

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: James L. and Elizabeth B. Crawford
Water Quality Certificate (David Cutts) 11-004
AAD No. 11-006/WRA
February 2012

DECISION AND ORDER

This matter came on before Chief Hearing Officer David Kerins on the Department of Environmental Management's (the "Department" or "DEM") Motion to Dismiss Appeal and Objection thereto filed by James L. Crawford and Elizabeth B. Crawford (the "Crawfords" or "Appellants"). The appeal was filed by the Crawfords by request for hearing on November 1, 2011. A Motion to Dismiss was also filed by David Cutts ("Cutts" or the "Applicant"). The Crawfords were represented by Robin L. Main, Esq. The Department was represented by Marisa A. Desautel, Esq. and the Applicant was represented by Jeremiah R. Leary, Esq. Oral arguments were heard January 31, 2012.

By way of background, on October 11, 2011, a Water Quality Certification ("Certification") was issued by DEM to Cutts for a residential subdivision known as Quaker Hill Farm Subdivision ("Quaker Hill"). The Crawfords attended a public hearing for the Quaker Hill Project, and filed their objection during the public comment period. The Crawford's appeal challenges the propriety of the issuance of the Certificate.

Analysis

DEM argues that this type of appeal is not allowed by State Law or DEM Regulation. The Crawfords argue that they have a Constitutional Right to an Adjudicatory Hearing and that a regulatory scheme which does not provide for an appeal to affected third- parties does not meet the requirements of due process.

The applicable regulations in this case are the DEM's Water Quality Regulations ("WQ") Regulations, which provide a regulatory appeal procedure for permit denials issued by the Office of Water Resources ("OWR"). R.I.G.L. § 46-12-1, et seq., the Rhode Island Water Pollution Control Act, is the statutory scheme from which the WQ Regulations were promulgated. Rule 21 of WQ Regulations, titled "Appeals," states that "[t]he *applicant* may appeal to the Director for review of the decision on an application for approval by filing an appeal with DEM/Administrative Adjudication."

Rule 7.00 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division ("Administrative Rules"), "Commencement of Formal Adjudicatory Proceedings," states that "*any person having a right to request an adjudicatory hearing shall follow the procedures and timelines set forth in R.I.G.L. § 42-17.7-9 and other applicable statutes and regulations.*" See Administrative Rules, Rule 7.00(a), emphasis added. The Crawfords' request for appeal contains a request for an adjudicatory hearing, pursuant to Rule 7.00(b) of the Administrative Rules.

The Rhode Island General Laws, Title 42, Chapter 17.7 establishes the Administrative Adjudication Division for Environmental Matters. § 42-17.7-2 authorizes the AAD to hear all contested licensing proceedings. Proceedings of the AAD are governed by the Administrative Procedures Act, Chapter 35 of Title 42 of the General Laws (the "APA"). The APA defines a contested case as a proceeding including licensing in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing. The Rhode Island Supreme Court has held that in order for a proceeding to constitute a

contested case subject to the requirements of the APA, a hearing must be required by law. Property Advisory Group, Inc., et al. v. Rylant, 636 A.2d 317 (R.I. 1994). R.I.G.L. § 42-17.7-3 (2) allows the Director of the Department to promulgate such rules and regulations as are necessary to carry out the purposes of Chapter 17.7. AAD's Rules of Practice and Procedure were adopted in accordance with the provisions of the enabling statute and are consistent with the APA. Chapter 17.7 did not create new rights for parties to have environmental disputes heard by AAD but rather created a formal adjudication division to adjudicate disputes between parties whose rights and/or privileges were already established by statute or regulation. Nothing in AAD's enabling legislation authorizes the AAD or Director to expand the rights of either the divisions within the Department or the rights of private persons. Moreover, our Supreme Court acknowledges that it “has consistently prevented state administrative agencies from expanding their jurisdiction through strained interpretations of unambiguous statutes”. Caithness Rica Ltd. v. Malachowski, 619 A.2d 833 (R.I. 1993) at 836.

In at least two (2) prior AAD application matters, the appeals of neighboring landowners in similar circumstances were dismissed for lack of AAD Jurisdiction. See Re: William R. Reagan (Appeal filed by Urania, Ltd.), AAD No 95-004/ISA, “Decision and Order Granting Division's Motion to Dismiss”, entered as a Final Agency Order on April 28, 1995; and Re: Louis G. and Joan R. Roy (Appeal by Jeffrey and Bonnie Glazer), entered as a Final Agency Order on June 7, 1995. In those matters, the AAD Hearing Officers granted the Motions to Dismiss and ruled that only the applicants had a right to a hearing before the AAD. Reagan at 2; Roy at 1. See also Re: James O'Neil AAD No. 08-018/ISA decided on November 18, 2008.

Constitutional Issues

The Crawfords argue that the statutory and regulatory scheme is flawed if they don't provide for the right to an Adjudicatory Hearing by affected third-parties.

This tribunal has ruled on numerous occasions that it is not authorized to decide Constitutional Issues. In Re: Robert Morris AAD No. 07-034/F&WA at page 10 the Hearing Officer stated: “Even if these issues were presented to AAD with the necessary factual underpinnings and legal authority and argument, AAD would refrain from addressing the constitutional claims. With regard to the constitutional claims raised by Applicant, the AAD has consistently held that constitutional issues are not properly before this tribunal. As pointed out 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. The Crawford's constitutional arguments are preserved for the record but will not be addressed further in this decision.

Conclusion

The jurisdiction of the AAD is established by RIGL § 42-17.2-2 and includes hearing appeals in “contested licensing proceedings”. The appeal filed by the Crawfords is for “an adjudicatory hearing” pursuant to AAD Rule 7.00 (b). The appeal of the Crawfords is not an appeal from a permit application which was granted or denied by RIDEM. The AAD is not authorized by statute to rule on matters such as determining if the RIDEM improperly issued a Water Quality Certification. The AAD is without jurisdiction to consider and adjudicate the subject appeal. The appeal, therefore, should be dismissed.

Findings of Facts

1. On November 10, 2011 Appellants John L. Crawford and Elizabeth B. Crawford (the “Crawfords”) filed a request for administrative ruling that RIDEM incorrectly issued a Water Quality Certification to David Cutts.
2. The appeal is not being taken from any permit or licensing approval or denial by the Rhode Island Department of Environmental Management (“RIDEM”) sought by the Crawfords.
3. The appeal is not being taken from a “contested licensing proceeding”.
4. The Administrative Adjudication Division of the Department of Environmental Management lacks jurisdiction to consider Crawfords'appeal.

Conclusions of Law

1. The AAD is authorized by RIGL § 42-17.7-2 to hear appeals involving “contested licensing proceedings”.
2. The facts as alleged in the Crawfords' appeal are not taken from a “contested licensing proceeding” for which they sought approval.
3. The AAD is without jurisdiction to consider the Crawfords' appeal.
4. The matter should be dismissed

Wherefore, it is hereby

ORDERED

1. RIDEM's Motion to Dismiss is **GRANTED**.
 2. The Appeal filed by James L. Crawford and Elizabeth L. Crawford is **DISMISSED**.
- Entered as an Administrative Order this _____ day of February, 2012.

David Kerins
Chief Hearing Officer