

6/12/08

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

RE: RAY REEDY, INC.
APPLICATION 07-0014

AAD NO. 07-013/FWA

DECISION AND ORDER

This is before the Administrative Adjudication Division of Environmental Matters ("AAD") on the Appeal of Ray Reedy Inc., c/o Johnston Corporation ("Applicant") of a Notice of Denial issued by the Office of Water Resources of the Department of Environmental Management ("Department") dated October 5, 2007 denying Applicant's Application for permission to alter freshwater wetland.

A status conference was held on November 8, 2007. An Order and Notice of Hearing and Prehearing Conference was issued to the parties at the status conference scheduling the Prehearing Conference for December 27, 2007. A motion to Continue Prehearing Conference was filed by Applicant and the Prehearing Conference was rescheduled for January 11, 2008.

On January 11, 2008 at 9:30 a.m. a Prehearing Conference was held. In attendance were Gregory Schultz, attorney for Department and Mary Shekarchi, attorney for Applicant. The attorneys for the respective parties represented to the Hearing Officer that they considered the only issue in dispute was the disapproval of the Town of North Kingstown and the Statutory Requirement that the Department must deny the application on that basis. The attorneys presented Prehearing Memoranda and requested that the Hearing Officer render a decision based on the stipulated facts without the necessity of a hearing. The Hearing Officer agreed and on January 16, 2008 a Prehearing Conference Record and Order was issued containing the stipulations of the parties. The Hearing Officer scheduled a conference for January 24, 2008 and reviewed with the attorneys for the parties the content of the Prehearing Conference Record and Order and how they would like to proceed. The attorneys advised the Hearing Officer that

the Prehearing Record accurately reflected their agreement and the attorneys jointly requested that the Hearing Officer render a decision based on the Record. The Hearing Officer advised the attorneys that he would render a decision based on the stipulated record but requested that both parties submit briefs reflecting their respective legal arguments.

Hearing Officer issued an Order on January 28, 2008 granting the joint request that a decision be rendered based on the submitted record. The Order also established a schedule for the submission of briefs. Briefs were submitted in a timely manner.

Subsequent to the filing of briefs a request was made by counsel for Department to the Town Council for the Town of North Kingstown for a clarification of the town's position. This question was raised in a case entitled Re: LYF, Inc., AAD 07-009/FWA which was being considered on identical issues to the instant case. The parties to the Ray Reedy matter agreed to wait for Town Council clarification as to whether they intended their "substantive objection" contained in their letter of June 5, 2007 was intended to be a "disapproval" so as to rise to the level of a veto under Statute and Regulation.

On April 24, 2008 counsel for Department filed a Motion to Continue the matter for sixty (60) days to await Town Council response. On April 28, 2008 an Order was issued scheduling the matter for hearing and review of the anticipated response of the Town Council of the Town of North Kingstown. On May 24, 2008 a conference was held with counsel for the respective parties. At that conference the parties agreed that on May 12, 2008 the North Kingstown Town Council met and voted to advise Department that its letter of June 5, 2007 (Applicant's Exhibit #16) was intended to be a "disapproval" intended to serve as a veto to the application under appeal. The parties agreed that this event would be considered by the hearing

officer as a "stipulated fact" for the purpose of arriving at decision without the necessity of additional proof.

The parties agreed to the following stipulation of facts and requested the Hearing Officer to adapt them in consideration of his decision:

STIPULATIONS OF FACT

1. Sometime in 2002, the RI Department of Environmental Management Office of Water Resources ("DEM") received the Applicant's Application to Alter Freshwater Wetlands (Application No. 02-0556) on that property located at approximately 75 feet south of North Quidnessett Road and Approximately 150 feet southwest of its intersection with North Briar Drive, across from utility pole No. 24 and further identified as the Town of North Kingstown Assessor's Plat 161, Lot 13 in the Town of North Kingstown, Rhode Island ("Property").
2. The Property is located in a NR-40 (Neighborhood Residential) Zoning District within the Town of North Kingstown.
3. The Applicant proposed to construct a three (3) bedroom single family dwelling with associated garage, driveway, septic system, deck, public waterline, utilities, and landscaping in a portion of a fifty (50') foot perimeter wetland associated with a swamp and within a one hundred (100') foot riverbank wetland associated with a intermittent stream.
4. During the Public Notice Comment Period, on November 3, 2003, the Town Council for the Town of North Kingstown voted to disapprove Application No. 02-0556.
5. On February 5, 2004, DEM issued its Notice of Denial for Application No. 02-0556.
6. After filing its Appeal of DEM's Notice of Denial for Application No. 02-0056, the Applicant informally met with the Department of Environmental Management ("DEM") and submitted revised plans for settlement.
7. Upon completing its review of the revised plans, DEM found the revised plans sufficient to grant a freshwater wetlands approval.
8. On February 13, 2006, the Applicant submitted those "sufficient to grant freshwater wetlands approval" revised plans to the Town of North Kingstown's Council requesting the Town lift its disapproval so the revised plans could be permitted by DEM.

9. On March 22, 2006, the Applicant submitted those "sufficient to grant freshwater wetlands approval" revised plans to the Town of North Kingstown's Council requesting the Town lift its disapproval so the revised plans could be permitted by DEM.
10. On April 10, 2006, the applicant appeared before the Town of North Kingstown Conservation Committee with the revised "sufficient to grant freshwater wetlands approval" plans and the conservation Committee still recommended that the previous Town Council disapproval remain in place.
11. Since the Town Council disapproval remained in place, settlement of Application No. 02-0056 was not an adequate option; on January 11, 2007, the Applicant submitted those same plans as a new Application to Alter Freshwater Wetlands under application No. 07-0014 on the subject Property.
12. Application 07-0014 is the same proposal as the revised settlement proposal that was denied by both the Town of North Kingstown Conservation Committee on March 22, 2006 and the Town Council on April 10, 2006.
13. Owner of the subject Property is Ray Reedy, Inc.
14. On December 29, 2006, the Owner appointed Richard L. Johnston, Esq. as its lawful attorney in fact to obtain all the necessary freshwater wetlands permits for the subject property.
15. The purpose of the proposed alteration in Application No. 07-0014 is to construct a significantly smaller home than proposed for the property in the first application No. 02-0056.
16. The proposed home in Application No. 07-0014 is a 910 square foot three (3) bedroom single family dwelling with an associated driveway, septic system, deck, public waterline, utilities and landscaping. This application did not include a garage.
17. The freshwater wetlands affected by the proposed project in Application No. 07-0014 include a fifty (50') perimeter wetland associated with a swamp and a one hundred (100') foot riverbank wetland associated with an intermittent stream.
18. On March 26, 2007, DEM informed the Applicant that Application No. 07-0014 was adequate for public comment period as required under the Freshwater Wetland Act, R.I.G.L. Section 2-1-18 et seq. ("Act").
19. The 45 day Public Comment Notice Period commenced on April 23, 2007 and ended on at June 7, 2007.

20. On May 24, 2007, the Town of North Kingstown Conservation Commission again recommended that the Town issued a substantive objection for Application No. 07-0014.
21. On June 5, 2007, the Town of North Kingstown Council Clerk forwarded DEM a copy of the Council's vote that a substantive objection be filed based on the Town's Conservation Commission's recommendation.
22. On September 28, 2007, Shawna Holdredge of DEM completed the biological review of application No. 07-0014 and indicated that the level of wetland impacts was not significant.
23. On October 3, 2007, Charles Horbert, DEM's Supervisor determined that the Town of North Kingstown's May 29, 2007 letter constituted a disapproval under the Act and was not a substantive objection because all of the wetland-related issues presented by the Town did not raise any new issues and were adequately evaluated by DEM.
24. On October 3, 2007, Charles Horbert, DEM's Supervisor determined that the proposed application did not result in any detrimental alterations to the subject wetlands.
25. DEM determined that the Applicant properly satisfied all of the review criteria under Rule 11.02 of the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act ("Rules").
26. The proposed project will not significantly reduce the suitability of the wetland as a whole to provide wildlife habitat and the wetlands will still be available for recreational uses.
27. The proposed project will not essentially change the natural character of the property under Section 2-1-21 of the Act.
28. The proposed project will not be unsuited to the land in its natural state under Section 2-1-21 of the Act.
29. The proposed project will not injure the rights of others under Section 2-1-21 of the Act.
30. The proposed project will not result in any random, unnecessary or undesirable alteration to the freshwater wetlands as defined under the Rules.
31. On October 5, 2007, DEM issued a Notice of Denial for Application No. 07-0014.
32. On October 5, 2007, DEM informed the Applicant that the only reason for its denial was the Town's disapproval under Section 2-1-21 (a) of the Act and Rule 9.05 (7) (c).

33. On October 23, 2007, the Applicant through its Attorney, appealed DEM's October 5, 2007 denial of application 07-0014 before this tribunal.
34. On May 12, 2008 the Town Council of the Town of North Kingstown, in a duly scheduled meeting, voted to advise the DEM that its expression of "substantive objection" as contained in its vote of June 5, 2007 was intended to be a "disapproval" so as to rise to a veto as provided for by Statute and Regulation.
35. DEM Office of Water Resources would have approved the application but for the Town's disapproval.

EXHIBITS

The parties agreed that the following exhibits be considered as full exhibits for the purposes of the Hearing Officer entering his decision:

- | | |
|------------------|-----------------------------------------------------------------------------------------------------------------------|
| Applicant's #1 | Copy of Scott Rabideau Resume. (2 pgs.) |
| Applicant's #2 | Copy of Scott Moorehead Resume. (1 pg.) |
| Applicant's #3 | Copy of Charles A. Horbert Resume. |
| Applicant's #4 | Copy of February 5, 2004 Denial Letter from DEM for Application No. 02-0056. (4 pgs.) |
| Applicant's #5 | Copy of Town Letter and Resolution date November 4, 2003. (2 pgs.) |
| Applicant's #6 | Copy of Town's Project Summary by Conservation Commission dated October 28, 2003. (2 pgs.) |
| Applicant's #7 | Copy of December 21, 2005 letter from DEM Attorney Greg Schultz to A. Louriston Parks, Esq., Town Solicitor. (1 pg.) |
| Applicant's #8 | Copy of February 13, 2006 letter to Applicant's Attorney Mary B. Shekarchi to Town Clerk, Jennette Holloway. (2 pgs.) |
| Applicant's #8.5 | Copy of Town Council Denial to lift disapproval based on revised settlement plans. (4 pgs.) |
| Applicant's #9 | Copy of Application dated and received by DEM, January 11, 2007. (3 pgs.) |

Applicant's #10	Copy of Power of Attorney and Deed. (2 pgs.)
Applicant's #11	Copy of Abutters List. (2 pgs.)
Applicant's #12	Copy of Abutters Map. (1 pg.)
Applicant's #13	Copy of March 24, 2007 letter to Applicant from DEM indicating application is adequate for notice. (2 pgs.)
Applicant's #14	Copy of Notice dated April 23, 2007. (2 pgs.)
Applicant's #15	Copy of Letter from Scott Rabideau of Natural Resource Services, Inc. to Applicant dated May 29, 2007. (2 pgs.)
Applicant's #16	Copy of letter from Town Clerk Holloway to Director Sullivan dated June 5, 2007 (2 pgs.) with attached Project Summary dated May 24, 2007 (4 pgs.). (Total 6 pgs.)
Applicant's #17	Biological Evaluation of Application to Alter Freshwater Wetlands dated September 28, 2007. (20 pgs.)
Applicant's #18	Copy of 100 year Flood Survey for North Quidnessett Road, (AP 161, Lot 13), North Kingstown, RI dated May 2003, by SFM Engineering. (13 pgs.)
Applicant's #19	Supervisors Determination dated October 3, 2007. (2 pgs.)
Applicant's #20	Copy of Notice of Denial of Application #07-0014 from DEM to Applicant dated October 5, 2007. (2 pgs.)
Applicant's #21	Copy of Site Plan. (1 pg.)
Applicant's #22	Copy of Narrative of Biological Impact for North Quidnessett Road, (AP 161, Lot 13) North Kingstown, Rhode Island, dated May 8, 2006. (20 pgs.)
Applicant's #23	Copy of Request for Administrative Hearing. (3 pgs.)
Applicant's #24	Copy of Robert S. DeGregorio Resume. (2 pgs.)

ISSUES

The parties raised the following issues for consideration:

For the Applicant

1. The Applicant's proposed project in Application No. 07-0014 does not represent a random, unnecessary, and/or undesirable alteration of any freshwater wetlands on the Property.
2. The Applicant's proposed alterations in Application No. 07-0014 will not essentially change the natural character of the land.
3. The Applicant's proposed alterations in Application No. 07-0014 will not be unsuited to the land in its natural state.
4. The Applicant's proposed alterations in Application No. 07-0014 will not injure the rights of others.
5. The Division incorrectly categorized the Town's May 29, 2007 vote as disapproval under R.I.G.L. Section 2-1-21 (a).
6. The Town's disapproval was arbitrary and capricious.

For the Division:

Whether the denial of Application No. 07-0014 is proper and should be approved.

ANALYSIS

The position of the Division is that it cannot approve the application because on June 5, 2007 the Town of North Kingstown issued to DEM a letter of disapproval of said 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. Section 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 also argues in its brief 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 has 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. Finally, Applicant argues 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.

Exhibit 16 Full is a letter from the Town Clerk of the Town of North Kingstown to the Director of the Department of Environmental Management dated June 5, 2007. It purports to enclose the action of the Town council relative to the subject application. The attached document is a record of vote of the Town Council of North Kingstown taken at a special meeting on May 29, 2007. It appears that the Town Council voted "that a substantive objection be filed to the Rhode Island Department of Environmental Management".

The Applicant in its brief made a two part argument:

1. That the action of the Town Council in expressing a "substantial objection" to the application did not constitute a "disapproval" as defined by Statute and Regulation and
2. That the "disapproval" issued by the Town was arbitrary and capricious in violation of Applicant's rights.

The vote of the Town Council on May 12, 2008 clarifies their intention and makes moot the argument contained in paragraph 1 above. 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 issue a decision approving the application notwithstanding the "disapproval" by the Town. Applicant bases this 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 legal authority 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 make the following findings of fact:

1. Sometime in 2002, the RI Department of Environmental Management Office of Water Resources ("DEM") received the Applicant's Application to Alter Freshwater Wetlands (Application No. 02-0556) on that property located at approximately 75 feet south of North Quidnessett Road and Approximately 150 feet southwest of its intersection with North Briar Drive, across from utility pole No. 24 and further identified as the Town of North Kingstown Assessor's Plat 161, Lot 13 in the Town of North Kingstown, Rhode Island ("Property").
2. The Property is located in a NR-40 (Neighborhood Residential) Zoning District within the Town of North Kingstown.

3. The Applicant proposed to construct a three (3) bedroom single family dwelling with associated garage, driveway, septic system, deck, public waterline, utilities, and landscaping in a portion of a fifty (50') foot perimeter wetland associated with a swamp and within a one hundred (100') foot riverbank wetland associated with a intermittent stream.
4. During the Public Notice Comment Period, on November 3, 2003, the Town Council for the Town of North Kingstown voted to disapprove Application No. 02-0556.
5. On February 5, 2004, DEM issued its Notice of Denial for Application No. 02-0556.
6. After filing its Appeal of DEM's Notice of Denial for Application No. 02-0056, the Applicant informally met with the Department of Environmental Management ("DEM") and submitted revised plans for settlement.
7. Upon completing its review of the revised plans, DEM found the revised plans sufficient to grant a freshwater wetlands approval.
8. On February 13, 2006, the Applicant submitted those "sufficient to grant freshwater wetlands approval" revised plans to the Town of North Kingstown's Council requesting the Town lift its disapproval so the revised plans could be permitted by DEM.
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10. On April 10, 2006, the applicant appeared before the Town of North Kingstown Conservation Committee with the revised "sufficient to grant freshwater wetlands approval" plans and the conservation Committee still recommended that the previous Town Council disapproval remain in place.
11. Since the Town Council disapproval remained in place, settlement of Application No. 02-0056 was not an adequate option; on January 11, 2007, the Applicant submitted those same plans as a new Application to Alter Freshwater Wetlands under application No. 07-0014 on the subject Property.
12. Application 07-0014 is the same proposal as the revised settlement proposal that was denied by both the Town of North Kingstown Conservation Committee on March 22, 2006 and the Town Council on April 10, 2006.
13. Owner of the subject Property is Ray Reedy, Inc.

14. On December 29, 2006, the Owner appointed Richard L. Johnston, Esq. as its lawful attorney in fact to obtain all the necessary freshwater wetlands permits for the subject property.
15. The purpose of the proposed alteration in Application No. 07-0014 is to construct a significantly smaller home than proposed for the property in the first application No. 02-0056.
16. The proposed home in Application No. 07-0014 is a 910 square foot three (3) bedroom single family dwelling with an associated driveway, septic system, deck, public waterline, utilities and landscaping. This application did not include a garage.
17. The freshwater wetlands affected by the proposed project in Application No. 07-0014 include a fifty (50') perimeter wetland associated with a swamp and a one hundred (100') foot riverbank wetland associated with an intermittent stream.
18. On March 26, 2007, DEM informed the Applicant that Application No. 07-0014 was adequate for public comment period as required under the Freshwater Wetland Act, R.I.G.L. Section 2-1-18 et seq. ("Act").
19. The 45 day Public Comment Notice Period commenced on April 23, 2007 and ended on at June 7, 2007.
20. On May 24, 2007, the Town of North Kingstown Conservation Commission again recommended that the Town issued a substantive objection for Application No. 07-0014.
21. On June 5, 2007, the Town of North Kingstown Council Clerk forwarded DEM a copy of the Council's vote to substantive objection be filed based on the Town's Conservation Commission's recommendation.
22. On September 28, 2007, Shawna Holdredge of DEM completed the biological review of application No. 07-0014 and indicated that the level of wetland impacts was not significant.
23. On October 3, 2007, Charles Horbert, DEM's Supervisor determined that the Town of North Kingstown's May 29, 2007 letter constituted a disapproval under the Act and was not a substantive objection because all of the wetland-related issues presented by the Town did not raise any new issues and were adequately evaluated by DEM.
24. On October 3, 2007, Charles Horbert, DEM's Supervisor determined that the proposed application did not result in any detrimental alterations to the subject wetlands.

25. DEM determined that the Applicant properly satisfied all of the review criteria under Rule 11.02 of the Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act ("Rules").
26. The proposed project will not significantly reduce the suitability of the wetland as a whole to provide wildlife habitat and the wetlands will still be available for recreational uses.
27. The proposed project will not essentially change the natural character of the property under Section 2-1-21 of the Act.
28. The proposed project will not be unsuited to the land in its natural state under Section 2-1-21 of the Act.
29. The proposed project will not injure the rights of others under Section 2-1-21 of the Act.
30. The proposed project will not result in any random, unnecessary or undesirable alteration to the freshwater wetlands as defined under the Rules.
31. On October 5, 2007, DEM issued a Notice of Denial for Application No. 07-0014.
32. On October 5, 2007, DEM informed the Applicant that the only reason for its denial was the Town's disapproval under Section 2-1-21 (a) of the Act and Rule 9.05 (7) (c).
33. On October 23, 2007, the Applicant through its Attorney, appealed DEM's October 5, 2007 denial of application 07-0014 before this tribunal.
34. On May¹², 2008 the Town Council of the Town of North Kingstown, in a duly scheduled meeting, voted to advise the DEM that its expression of "substantive objection" as contained in its vote of June 5, 2007 was intended to be a "disapproval" so as to rise to a veto as provided for by Statute and Regulation.
35. DEM Office of Water Resources would have approved the application but for the Town's disapproval.
36. The action by the Town Council of the Town of North Kingstown was a "disapproval" as defined in R.I.G.L. Section 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). Applicant argues that the outcome is arbitrary, capricious and in violation of fundamental rights.

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. section 42-17.7-1 *et seq.*
2. The vote of the Town Council of the Town of North Kingstown on June 5, 2007, as clarified by its vote of May 12, 2008 meets the requirements of R.I.G.L. § Section 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 October 5, 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).

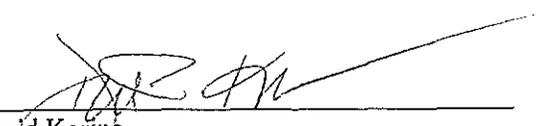
Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. Applicant's Appeal is DENIED.

Entered as an Administrative Order this 10th day of June, 2008 and

herewith recommended to the Director for issuance as a Final Agency Order.



David Kerins
Acting Chief 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 Order this 11th day of June, 2008.



W. Michael Sullivan, Ph.D., Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, Rhode Island 02908

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: Mary B. Shekarchi, Esquire, 33 College Hill Road, Suite 15-E, Warwick, RI 02886; via interoffice mail to John Langlois, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 11th day of June, 2008.



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.