

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

**RE: KARLEETOR, LLC
APPLICATION 06-0557
(APPEAL FILED BY CITY OF CRANSTON)
(APPEAL FILED BY ADRIENNE WYNN et al)**

AAD No. 07-004/EWA

DECISION AND ORDER DISMISSING APPEALS

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 Karleetor, LLC (Karleetor) on August 7, 2007. Appellant City of Cranston (City) and Appellants Mattiucci, *et al* filed objections to the motion. The Office of Water Resources (OWR) took no official position on the issues raised by Karleetor's motion. Oral argument was heard on September 11, 2007.

The Motion to Dismiss asserts that the AAD lacks jurisdiction to hear the Appellants' appeals of a permit that Karleetor was granted by the OWR. In its consideration of Karleetor's Request for Preliminary Determination regarding a proposed concrete dry batching facility in Cranston, RI, the OWR had determined that the proposed project was an insignificant alteration to freshwater wetlands. An Insignificant Alteration Permit was issued on April 9, 2007. The City filed a request for hearing at the AAD on April 27, 2007. On the same date a request for hearing was filed on behalf of Adrienne Wynn¹, Daniel and Kathleen McKenna, Harold and Marie Reall, Frank Mattiucci, Daniel Nelson, Sandra Phayre, Lillian Celani, Rita L. Holahan, and a nonprofit corporate entity identified as Cranston Citizens for Responsible Zoning & Development (CCRZD)².

¹ By letter dated June 15, 2007 Ms. Wynn withdrew her name from the request for hearing and stated that she had severed her association with the Cranston Citizens for Responsible Zoning & Development.

² During motion argument and in response to Karleetor's claims that the CCRZD had solicited and encouraged individuals to engage in prohibited *ex parte* communications with DEM Director W. Michael Sullivan, Attorney Richard E. Crowell, Jr. stated that the CCRZD was not a party to the appeal and was included in the request for hearing through counsel's error.

A status conference was conducted with the parties on May 16, 2007 at which concerns challenging AAD's jurisdiction to hear the appeals were briefly aired. It was determined that the procedural hurdle of whether the appeals were properly before the AAD needed to be addressed prior to the matter being reached for hearing on the merits. A timetable for Karleetor to file the Motion to Dismiss and for the other parties to file any objections was thereafter established.

Karleetor's Motion to Dismiss

Karleetor asserts that the AAD "is without jurisdiction or authority to hear an appeal of the grant or denial of a permit by anyone other than the permit applicant." *Appellee's Motion to Dismiss*, at 1. The Motion states that the *Rules and Regulations Governing the Administration and Enforcement of the Fresh Water Wetlands Act (Wetlands Regulations)* do not provide a procedure for an abutter or neighbor to appeal a decision regarding a permit and that the AAD cannot expand its jurisdiction, by allowing non-applicant appeals, beyond that which was established in statute by the General Assembly. *Appellee's Motion to Dismiss* at 1-2 (citations omitted).

In response to the City's argument, discussed below, Karleetor asserted at the hearing that the provisions of R.I. GEN. LAWS § 2-1-21 (that grants municipalities "veto power" over a permit) are not applicable to this matter because the project was determined to be an insignificant alteration of freshwater wetlands; the statutory requirements only apply to significant alterations of wetlands.

In addition to the above jurisdictional issues, Karleetor also contends that the Appellants lack standing to present their appeals. *Appellee's Memorandum*

of Law in Support of Its Motion to Dismiss at 14.

City's Objection

In its supporting memorandum and in argument, the City asserts that the AAD cases upon which Karleetor has relied in arguing that the AAD is without jurisdiction to hear appeals from non-applicants, should not be applied to a municipality because municipalities were given certain powers under the Freshwater Wetlands Act. *Appellant, City of Cranston's Memorandum of Law in Opposition to Appellee's Motion to Dismiss (City's Memorandum)* at 2.

The City also argues that through the Department's adoption of the recent *Wetlands Regulations*, language limiting the right to appeal to permit applicants was eliminated³. *City's Memorandum* at 3-4.

Finally, the City contends that the municipality has standing to appeal the decision to permit an insignificant alteration because the *Wetlands Regulations* "specifically allows the input from a city or town." *City's Memorandum* at 4. In its oral argument the City expanded on this theme, citing the provisions of R.I. GEN. LAWS § 2-1-21 (2) wherein city and town councils have the right to prevent the Department from granting a permit. Counsel acknowledged that the statute required certain procedures, including notice, if the permit involved a significant alteration. He claimed, however, that the Department has "frustrated the intent of the legislature to provide a veto to the municipality" by finding the project to be an insignificant alteration. As a result, the City is neither allowed to examine

³ This representation is one of several made by the parties that distorts the regulatory framework concerning wetlands permits. To clarify the record: the *Wetlands Regulations* were adopted by the Department, not the legislature; the "proposed" *Wetlands Regulations* became effective June 1, 2007; the new *Wetlands Regulations* amended the section "Application to Alter a Freshwater Wetland" and re-numbered it from the old Rule 9.05 to the new Rule 10.00. Old Rule 9.05 (E)(4) addressed the appeal of decisions regarding an Application to Alter a Freshwater Wetland; new Rule 10.09 (A) provides a similar procedure.

and challenge the evidence, nor to cross-examine witnesses.

In its memorandum and in argument, the City also raised constitutional arguments concerning denial of substantive and procedural due process.

Objection by Appellants Mattiucci, et al

Appellants assert that they are "a group of residents who potentially will either abut or exist in close proximity to a full scale concrete batching plant that will admittedly incorporate manufacturing processes that will emit and distribute materials and material byproducts into the air, land and water shared and/or enjoyed by the Appellants in the course of their daily lives". *Appellants' Memorandum of Law in Support of Objection to Appellee's Motion to Dismiss (Appellants' Memorandum)* at 5-6. They contend that the Department's action in issuing a "questionable if not illegal" Insignificant Alteration Permit has created the possibility of damage and contamination to Appellants' homes and properties. Appellants claim that the impact on their property rights and interests entitle them "to federal and state due process and equal protection guarantees as well as the right to a qualified hearings [sic] when federal or state action places such rights and interests in jeopardy." *Id.* at 5.

Appellants assert that the DEM and the AAD have an "independent duty to review, adjudge and validate" the Insignificant Alteration Permit because of "the various substantial errors and omissions (of fact and law)" that are set forth in Appellants' request for hearing and repeated in the *Appellants' Memorandum*. *Id.* at 8-9. Appellants' recitations of error concern DEM's failure to provide notice and hearing to the Appellants during the permit process; allegations of violations of state and local laws by Karleetor; DEM's use of information regarding "drainage, percolation, groundwater contamination, and

water flow" in a manner that is inconsistent with industry standards; DEM's failure to appropriately consider hazardous materials contained within concrete and their effect on human health; DEM's reliance on information regarding the flood plains and proximate wetlands that is inconsistent with industry standards; and DEM's failure to ensure that the wetlands were accurately flagged. In all, Appellants allege 21 paragraphs of errors and omissions by the DEM in its review and approval of Karleetor's Insignificant Alteration Permit. *Id.* at 9 -11.

Appellants further argue that no matter that Karleetor has received an "Insignificant Alteration Permit", the proposed activity will "lead to a direct significant alteration and/or pollution of existing freshwater wetlands." As such Appellants assert that they have the same rights they would be entitled to if Karleetor had gone through the full permitting process. That is, that they have "a right to participate in all required hearings." *Id.* at 12-13.

Analysis and Conclusion

As established by the Rhode Island General Assembly, the AAD is charged with the responsibility to hear all contested enforcement and contested licensing proceedings within the agency, in conformance with the *Administrative Procedures Act*. R.I. GEN. LAWS § 42-17.7-2 and 42-35-1.1. Although the AAD is empowered to review, interpret and adjudicate matters concerning statutes and regulations under its jurisdiction, AAD's authority is circumscribed through guidance and instruction from the courts.

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. I therefore conclude that the constitutional issues raised by the Appellants in their hearing requests and in their objections to the Motion to Dismiss are not within AAD's jurisdiction to address.

In my consideration of the remaining arguments of the parties, I have reviewed the provisions of the *Administrative Procedures Act* (R.I. GEN. LAWS § 42-35-1 *et seq*), the *Freshwater Wetlands Act* (R.I. GEN. LAWS § 2-1-18 *et seq.*) and the *Wetlands Regulations*.

AAD's jurisdiction to hear contested proceedings is defined by the provisions of the *Administrative Procedures Act*. R.I. GEN. LAWS § 42-35-9 (a) requires that in any contested case, "all parties shall be afforded an opportunity for hearing after reasonable notice." R.I. GEN. LAWS § 42-35-1 defines "contested case" as follows:

(c) "Contested case" means 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... (emphasis added)

As the statutory definition provides, a hearing must be required by law in order for an administrative matter to constitute a contested case. Property Advisory Group, Inc. v. Rylant, 636 A.2d 317, 318 (R.I. 1994).

To determine if a hearing is required by law in this matter, I have examined the *Freshwater Wetlands Act* and the *Wetlands Regulations*. The *Freshwater Wetlands Act* provides as follows:

2-1-21. Approval of director. -- (a)(1) No person, firm, industry, company,

corporation, city, town, municipal or state agency, fire district, club, nonprofit agency, or other individual or group may excavate; drain; fill; place trash, garbage, sewage, highway runoff, drainage ditch effluents, earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; dike; dam; divert; change; add to or take from or otherwise alter the character of any fresh water wetland as defined in § 2-1-20 without first obtaining the approval of the director of the department of environmental management.

(2) Approval will be denied if in the opinion of the director granting of approval would not be in the best public interest. **Approval shall not be granted if the city council or town council of the municipality within whose borders the project lies disapproves within the forty-five (45) days provided for objections set forth in § 2-1-22....** *(emphasis added)*

2-1-22. Procedure for approval by director -- Notice of change of ownership -- Recordation of permit. -- (a) Application for approval of a project to the director of environmental management shall be made in a form to be prescribed by the director and provided by the director upon request. **Prior to the application, a request may be made for preliminary determination as to whether this chapter applies.** A preliminary determination shall be made by the director only after an on-site review of the project and the determination shall be made within thirty (30) days of the request. **This chapter shall be determined to apply if a significant alteration appears to be contemplated and an application to alter a wetland will be required...** *(emphasis added)*

The above statutes recognize a distinction between wetland alterations that are significant as opposed to those alterations deemed insignificant. As set forth below, the *Wetlands Regulations* have established a procedure for considering the two types of alterations, resulting in two kinds of permits. One permit, issued pursuant to a Request for a Preliminary Determination, is for a proposed project where it has been determined that the *Freshwater Wetlands Act* is not applicable because it involves an insignificant alteration. The second permit may be issued following a more complicated process of review of an Application to Alter a Freshwater Wetland. The City's "veto power" over an application is only conferred when an Application to Alter a Freshwater Wetland is being reviewed by the Department. R.I. GEN. LAWS § 2-1-21 (a)(2). No such power exists, because the legislature did not grant it, when an Insignificant Alteration Permit is issued.

The current *Wetlands Regulations*, effective June 1, 2007, provide in Rule 15.00 that any application submitted to the Department prior to the effective date of the regulations, shall be governed by the rules in effect at the time the application was filed. Consequently, the *Wetlands Regulations* which became effective April 23, 1998, are the ones that govern consideration of this matter (as previously noted in footnote 3, however, the provisions regarding the appeal of decisions remains essentially the same in both sets of regulations).

The 1998 regulations delineate the process for filing a Request for Preliminary Determination in Rule 9.03. Pursuant to the regulations, the request may be submitted to the Department in order to determine whether a proposed project constitutes a significant alteration. If the Department determines that a project does not represent, in any way, an alteration of a wetland, then a Determination of Non-Jurisdiction will be issued to the applicant in letter form. With that determination a permit is not needed. Rule 9.03 C(3).

If the Department determines that a proposed project is an insignificant alteration, then an Insignificant Alteration Permit will be issued, "subject to such conditions ...as the Director may require to protect the wetlands." Rule 9.03 (D) (1). In light of this language, and contrary to the allegations made by counsel for Appellants Mattiucci *et al*, there is nothing suspicious or unusual about the Department's imposition of conditions on the permit issued in this matter.

If the Department has determined that the proposed project contemplates a significant alteration of freshwater wetlands, then the applicant will have to follow the process for submission of an Application to Alter a Freshwater Wetland. As indicated by Rule 9.03E, when the Department does not issue an Insignificant Alteration Permit, the person who made the Request for

Preliminary Determination is not entitled to an opportunity for hearing.

Rule 9.03 E. Significant Alterations

If the Department determines that a proposed project appears to contemplate a significant alteration, an Application to Alter a Freshwater Wetland will be required. (See Rule 9.05). **A determination by the Department that a project appears to contemplate a significant alteration is not a denial of a permit.** (*emphasis added*)

If an applicant has submitted an Application to Alter a Freshwater Wetland, then that applicant may appeal the decision. Rule 9.05 (E) provides as follows:

4) Appeal of Decisions

(a) Within ten (10) days [sic] of the receipt of a decision from the Department **regarding an Application to Alter a Freshwater Wetland, the applicant may request an adjudicatory hearing** to appeal the decision, or portions thereof.... Any request for an adjudicatory hearing on an application must be accompanied by a fee as specified in these Rules. (see Rule 8.04) A request for an adjudicatory hearing will not be considered timely filed unless accompanied by the full required fee.... (*emphasis added*)

Applicant has the opportunity for a hearing, must pay an appeal fee, and pursuant to Rule 9.05 (E) (5), bears the burden of proof at the adjudicatory hearing. There is no provision allowing anyone other than the applicant to request a hearing.

Based upon the above analysis, I conclude that the statutes and *Wetlands Regulations* are clear and unambiguous: no one, not even the person who submitted the Request for Preliminary Determination, has the right to appeal a decision on an Insignificant Alteration Permit, and only an applicant has the right to appeal a decision regarding an Application to Alter a Freshwater Wetland.

The Rhode Island Supreme Court 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, 836 (R.I. 1993). See In Re: William R. Reagan (Appeal Filed by Urania, Ltd.), AAD No. 95-004/ISA, Final Agency Order entered 4/28/95; In Re: Robert and Hilda Crispi (Permit Issued to Brian Monfils Builders, Inc.), AAD No. 01-002/ISA, *Final Agency Order* entered 11/30/2001. The AAD cannot grant an opportunity for hearing where one has not been required by law. The Appellants may have valid grievances, but the AAD is not the appropriate forum to hear their complaints.

Since there is no right to a hearing for any of the Appellants in this matter (or for that matter, even for Karleetor), the matter before me does not constitute a "contested case" under AAD's jurisdictional statute or under the *Administrative Procedures Act*. As a result, the AAD lacks the subject-matter jurisdiction to proceed on either of the appeals. The appeals are therefore dismissed.

FINDINGS OF FACT

A review of the AAD file reveals the following:

1. Insignificant Alteration Permit No. 06-0557 was issued to Karleetor, LLC on April 9, 2007.
2. The City of Cranston filed a request for hearing at the AAD on April 27, 2007.
3. A request for hearing was filed at the AAD on April 27, 2007 on behalf of Adrienne Wynn; Daniel and Kathleen McKenna; Harold and Marie Reall; Frank Mattiucci; Daniel Nelson; Sandra Phayre; Lillian Celani; Rita L. Holahan; and the Cranston Citizens for Responsible Zoning and Development.

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:

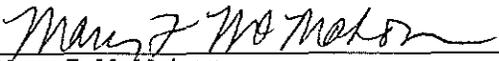
1. Pursuant to R.I. GEN. LAWS § 42-17.7-2, the Department of Environmental Management Administrative Adjudication Division has jurisdiction to hear contested enforcement proceedings and contested licensing proceedings.
2. Pursuant to R.I. GEN. LAWS § 42-35-1.1 the DEM is subject to the provisions of the *Administrative Procedures Act*.
3. The *Administrative Procedures Act* requires that in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.
4. Pursuant to the *Administrative Procedures Act*, a hearing must be required by law in order for an administrative matter to constitute a contested case.
5. There is no right to a hearing regarding an Insignificant Alteration Permit.
6. Only the applicant has the right to a hearing regarding a decision on an Application to Alter a Freshwater Wetland.
7. The AAD has no jurisdiction to hear a matter that is not a contested case.
8. The City has failed to meet the requirements of a "contested case" under the *Administrative Procedures Act*.
9. The AAD has no jurisdiction to hear the appeal filed by the City in this matter.
10. Appellants Mattiucci, *et al* have failed to meet the requirements of a "contested case" under the *Administrative Procedures Act*.
11. The AAD has no jurisdiction to hear the appeal filed by Appellants Mattiucci, *et al* in this matter.

Wherefore, it is hereby

ORDERED

1. The Motion to Dismiss filed by Karleetor, LLC is GRANTED.
2. The appeal filed by the City of Cranston is DISMISSED.
3. The appeal filed by Appellants Mattiucci, *et al* is DISMISSED.

Entered as an Administrative Order this 18th day of October, 2007 and herewith recommended to the Director or his designee for issuance as a Final Agency Order.



Mary F. McMahon
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 26 day of October,

2007.



W. Michael Sullivan Ph.D.
Director
Department of Environmental Management
235 Promenade Street, Fourth Floor
Providence, Rhode Island 02908

Assoc Director for
NEM

RE: KARLEETOR, LLC
APPLICATION 06-0557

AAD No. 07-004/FWA

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CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: Richard E. Crowell, Jr., Esquire, Suite B, 3016 Post Road, Warwick, RI 02886; Vito L. Sciolto, Esquire, 375 Pontiac Avenue, Cranston, RI 02910; Patrick J. Quinlan, Esquire, 72 Pine Street, 1st Floor, Providence, RI 02903; John O. Mancini, Esq., 55 Pine Street, Suite 5000, Providence, RI 02903; via interoffice mail to: Patty Allison Fairweather, Executive Counsel, DEM Office of Legal Services and Gregory S. Schultz, Esq., DEM Office of Legal Services, 235 Promenade St., 4th Fl., Providence, RI 02908; on this 26th day of October, 2007.

Brenda Macdon

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. 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.

