

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

RE: DEBORA & JAMES EASTWOOD, III
APPLICATION NO. 05-1034

AAD No. 05-007/FWA

RE: DEBORA & JAMES EASTWOOD, III
APPLICATION NO. 9532-0846
(Consolidated Cases)

AAD No. 05-009/ISA

DECISION AND ORDER DISMISSING APPEALS

This matter came before Hearing Officer Joseph F. Baffoni on October 27, 2005 for consideration of the two (2) written Motions to Dismiss the Notices of Appeal and Requests for Hearing ("Appeals") of Debora and James Eastwood III ("Appellants"). The Appellants are abutters to property that was the subject of applications by KSL Realty North Providence, LLC et al ("Applicants") for: (1) an Individual Sewage Disposal System ("ISDS") permit (AAD No. 05-009/ISA); and (2) an Insignificant Alteration – Permit (AAD No. 05-007/FWA). The Department of Environmental Management, Office of Water Resources ("OWR") approved the ISDS permit application as well as the Insignificant Alteration – Permit.

The Appellants filed the Appeals with the Administrative Adjudication Division for Environmental Matters ("AAD") on August 24, 2005. On September 22, 2005, the Applicants filed a Motion to Dismiss in each of said matters. In support of their Motions to Dismiss, Applicants attached a copy of the decision of the AAD issued November 30, 2001 in connection with the application of Robert and Hilda Crispi (as to AAD No. 05-009/ISA); and a copy of the decision of the AAD issued September 25, 2003 in connection with the application of J.T. O'Connell Realty Company (as to AAD No. 05-007/FWA). By order dated

September 26, 2005, the instant matters were consolidated for all further proceedings at the AAD.

Applicants' Consolidated Objection to Applicants' Motions to Dismiss was filed on October 6, 2005. This matter involves a question of jurisdiction of the AAD, and regardless of whether Appellants' objection was timely filed; I will consider the merits of the Motions to Dismiss *sua sponte*. Oral arguments on the Motions to Dismiss were presented on October 27, 2005.

The Applicants seek to have each of the appeals filed by Appellants at the AAD dismissed for lack of standing. The Applicants assert that the AAD is without jurisdiction to hear the Appellants' appeals because the Appellants have no right to request a hearing in either of the consolidated matters. Applicants contend that the jurisdiction of AAD is limited by the statute creating AAD, and that the AAD's lack of jurisdiction in such matters has been decided in previous cases. Wherefore, Applicants argue that both of the instant appeals should be dismissed for lack of standing.

OWR did not file a motion to dismiss the instant appeals or a written joinder in Applicants' Motion. However, OWR (at oral argument) supported Applicants' Motions to Dismiss the instant appeals. OWR concurs with the Applicants' contentions, and OWR posits that the cases cited by Applicants clearly demonstrate that abutting landowners have no standing in either of the consolidated matters.

Appellants aver that a portion of the wetlands at issue in this matter are

located on portions of Appellant's property, and that the proposed location of the ISDS is within 200 feet of their boundary line. Wherefore, Appellants contend that as such they are granted a direct interest in this matter as conferred by Section 8.02 (c) of the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, ("Freshwater Wetlands Regulations"), and Regulation SD 2.02 (E) of the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems ("ISDS" Regulations). It is argued by Appellants that since they have no other administrative avenues of relief, they are therefore entitled to standing in this appeal.

It was stipulated at oral argument that "standing is strictly a matter of law" and therefore these matters are before the Hearing Officer for a determination of whether the Appellants have standing to bring these appeals in order for the AAD to have the requisite jurisdiction.

A review of the pertinent Rules and Regulations cited by Appellants demonstrates that they do not support Appellants' contentions that they confer a direct interest in this matter to the Appellants. Rule 8.02 (c) of the Freshwater Wetlands Regulations provides that written, notarized authorization be obtained from property owners who own property containing wetlands that will be directly altered as a result of a proposed project. Such alterations include those alterations as defined under the term "alter the Character" in said Rules. Rule 8.02 (c) clearly does not apply to the "Insignificant Alteration – Permit" that was

approved this matter, and it does not confer a direct interest in this matter to the Appellants.

SD 2.02 (e) of the ISDS Regulations allows abutters within 200 feet of any component of the subject proposed ISDS to submit written comments or information bearing upon an application and relating to the intent and purpose of said Regulations, which shall be considered by the ISDS Program Staff as part of their review of the application. SD 2.02 (e) allowed Appellants to submit comments or information as aforesaid, but it does not confer a direct interest in this matter to the Appellants tantamount to a right to appeal.

Appellants' argument that since they have no other administrative avenues of relief, the Appellants, as abutters, are therefore entitled to standing at the AAD lacks merit. Such arguments were advanced and rejected in the *Robert and Hilda Crispi* matter, the *J.T. O'Connell Realty Company* matter, as well as numerous other cases cited in said decisions.

The jurisdiction of AAD is circumscribed by its enabling legislation and other statutes. 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 authorizes the AAD or Director to expand the rights of private persons. 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).

AAD Rule 7.00 governs the Commencement of Formal Adjudicatory Proceedings at the AAD. Rule 7.00 (a) entitled "Request for Hearing" provides as follows:

"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."

The term "Adjudicatory Proceeding" is defined in AAD Rule 2.00 (c) (1) as: a proceeding before the AAD in which the legal rights, duties or privileges of specifically named persons are determined after opportunity for an agency hearing. Admittedly, neither of Appellants is a specifically named person in either the statutes or regulations.

Proceedings of the AAD are governed by the Administrative Procedures Act, Chapter 35 of Title 42 of the R.I. GEN LAWS ("APA"). Section 42-35-9(a) provides that "In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." Section 42-35-1 contains the following definitions:

(c) "Contested case" means a proceeding...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.

(f) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.

It is well established 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). Appellant does not cite any statute or regulation which creates a right to a hearing under the circumstances in this matter. Absent a statute or regulation creating a right to appeal a determination by the OWR, the AAD is without jurisdiction to entertain the instant requests for hearing. Clearly the statutes and regulations governing Freshwater Wetlands and/or ISDS Permits do not grant the right to appeal to anyone other than an Applicant.

In somewhat analogous matters concerning the appeals of neighboring landowners, the AAD and the Director have ruled previously that absent a statute or regulation creating a right to appeal a determination by a Division of DEM the AAD is without jurisdiction to entertain the request for hearing. See *Re: Crispi, Robert & Hilda*, AAD No. 01-002/ISA, and *Re: J.T. O'Connell Realty Company*, AAD No. 03-002/FWA.

Based on the foregoing, and after consideration of the memoranda and arguments of counsel, I conclude that the Appellants have no standing to appeal OWR's decision to issue either the ISDS Permit or the Insignificant Alteration-Permit. Consequently, the AAD lacks jurisdiction to entertain the Appellants' requests for a hearing.

Wherefore, after consideration of the undisputed facts as stipulated at oral argument, I make the following:

FINDINGS OF FACT

1. KSL Realty North Providence, LLC et al applied for: (1) an Individual Sewage Disposal System ("ISDS") permit; and (2) for an Insignificant Alteration-Permit, both of which were for property located in South Kingstown, Rhode Island.
2. The ISDS application, and the Insignificant Alteration – Permit were both approved by the Office of Water Resources of the Department of Environmental Management.
3. Debora and James Eastwood, III ("Appellants") are the owners of property abutting the property that was the subject of the ISDS application and the Insignificant Alteration – Permit.
4. On August 24, 2005, Debora and James Eastwood III, filed a "Notice of Appeal and Request for Hearing" with the DEM Administrative Adjudication Division for Environmental Matters ("AAD") in each of the above-entitled matters.
5. These matters came before the Hearing Officer for a determination of whether the Appellants are entitled to standing in said appeals in order for the AAD to have the requisite jurisdiction.
6. Pursuant to R.I. Gen. Laws § 42-35-1.1 the DEM is subject to the provisions of the Administrative Procedures Act.
7. The Administrative Procedures Act defines "contested case" to mean a proceeding 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.

CONCLUSIONS OF LAW

After due consideration of the above undisputed facts, I conclude the following as a matter of law:

1. Pursuant to R.I. Gen. Laws § 42-17.7-2, the Department of Environmental Management Administrative Adjudication Division has jurisdiction to hear only contested enforcement proceedings and contested licensing proceedings.
2. The AAD has no jurisdiction to hear a matter that is not a contested case under the Administrative Procedures Act.
3. There is no statutory or regulatory requirement that anyone other than an applicant has the right to administratively appeal a decision on an ISDS permit application or an Insignificant Alteration-Permit.
4. Debra and James Eastwood, III have failed to demonstrate that their legal rights, duties or privileges are required by law to be determined by the DEM after an opportunity for hearing.
5. The appeals of Debora and James Eastwood, III fail to meet the definition of a "contested case" under the Administrative Procedures Act.
6. The AAD has no jurisdiction to hear the Notice of Appeal and Request for Hearing filed by Debora and James Eastwood, III in either of the above-entitled matters.

Wherefore, it is hereby

ORDERED

1. The Motions to Dismiss filed by KSL Realty North Providence, LLC et al, as Applicant, in each of the above-entitled matters are hereby GRANTED.
2. The Appeal and Request for Hearing filed by Debora and James Eastwood, III, in each of the above-entitled matters is DISMISSED.

Entered as an Administrative Order and herewith recommended to the
Director for issuance as a Final Agency Decision and Order this 7th day
of December, 2005.



Joseph F. Baffoni
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 Decision and Order this 7th day of
December, 2005.



W. Michael Sullivan, PhD
Director
Department of Environmental Management
235 Promenade Street, Fourth Floor
Providence, RI 02908

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CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Jennifer Azevedo, Esquire, 170 Westminster Street, Suite 800, Providence, RI 02903; James H. Reilly, Esquire, Kelly, Kelleher, Reilly & Simpson, 146 Westminster Street, Suite 800, Providence, RI 02903-2202 via interoffice mail to Greg Schultz, Office of Legal Services, and Dean Albro, Chief, Office of Compliance & Inspection, 235 Promenade Street, Providence, RI 02908 on this 8th day of December, 2005

Barbara L. Stewart

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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. General 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.