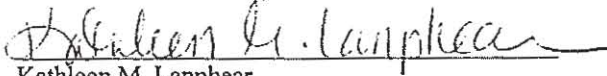
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Entered as a Recommended Decision and Order this 7th day of December, 2007 and

herewith forwarded to the Director for issuance as a Final Agency Order.



Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

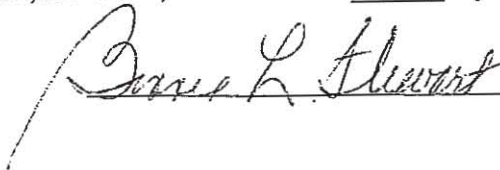
Entered as a Final Agency Order this 13 day of December, 2007



W. Michael Sullivan, PhD.
Director
Rhode Island Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908
(401) 222-2771

CERTIFICATION

I hereby certify that I caused a true copy of the within Final Agency Decision and Order to be forwarded, via regular mail, postage prepaid to: Michael S. Kiernan, Esq., Kiernan, Plunkett and Redihan, 91 Friendship Street, Providence, RI 02903; and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 14th day of December, 2007.



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NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

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APPENDIX A

Applicant's Exhibit 1 (FULL)	Copy of Application for Renewal of License #100 submitted to the Department of Environmental Management
Applicant's Exhibit 2 (FULL)	Copy of Application for Renewal of License #14 submitted to the Department of Environmental Management
Division's Exhibit 1 (FULL)	The letter from the Division dated January 19, 2007 advising the Applicant that his Application for Renewal of Propagating License #14 had been denied. 2 Pages (Copy)
Division's Exhibit 2 (FULL)	The letter from the Division dated January 19, 2007 advising the Applicant that his Application for Renewal of Propagating License #100 had been denied. 2 Pages (Copy).
Division's Exhibit 3 (FULL)	The Applicant's letter requesting a hearing concerning the Division's denial of his Application for Renewal of Propagating License #14. 1 Page (Copy).
Division's Exhibit 4 (FULL)	The Applicant's letter requesting a hearing concerning the Division's denial of his Application for Renewal of Propagating License #100 dated December 12, 2006. 1 Page (Copy)
Division's Exhibit 5 (FULL)	The Applicant's Application for Renewal of Propagating License #14 and Applicant's Application for Renewal of Propagating License #100 dated December 12, 2006. 1 Page (Copy)
Division's Exhibit 6 (FULL)	<i>Curriculum vita</i> of Michael L. Lapisky. 2 Pages (Copy).
Division's Exhibit 7 (FULL)	<i>Curriculum vita</i> of Lori Gibson. 1 Page (Copy).
Division's Exhibit 8 (FULL)	Curriculum vita of Scott N. Marshall, DVM. 1 Page (Copy).