

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Champlin's Realty Associates
AAD No. 04-008/WRA
Water Quality Certificate 03-020
2005

ORDER OF DISMISSAL

This matter came before Hearing Officer Baffoni for oral argument on February 7, 2005 for consideration of the Motions to Dismiss the Appeal and Request for Hearing of the Conservation Law Foundation ("CLF" or "Appellant"). Appellant filed said Appeal and Request for Hearing at the Administrative Adjudication Division on November 8, 2004, in which it essentially seeks to vacate the Water Quality Certificate ("WQC") issued to Champlin's Realty Associates ("Champlins") by the Office of Water Resources ("OWR") of the Department of Environmental Management ("Department" or "DEM"). OWR filed a motion to dismiss the Appeal and Request for Hearing, and a memorandum in support thereof on January 7, 2005. Champlin's filed a motion to dismiss (in which it joined in OWR's memorandum) on January 12, 2005. CLF filed an objection to the motion to dismiss on January 12, 2005, a memorandum in support of its objection on January 25, 2005, and (after oral arguments) a supplemental memo on February 11, 2005.

The pertinent facts in this matter are not in dispute. A recitation of same is made for consideration, evaluation, and proper disposition of the jurisdictional issue.

The following facts are undisputed:

1. Champlin's applied to OWR for a WQC associated with a proposed expansion of a marina located in the Great Salt Pond of Block Island, Rhode Island in 2003.
2. OWR approved Champlin's application and issued a WQC for the subject marina project on October 8, 2004.
3. On November 8, 2004, CLF filed an Appeal and Request for Hearing (dated November 8, 2004) at the AAD, seeking to vacate the WQC issued to Champlin's OWR and Champlin's (hereinafter "Movants") contend that this matter is not a "contested case" pursuant to the Rhode Island Administrative Procedures Act ("APA"), Gen. Law § 42-35-15; and therefore the AAD does not have jurisdiction. It is argued by Movants that the AAD does not have jurisdiction over CLF's Request for Hearing because CLF was not the Applicant; and therefore CLF has no right to an adjudicatory hearing under the Water Quality Regulations.

Wherefore, Movants urge that CLF's Request for Administrative Adjudicatory Hearing be dismissed for lack of jurisdiction.

On the contrary, it is CLF's contention that AAD does have jurisdiction over CLF's Appeal because the Appeal concerns a contested matter within the meaning of the APA. CLF argues that the DEM Water Quality Regulations provide that a hearing is mandated when a person requests one following: (1) proper public notice of a complete water quality application; and/or (2) pursuant to notice by an

applicant proposing an activity that will have an adverse impact upon a high quality water body. CLF also argues that a hearing is constitutionally mandated in situations where a party's property rights are threatened by governmental approval of a proposed activity.

Specifically CLF asserts that OWR failed to provide or require Champlin's to provide reasonable notice of Champlin's WQC, including an opportunity to request a hearing. Champlin's avers that as a consequence of the foregoing, CLF has been effectively denied its right to a hearing under the Water Quality Regulations, the APA and the Rhode Island Constitution. Wherefore, CLF urges the AAD to find that AAD has subject matter jurisdiction over the instant Appeal and Request for Hearing, and to deny the Motions to Dismiss.

CLF presented a rather extensive dissertation of the Water Quality Regulations, especially Rule 13B (dealing with public notice and hearing for WQCs), Rule 13, Appendix C (State Antidegradation Policy) and Rule 18 (Antidegradation of Water Quality Standards). CLF, in its memorandum in support of its objection, attached copies of various letters, documents and other material, all of which proved rather informative. However, they shed no light on the issue for consideration in this matter viz. whether the AAD lacks subject matter jurisdiction. It is well established that the jurisdiction of AAD is circumscribed by its enabling legislation and the Rhode Island Administrative Procedures Act ("APA"). The AAD was established by Chapter 17.7 of Title 42 of the R.I. GEN. LAWS § 42-17.7-2 authorizes the AAD to hear *inter alia* all contested licensing proceedings. Nothing in AAD's enabling legislation or other statutory authority authorizes the AAD or Director to expand it's jurisdiction. The Rhode Island Supreme Court has ruled 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).

The APA specifies the types of administrative matters that qualify as a contested case. § 42-35-1(c) defines a "contested case" as "a proceeding, including but not restricted to ratemaking, price fixing, and 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;." Only when a hearing is required by law, either by statute or regulation, can a matter be considered a contested case pursuant to the APA. If there is no hearing required by statute or regulation, then the matter is not a contested case pursuant to the APA; and consequently the AAD lacks the requisite subject matter jurisdiction.

CLF cited certain provisions of the Water Quality Regulations and the State's Anti-Degradation Policy in support of it's right to a hearing. Clearly, a review of the provisions cited by CLF demonstrates that they fail to support CLF's contentions pertaining to its right to an adjudicatory hearing. Rule 13 of the DEM Water Quality Regulations governs the issuance of Water Quality Certificates by the Department. This rule specifically provides that the construction of new marinas and the expansion of existing marinas are projects and/or activities which require a Water Quality Certificate ("WQC"), which document essentially states that the proposed project and/or activity does not violate said regulations.

The Water Quality Regulations provide for two (2) different types of hearings associated with the application for a WQC.

The first type of hearing provided for in the Water Quality Regulations is a Public Hearing. Rule 13B is entitled "Public Notice and Hearing for Water Quality Certification."

Rule 13B(2) specifies:

"Public Hearing - The Department shall hold a public hearing when so requested in accordance with Rhode Island General Laws Chapter 42-35. The Department also may hold a public hearing concerning the application at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the application."

The public hearing provision referred to above applies during the application review process, and is intended to provide the Department all the information necessary for a thorough review. OWR administers WQCs for a variety of projects under state and federal permit review. WQCs serve to advise permitting agencies as to whether a proposed project would be in compliance with state water quality regulations. WQCs are necessary pre-requisites to many permits, but are not permits in and of themselves.

The second type of hearing provided for in the Water Quality Regulations is an Adjudicatory Hearing, which pursuant to the APA, is a contested case. The provisions pertaining to adjudicatory hearings are contained in WQ Rules 17 and 21.

WQ Rule 17 is entitled "Modification, Suspension or Revocation of Approval", and WQ 17C provides:

"The party served with a Notice of Revocation/Suspension of an approval may request an adjudicatory hearing to contest the revocation as set forth in the provisions of rule 21. A Notice of Revocation/Suspension of an approval automatically becomes a final order of the Director enforceable in Superior Court upon failure to request said adjudicatory hearing."

WQ Rule 21 is entitled "Appeals", and WQ 21B provides:

Appeal Procedure for Approval Denials - Any person whose approval application is denied may appeal to the Director for review of the decision on which the denial is based by filing an appeal with DEM/Administrative Adjudication.

It is undisputed that Champlin's application for a WQC was associated with its proposed expansion of a marina. The WQC may well be a necessary prerequisite to permit by another agency, but it is not a permit in and of itself. A WQC serves only to advise another agency (or Division of DEM) as to whether a project would violate water quality standards; and the final decision as to whether or not to grant or deny a permit lies with the other agency (or Division) issuing the permit and not with the OWR.

The role of WQCs in the permitting process has been clarified through the issuance of the Rhode Island Policy on the Application of Water Standards ("Policy"). Said Policy elaborately describes the function and purposes of a WQC. It specifically states that WQCs are not independent permits in and of themselves; and that such documents are only to advise agencies as to whether a proposed project would violate water quality standards. The final decision as to

whether to deny or grant a permit lies with the agency issuing the permit, not with the OWR. The Department has clearly determined that WQCs are solely advisory and the OWR's opinion as to whether a project will violate water quality standards does not give rise to a contested case requiring an adjudicatory hearing. It is well established that such interpretations must be given great weight. Gryguc v. Bendick, 510 A.2d 937 (R.I. 1986).

Additionally, the function of water quality certification was addressed by this tribunal in similar matters, both of which were also associated with CRMC proceedings. In Bruce E. Harrington, AAD No. 92-003/WRE (Decision and Order dated March 22, 1993), and in Philip E. & Jacqueline Pelletier, AAD No. 92-002/WRE (Decision and Order dated March 18, 1993), it was determined in both of said matters that a WQC serves only as an advisory opinion as to the impact of a proposed project on water quality and is not a "license" as contemplated in AAD's jurisdictional statute. Wherefore, it was found in said matters that the AAD lacked subject matter jurisdiction.

CLF also argues that even assuming that CLF had no express right to a hearing by statute or regulation, the AAD's denial of CLF's request for a hearing would be violative of CLF's due process and equal protection rights under the Rhode Island Constitution. However, the AAD has consistently held that such constitutional challenges are not properly before this tribunal. Re: Betty Combs, AAD No. 04-003/ISA, Final Agency Order dated October 7, 2004; Re: Johnston Corporation, AAD No. 02-012/ISA, Final Agency Order dated April 29, 2004; Re: Tallman & Mack (F/V Maria Mendonsa), AAD No. 00-001/F&WA, Administrative Order issued May 18, 2000; Re: F/V Sister Alice, AAD No. 98-002/F&WA, Final Agency Order dated April 8, 1999; Louis and Joan R. Roy, AAD No. 95-002/ISA, Final Agency Order dated June 7, 1995; Richard and Anita Ally, AAD No. N/A Administrative Order issued November 5, 1991; Bruce T. Cunard/ROW Acquisition, Inc. d/b/a Reliable Shellfish, AAD No. N/A Final Agency Order dated June 7, 1991. 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." CLF's constitutional arguments are preserved for the record, but will not be addressed further.

Based on the foregoing, and after consideration of the memoranda and arguments of counsel, I find that water quality certification serves only as an advisory opinion as to the impact of a proposed project on water quality and is not a license or a permit as contemplated by AAD's jurisdictional statute. Consequently, the AAD lacks subject matter jurisdiction herein.

Based on the foregoing, it is hereby

ORDERED

1. The Motions to Dismiss filed by the Office of Water Resources and Champlin's Realty Associates are GRANTED.
2. The Appeal and Request for Hearing filed by Conservation Law Foundation is DISMISSED.

Entered as an Administrative Order this _____ day of March, 2005 and hereby recommended to the Acting Director for issuance as a Final Agency Order.

Joseph F. Baffoni

Hearing Officer

Entered as a Final Agency Order this _____ day of _____ 2005.

Frederick Vincent

Acting Director