

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Hopkinton Associates, LLC, (Appeal Filed by Peter Marek)
AAD No. 07-015/FWA
Application 05-0536
2008

DECISION AND ORDER DISMISSING APPEAL

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD) for consideration of the *Motion to Dismiss* that was filed by Hopkinton Associates, LLC, the Applicant in this matter, on January 25, 2008. Peter Marek (Appellant), the individual who filed the AAD appeal, filed an objection; the Office of Water Resources (OWR) submitted a *Response in Support of Hopkinton Associates, LLC Motion to Dismiss*. Oral argument, including Appellant's presentation of a witness, was heard on March 25, 2008.

In brief, this matter involves a proposed residential subdivision in the Town of Hopkinton (Town) for which the Town required as a condition of its approval that Grassy Pond Road, a narrow gravel Town road, be improved. In its pursuit of a wetlands alteration permit from the DEM, the Applicant discovered that the physical layout of Grassy Pond Road was not in the legal roadbed as originally platted in the late 1800's. Part of the old road and a culvert had been placed on Appellant's property. *Memorandum in Support of Motion to Dismiss* at 1-2.

On October 5, 2007 the OWR issued a Permit to Alter Freshwater Wetlands (Wetlands Permit) to the Town and to Hopkinton Associates. Both Hopkinton Associates and the OWR state that the initial plans submitted to the OWR during the approval process were revised so that the encroaching roadbed and culvert would be removed from Appellant's property; the roadway would be improved by extending onto Hopkinton Associates' property instead. *Id.* at 2.

Hopkinton's Motion to Dismiss

In its *Motion to Dismiss* Hopkinton Associates asserts that the Appellant is an abutter to the property that is the subject of the Wetlands Permit. Hopkinton Associates contends that the AAD is without jurisdiction to hear Appellant's appeal because only an applicant has the right to an appeal and Mr. Marek is not the Applicant in this matter.

Appellant's Objection

Appellant represents that his property not only abuts the entire length of the westerly side of Grassy Pond Road but that four hundred (400) feet of the roadbed lies on his property. He contends that he is not just an abutter; rather, because the proposed wetlands alteration also involves the roadbed on his property, Mr. Marek stands as a landowner who was required to have been included as a signatory on Hopkinton Associates' Application to Alter a Freshwater Wetland (Application) in accordance with Rule 8.02 of the *Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (Wetlands Regulations)*.

Memorandum in Support of Peter Marek's Objection to Hopkinton Associates Motion to Dismiss His Appeal (Appellant's Memorandum) at 1-2.

Appellant presented one witness, Douglas Reese, the Town's Director of Public Works, who testified pursuant to a subpoena. Although the *Appellant's Memorandum* stated that Mr. Reese would "testify that the "new" plans submitted by Hopkinton, LLC. (Grassy Pond Road Improvements Roadway Cross-sections, January 16, 2007-page 3), still exhibit that the roadway,

the culvert headwall and its anticipated improvements will continue to encroach upon Mr. Marek's property ..." (*Id.* at 7), Mr. Reese's actual testimony was much more limited. Mr. Reese testified that he oversees the Department and is involved on a daily basis with maintenance of the Town's roadways. He stated that he sent a letter dated June 8, 2007 to the Town's Planning Board members expressing his concerns about the right of way on Grassy Pond Road. Appellant's Exhibit 2. He had written the letter at Mr. Marek's request, around the time that Mr. Marek had shown him a map of the area. He stated that, while he generally receives plans for review, he only saw Applicant's initial plans in this matter. He had observed Grassy Pond Road and identified it as a gravel road with culverts under the road. He recalled that there was a fence on Grassy Pond Road. Following the testimony, Appellant argued that his property will be disturbed by the work on the roadway: part of the culvert that is to be removed is on his property and his "borderline" fence will be removed. Counsel stated that the roadway will be moved off Appellant's property, "but barely so."

Analysis and Conclusion

Hopkinton Associates represents that the Wetlands Permit no longer involves an improvement of the roadway on Appellant's property, that in fact the approved plans move the portion of the roadbed off Appellant's property and relocate the road on the Town's current land and on land belonging to Hopkinton Associates. Hopkinton Associates and the OWR therefore do not view the Appellant as a landowner but rather as an abutter.

Although the Appellant rests his right to hearing on the foundation that he is the owner of a portion of the property that is the subject of the Wetlands Permit, I will first address the issue of whether Mr. Marek, as an abutter, has a right to a hearing before the AAD.

Rule 9.05 (E) of the *Wetlands Regulations* provides that if an applicant has submitted an Application to Alter a Freshwater Wetland, then that applicant may appeal the Department's decision. An applicant has the opportunity for a hearing, must pay an appeal fee and bears the burden of proof at the adjudicatory hearing. There is no provision allowing anyone other than the applicant to request a hearing.

Since only an applicant has the right to appeal a decision regarding an Application to Alter a Freshwater Wetland, an abutter's request for hearing does not constitute a "contested case" under AAD's jurisdictional statute or under the *Administrative Procedures Act*. In *Re: Karleeter, LLC (Appeal filed by City of Cranston; Appeal filed by Adrienne Wynn et al)*, AAD No. 07-004/FWA, *Final Agency Order* entered 10/26/07, at 9-10. As a result, the AAD lacks jurisdiction to proceed on an abutter's appeal.

Appellant has no right to a hearing before the AAD as an abutter; he may only proceed with his appeal if he is the owner of property that is the subject of the Wetlands Permit. On this issue, in addition to my consideration of the arguments and memoranda of the parties, I have reviewed the Appellant's request for hearing, entitled "Notice of Appeal of Permit Approval" (Notice of Appeal) and the Wetlands Permit issued to the Town and Hopkinton Associates. Since Douglas Reese's testimony and correspondence were based on Applicant's initial plans and there were later revisions (*Appellant's Memorandum* references re-submitted and re-engineered plans of January 16, 2007; the Wetlands Permit references plans submitted on April 18, 2007), I consider his testimony to be inconclusive, based on outdated plans and to be of such questionable value that the testimony and correspondence must be disregarded in this decision on Applicant's *Motion to Dismiss*.

Appellant's Notice of Appeal claims that Mr. Marek should have been made a co-applicant on the Application. Notice of Appeal at 2. He states that the proposed planned and requested alteration seeking widening of Grassy Pond Road, an additional ten (10) to sixteen (16) feet at the site proposed will require further usurpation of the

Appellant's land and to date there has been no proceeding, noticed to the Appellant, of any condemnation or other process to be initiated by the Town of Hopkinton to obtain Appellant's private property for the proposed widening and use by the Appellees. *Id.* at 2-3.

The Notice of Appeal requests the following relief:

Ultimately the Appellant would seek that the subject disputed portion of Grassy Pond Road, which lies upon his real estate, be moved approximately thirty-five (35) feet west so that it occupies the real property owned by the Appellees, Hopkinton Associates, so that the impact upon the Appellant's land will be minimal in servicing the proposed development on Kenney Hill Road, Hopkinton. *Id.* at 4.

As an owner of a portion of the property that was the subject of the Wetlands Permit, Appellant asserts that the *Wetlands Regulations* require that he be a signatory to the Application. As an owner of a portion of the property that was the subject of the Wetlands Permit, Appellant asserts that he has a right to a hearing before the AAD. Both of these assertions rely on the fundamental premise that he is indeed the owner of property that was the subject of the Wetlands Permit, which both the Applicant and the OWR deny. Appellant must therefore produce evidence that his property was the subject of the Wetlands Permit in order to avoid the dismissal of his appeal.

Appellant maintains that "the engineering plans submitted, including the re-submitted and re-engineered plans of **January 16, 2007**, by Hopkinton Associates, LLC., and other expert data supplied by Hopkinton, Associates, LLC., uses the property of the Appellant in presentation of the sought for alteration as set forth within the Application for Permit." *Appellant's Memorandum* at 1. (emphasis added). Mr. Marek details his complaint in the *Appellant's Memorandum*:

Your Appellant states and will prove by expert testimony that although the new plans of **January 2007**, have moved the road, there is no doubt encroachment still exists upon Mr. Marek's property. In particular those drawings and diagrams contained within the plan showing bridge abutment widths. Further, the current culvert existing and being re-constructed within those same plans is almost wholly contained within Mr. Marek's property and the same plans require that that culvert be extended from current length of fifteen (15') feet to thirty (30') feet. Obvious to any engineer, and lay persons alike, to remove and construct this older culvert will require intrusion and encroachment onto Mr. Marek's property without question. *Id.* at 3. (emphasis added)

The Appellant contends that he has a right to a hearing before the AAD because the approved alterations to freshwater wetlands "directly impacts" his property.

Both the Applicant and the OWR have responded that the plans were revised to keep the project on Hopkinton Associates' and the Town's property, both of which entities signed the Application to Alter a Freshwater Wetland. *Memorandum in Support of Motion to Dismiss* at 2.

It appears from the terms of the Wetlands Permit that the Appellant has based his arguments on an earlier version of the plans, and not the plans that were made available for public comment during the final approval process. The Wetlands Permit letter addressed to the Town and Hopkinton Associates provides as follows:

The Department of Environmental Management's ("DEM") Freshwater Wetlands Program ("Program") has completed its review of your Application to Alter a Freshwater Wetland regarding the proposed reconstruction and pavement of Grassy Pond Road with associated retaining walls, drainage improvements, culvert replacement and landscaping as described and detailed in the material and information submitted in support of your application ***and on site plans received by the DEM on April 18, 2007***. These site plans describing the project were made available for public comment as part of the forty-five (45) day public notice period required in accordance with the Freshwater Wetlands Act ... and the procedures set forth in Rule 9.05 of the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act ... Wetlands Permit at 1. (emphasis added)

The Freshwater Wetlands Program concluded that, pursuant to its review and evaluation, the project did not represent a random, unnecessary or undesirable alteration of freshwater wetlands. The Wetlands Permit was issued subject to all controlling *Wetlands Regulations* and, among other

terms and conditions, imposed Condition 2: the Permit “is specifically limited to the project, site alterations and limits of disturbance as detailed on the site plans submitted with [the] application and received by the DEM on **April 18, 2007.**” *Id.* at 1-2. (emphasis added)

Appellant's Memorandum refers to the January 2007 engineering plans on pages 1, 3, 7 and 10; the April 18, 2007 plans are not mentioned in either the Notice of Appeal or in the *Appellant's Memorandum*. Appellant's reliance on the wrong set of site plans introduces a serious factual flaw to his underlying premise that his property was the subject of the Wetlands Permit. Appellant's opportunity to present testimonial and documentary evidence during the motion argument neither cured the flaw nor otherwise buttressed his claim that his property was the subject of the Wetlands Permit. Mr. Marek has failed to produce evidence to establish that his property was the subject of the Wetlands Permit.

Appellant has also raised constitutional issues and issues regarding whether the Town's requirements for the roadway have been properly approved by the Town. As for the first matter, the AAD has long acknowledged the ruling of the U. S. District Court that “the expertise of state administrative agencies does not extend to issues of constitutional law.” *Bowen v. Hackett*, 361 F. Supp. 854, 860 (D.R.I. 1973). In accordance with that directive, AAD decisions have repeatedly held that constitutional issues are not properly before this tribunal. *In Re: Bruce T. Cunard*, AAD No. N/A, *Final Agency Order* entered 6/17/91; *In Re: Richard and Anita Ally*, AAD No. N/A, *Administrative Order* entered 11/5/91; *In Re: Louis G. and Joan R. Roy*, AAD No. 95-002/ISA, *Final Agency Order* entered 6/7/95; *In Re: Karleector, LLC (Appeal filed by City of Cranston; Appeal filed by Adrienne Wynn et al)*, AAD No. 07-004/FWA, *Final Agency Order* entered 10/26/07. As for Mr. Marek's concerns regarding the Town's requirements for the roadway and the removal of old culverts (which may involve easement or right-of-way property concerns), I leave those issues for the Town and, where applicable, the Courts.

Wherefore, I make the following:

FINDINGS OF FACT

A review of the AAD file reveals the following:

1. A Wetlands Permit was issued on October 5, 2007 to the Town and Hopkinton Associates for Application No. 05-0536.
2. As provided in Condition 2 of the Wetlands Permit, the “permit is specifically limited to the project, site alterations and limits of disturbance as detailed on the site plans submitted with [the] application and received by the DEM on April 18, 2007.”
3. Appellant Peter Marek filed a request for hearing at the AAD on November 2, 2007.
4. Appellant Peter Marek presented no evidence to demonstrate that he is the owner of property that was the subject of the Wetlands Permit, issued for the project, site alterations and limits of disturbance as detailed on the site plans received by the DEM on April 18, 2007.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and my review of the pertinent statutes, regulations and case law, I conclude the following as a matter of law:

1. Appellant Peter Marek has failed to prove that his property was the subject of the Wetlands Permit issued for Application No. 05-0536.
2. Appellant Peter Marek has failed to prove that he was required to be a signatory on the Application to Alter a Freshwater Wetland.
3. Pursuant to R.I. GEN. LAWS § 42-17.7-2, the Department of Environmental Management Administrative Adjudication Division has jurisdiction to hear contested enforcement proceedings and contested licensing proceedings.

4. Pursuant to R.I. GEN. LAWS § 42-35-1.1 the DEM is subject to the provisions of the *Administrative Procedures Act*.
 5. The *Administrative Procedures Act* requires that in any contested case, all parties shall be afforded an opportunity for hearing.
 6. Pursuant to the *Administrative Procedures Act*, a hearing must be required by law in order for an administrative matter to constitute a contested case.
 7. Only the applicant has the right to a hearing regarding a decision on an Application to Alter a Freshwater Wetland.
 8. The AAD has no jurisdiction to hear a matter that is not a contested case.
 9. Appellant Peter Marek has failed to meet the requirements of a “contested case” under the *Administrative Procedures Act*.
 10. The AAD has no jurisdiction to hear Appellant Peter Marek's appeal in this matter.
- Wherefore, it is hereby

ORDERED

1. Hopkinton Associates' Motion to Dismiss is GRANTED.
2. The appeal filed by Appellant Peter Marek is DISMISSED.

Entered as an Administrative Order this ____ day of June, 2008 and herewith recommended to the Director or his designee for issuance as a Final Agency Order.

Mary F. McMahon

Hearing Officer

Entered as a Final Agency Decision and Order this ____ day of _____, 2008.

W. Michael Sullivan Ph.D.

Director

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to R.I. Gen. 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