

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Lyf, Inc.
AAD No. 07-009/FWA
Application No. 06-0079
2008

DECISION AND ORDER

This matter came before the Administration Adjudication Division for Environmental Matters (“AAD”) on the Appeal of LYF, Inc. of a Notice of Denial issued by the Office of Water Resources of the Department of Environmental Management (“Department”) dated June 26, 2007 denying Applicant's application for permission to alter freshwater wetland. Applicant filed its appeal by letter dated July 13, 2007 and received on July 24, 2007.

Applicant waived the status conference as well as the ninety (90) day hearing requirement. Applicant filed a Motion for Summary Judgment on January 31, 2008. On February 6, 2008 Department requested additional time to respond to the Applicant's Motion for Summary Judgment. On February 18, 2008 an Order was issued allowing the Department until February 20, 2008 to respond. On February 28, 2008 a Notice was issued setting down the Motion for Summary Judgment for oral argument on March 10, 2008.

A conference was held on March 10, 2008 at which time attorney for the Department requested the opportunity to inquire from the Town Council of the Town of North Kingstown for a clarification of their December 15, 2006 letter which expressed a “substantive objection” to the Appellant's application. On March 11, 2008 an Order was issued continuing the hearing on Motion for Summary Judgment until April 11, 2008. On April 14, 2008 an Order was issued continuing the matter until April 24, 2008 due to the illness of the attorney for the Department. On April 24, 2008 Applicant filed a Motion to Continue Prehearing Conference in order to obtain a clarification relative to the “substantive objection” of the Town Council. On April 28, 2008 an Order was issued continuing the matter until May 24, 2008. On May 14, 2008 the Department filed a Supplemental Objection to Applicant's Motion for Summary Judgment alleging that on May 12, 2008 the North Kingstown Town Council voted to advise that it “disapproved” of the application.

On May 24, 2008 attorneys for the parties appeared for consideration of Applicant's Motion for Summary Judgment and Department's Supplemental Objection thereto. Applicant moved to withdraw its Motion for Summary Judgment based on the recent vote of clarification by the Town Council. The Department had no objection to Applicant's Motion to Withdraw Motion for Summary Judgment. The parties thereafter requested that the Hearing Officer issue a decision based on the record including stipulations of fact and acceptance of exhibits as full.

On May 30, 2008 an Order was issued granting Applicant's Motion to Withdraw its Motion for Summary Judgment. The Order also granted the joint Motion of the parties that the Hearing Officer issue a decision based on the legal arguments contained in the pleadings and the exhibits presented by Applicant in its Motion for Summary Judgment admitting said exhibits as full. The Order also contained the agreed stipulations of the parties as follows:

“On May 12, 2008 the Town Council of the Town of North Kingstown, in a duly scheduled meeting, voted to advise DEM that the words ‘substantive objection’ as contained in its letter dated December 15, 2006 was intended to be a ‘disapproval’ as to require the Department to deny the application in accordance with statute and regulation. The parties agree that if not for the ‘disapproval’ of the Town of North Kingstown the application would have been approved.”

STIPULATION OF FACTS

The parties agree on the following facts:

1. Applicant filed its Applicant No. 06-0079 to alter freshwater wetlands for property located in the Town of North Kingstown, R.I. on Gilbert Stuart Road designated as Lot 21 on Tax Assessor's Plat 38.
2. On December 11, 2006 the North Kingstown Town Council voted to advise the Department of Environmental Management (DEM) that it had a "substantial objection" to the Application No. 06-0079.
3. By letter dated June 26, 2007 DEM advised the Applicant that its application was denied due to the disapproval filed by the Town Council of the Town of North Kingstown.
4. During the pending of the appeal counsel for DEM requested a clarification from the Town council for the Town of North Kingstown as to whether the wording "substantial objection" expressed in its vote was intended to be a "disapproval" so as to constitute a veto under R.I.G.L. § 2-1-21 (a) and Rules 5.23 and 9.05 (c) (7) (d) of the DEM Freshwater Wetlands Act.
5. On May 12, 2008 the North Kingstown Town Council voted to advise the DEM that its vote was to constitute a "disapproval" of the application.
6. It is agreed between the parties that the application would be approved but for the vote of the North Kingstown Town Council to "disapprove".

ISSUES

The Applicant argues that notwithstanding the "disapproval" by the Town Council for the Town of North Kingstown that the Division should approve the application because the Town's "disapproval" is arbitrary, capricious and in violation of Applicant's rights.

The Division argues that the denial of Application No. 06-0079 is proper and should be approved. The Division also argues that in light of the "disapproval" of the Town Council of the Town of North Kingstown that it is without authority to approve the application.

ANALYSIS

The position of the Division is that it cannot approve the application because on December 11, 2006 the Town of North Kingstown voted to issue to DEM a letter of "substantial objection" of the subject application. The Division considers itself unable to approve the application, notwithstanding it be acceptable on all other grounds, because the language contained in R.I.G.L. § 21-1-21 (a) and Rules of 5.23 and 9.05 (c) (7) (d) of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (April 1998).

Applicant initially argued that even through the Town Council voted "that a substantive objection be filed", it did not amount to a "disapproval" by the Town so as to trigger the provisions of the statute. Applicant had taken the position that the Division has not properly applied its Rules and that although the Town's action may have been an objection it did not rise to the level of a "disapproval" necessary to require the Division to deny the application. Applicant also argued that if we accept the fact that the objection of the Town is considered "disapproval" the Town has acted in a manner which is arbitrary and capricious. The vote of the Town Council on May 12, 2008 clarified their intention and makes moot Applicant's first argument. The council in its most recent vote clearly states that it intends to prevent the issuance of a permit by expressing its "disapproval".

The Applicant's remaining argument is that the Hearing Officer issues a decision approving the application notwithstanding the "disapproval" by the Town. Applicant suggests argument on the fact that the Hearing Officer should disregard the provisions of R.I.G.L. § 2-1-21 (a) and Rules 5.23 and 9.05 (c) (7) (d) of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (April 1998). Applicant bases this argument on the

fact that the outcome is arbitrary, capricious and in violation of fundamental rights. This argument addresses constitutional issues.

Even if these issues were presented to AAD with the necessary factual underpinnings and argument, AAD must 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.” Applicant's constitutional arguments are preserved for the record but will not be addressed further in this direction.

FINDINGS OF FACT

After consideration of the stipulations of fact, documentary evidence and arguments of the parties I made the following findings of fact:

1. Applicant filed its applicant No. 06-0079 to alter freshwater wetlands for property located in the Town of North Kingstown, R.I. on Gilbert Stuart Road designated as Lot 21 on Tax Assessor's Plat 38.
2. On December 11, 2006 the North Kingstown Town Council voted to advise the Department of Environmental Management (DEM) that it had a “substantial objection” to the Application No. 06-0079.
3. By letter dated June 26, 2007 DEM advised the Applicant that its application was denied due to the disapproval filed by the Town Council of the Town of North Kingstown.
4. On May 12, 2008 the North Kingstown Town Council voted to advise the DEM that its vote was to constitute a “disapproval” of the application.
5. The vote of the Town Council of the Town of North Kingstown on December 15, 2006 as clarified in its vote of May 12, 2008 constitutes a “disapproval” as defined in R.I.G.L. § 2-1-21 (a) and Rules 5.23 and 9.05 (c) (7) (d) of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetland Act (April 1998).
6. The application would have been approved but for the vote of the North Kingstown Town Council to “disapprove”.

CONCLUSION OF LAW

After due consideration of the findings of fact and the legal arguments of the parties, I conclude the following as a matter of law.

1. The Administrative Adjudication Division for Environmental Matters (AAD) has jurisdiction over this matter pursuant to R.I.G.L. § 42-17.7-1 et seq.
2. The vote of the Town Council of the Town of North Kingstown on December 15, 2006, as clarified by its vote of May 12, 2008 meets the requirements of R.I.G.L. § 2-1-21 (a) and Rule 5.23 and 9.05 (c) (7) (d) of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (April 1998) so as to constitute a “disapproval” as defined therein.
3. Rhode Island General Laws provide cities and town governing bodies with the power and right to veto an otherwise acceptable application and the AAD is without the authority to reverse the Denial by DEM under such circumstances.
4. On June 26, 2007 DEM properly issued a Notice of Denial of Application No. 07-0014 in accordance with R.I.G.L. § 2-1-21 (a) and Rules 5.23 and 9.05 (c) (7) (d) of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act (April 1998).

Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. Applicant's Appeal is DENIED.

Entered as an Administrative Order this ___ day of _____, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins

Acting Chief Hearing Officer

Entered as a Final Agency 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