

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

IN RE: H. Winfield Tucker
Notice of Violation No. C91-0308

AAD No. 91-113/FWE

ORDER

This matter is before the hearing officer on the Motion for Partial Summary Judgment filed by the Division of Freshwater Wetlands ("Division") on December 4, 1992. As of the date of this order, no objection has been filed by Respondent.

A brief recitation of the travel of this matter is necessary to a determination of the instant Motion. On November 10, 1992, the Division filed a Request for Admissions with the AAD requiring Respondent to either admit or deny certain facts within ten (10) days of service. The certification on the Request for Admissions indicates that Respondent's Counsel was sent a copy by facsimile and by first class mail, postage prepaid on November 9, 1992. On December 2, 1992, Respondent filed its prehearing memorandum and filed its Response to Request for Admissions. The prehearing conference was held on December 4, 1992. At the prehearing conference, the Division filed with AAD and served upon Respondent's counsel two Motions, a Motion to Strike the Respondent's Response to the Requests for Admissions as untimely and a Motion for Partial Summary Judgment. Respondent's Counsel was advised by this hearing officer that pursuant to the AAD Rules of Practice and Procedure, Respondent had seven (7) days

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in which to file an objection and thereafter the Motions would be ruled upon. No objection to the Motion to Strike was filed and the Motion to Strike was granted and the admissions set forth in the Request for Admissions were deemed admitted. Similarly, no objection to the pending Motion for Partial Summary Judgment was ever filed with AAD. The Division did not request oral argument on its Motion.

The Division seeks partial summary judgment based upon the facts deemed admitted pursuant to the Request for Admissions. Specifically, the Division contends that the facts deemed admitted sufficiently establish that

- 1) H. Winfield Tucker owns property located on Tuckertown Road, Wakefield, Rhode Island.
- 2) During his period of ownership of the property, H. Winfield Tucker constructed or permitted the construction of a gazebo on the property.
- 3) The gazebo is within fifty (50') feet from the edge of White Pond.
- 4) Prior to the time that Respondent constructed or permitted construction of the gazebo, H. Winfield Tucker did not have a permit to alter freshwater wetlands.

As the moving party, the Division must demonstrate by affidavit or other documentary evidence before this administrative tribunal that it is entitled to judgment as a

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matter of law and that there exist no genuine issues of material fact. Palmisciano v. Burrillyville Racing Assn., 603 A.2d 317 (R.I. 1992).

Upon deciding this motion for summary judgment, it is incumbent upon me to conduct an examination of the pleadings, affidavits, admissions and other appropriate evidence in the light most favorable to Respondent. Commercial Union Companies v. Graham, 945 A.2d 243, (R.I. 1985). Thereafter, summary judgment may only be granted if such review determines that no issue of material fact exists and the moving party is entitled to judgment as a matter of law. Blanchard v. Blanchard, 484 A.2d 904 (R.I. 1984).

In the instant matter the Division seeks partial summary judgment as to the material facts numbered 1 - 4 stated previously. The Division's request for an order limiting the issues remaining in dispute is governed by Super. R. Civ. P. Rule 56(d).

Super. R. Civ. P. Rule 56(d) provides as follows:

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and

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directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

It is clear after review of the Rules, pleadings, admissions and other evidence properly of record that, as the Division asserts, an order under Super. R. Civ. P. 56(d) establishing certain facts and leaving others for determination at trial is appropriate. See Russo v. Cedrone, 118 R.I. 549 (1977).

Based on the foregoing discussion and no objection having been filed, it is hereby

ORDERED

1. The Motion for Partial Summary Judgment is GRANTED and the following facts are established:

- A) H. Winfield Tucker owns property located on Tuckertown Road, Wakefield, Rhode Island.
- B) During his period of ownership of the property, H. Winfield Tucker constructed or permitted the construction of a gazebo on the property.
- C) The gazebo is within fifty (50') feet from the edge of White Pond.
- D) Prior to the time that Respondent constructed or permitted construction of the gazebo, H. Winfield Tucker did not have a permit to alter freshwater wetlands.

2. All other issues remain to be determined at hearing.

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Entered as an Administrative Order this 8th day of
January, 1993.

Kathleen M. Lanphear

Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within
Order to be forwarded via regular mail, postage prepaid to Paul
J. Pisano, Esq., 681 Smith Street, Providence, RI 02908 and via
interoffice mail to Patricia C. Solomon, Esq., Office of Legal
Services, 9 Hayes Street, Providence, RI 02908 on this 8th
day of January, 1993.

Dennis R. Stewart