

3/13/92

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

IN RE: John Travassos
Application No. 90-0746F

AAD No. 91-020/FWA

DECISION AND ORDER

This matter is before the Hearing Officer on the Motion to Compel Consideration of Alternative Design Proposals filed by John Travassos, Tiverton Industrial and Recreational Development Commission ("Applicant") in the above-entitled matter. A timely objection to the Motion was filed by the Division of Freshwater Wetlands ("Division"). At the request of the parties, oral argument was held on March 6, 1992 at the Offices of the Administrative Adjudication Division for Environmental Matters, One Capitol Hill, Providence, Rhode Island.

By way of background, the Division denied Applicant's permit application by letter dated November 6, 1991 ("denial letter"). Paragraph 6 of the denial letter listed three possible alternatives to the project identified as (a), (b), and (c). The subject of this Motion is the alternative numbered 6(b) which reads in pertinent part:

6. Alternatives to the project, as proposed, appear to exist which, if incorporated into a revised design would significantly reduce environmental impacts and address the concerns of the Department. These alternatives may include but are not limited to:

b. The applicant has not incorporated sufficient mitigation minimization

techniques at the major wetland crossing, stations 8+00 through 11+00, to address the undesirable negative effects of the proposed project to unique and valuable wetland areas. Such alternatives may include but not be limited to reduction of the width overall of the proposed crossing disturbance and incorporation of a bridging design or series of bridges which span the entire unique wetland area (+-220 linear feet).

On February 21, 1992, the day of the prehearing conference in this matter, Applicant filed an alternative design proposal with the Division which Applicant asserts incorporates all the alternatives listed in Paragraph 6(b). On that same date, Applicant filed the instant Motion to Compel with AAD.

As grounds for its Motion, Applicant states that the alternative design proposal which incorporates a five span bridging system and other alternatives was submitted in direct response to paragraph 6(b) of the denial letter and in an effort to meet the concerns of the Division. The Applicant maintains that if the alternative proposal was reviewed by the Division and deemed acceptable, the full hearing on the Application may prove unnecessary.

In response, the Division raises essentially three issues. First, the Division contends that an AAD hearing officer's jurisdiction is limited to a review of the application as submitted and denied. Second, that such an order would effectively circumvent the application process without authority, and finally, that assuming jurisdiction, the hearing officer should refrain from issuing an order compelling review as it would "wreak havoc" on the regulatory and appellate review process.

After consideration of all the arguments of counsel and the written submissions, the following factors are worthy of consideration. The denial letter was issued on November 6, 1991 incorporating inter alia, the alternative of a bridging system as outlined in paragraph 6(b). On February 21, 1992 the Applicant submitted revisions which they contend comport with paragraph 6(b). On the same day the alternative design was filed, the Applicant filed its motion to compel review with AAD. Based on the facts as presented, it appears evident that the revisions were submitted in an effort to meet the Division's concerns as set forth in the denial letter. From the wording of the denial letter the listed alternative "if incorporated into a revised design would significantly reduce environmental impacts . . ." (Denial letter at p. 3.)

Rule 7.07' of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act ("Rules") states:

7.07 Amendments to the Proposal During Review Period -

If, during the review process, it is found that an application fulfills any one of the criteria which may cause random, unnecessary and/or undesirable destruction of fresh water wetlands (as outlined in Section 5.03 (c)) the applicant will be so informed as soon as is practical [sic] possible. The applicant may then amend his/her proposal or provide mitigating measures.

I do not know whether Rule 7.07 was adhered to by the Division during the Application process. Similarly, I do not know whether Applicant may have been advised of the Division's findings that the application fulfilled one of the criteria in Rule 5.03(c) and failed to amend the proposal during the review process as allowed by Rule 7.07. Assuming arguendo that the hearing officer has jurisdiction to decide the Motion, such facts would bear upon my decision.

As stated previously, the alternative design proposals were filed on February 21, 1992 and a Motion to Compel filed simultaneously.

I am deferring a ruling on the Motion to Compel and affording the Division a reasonable opportunity to voluntarily review the submissions made by Applicant on February 21, 1992. Should this issue remain outstanding at the commencement of the

hearing on April 6, 1992, Applicant may then press its Motion, additional argument may be heard at that time and a ruling will issue.

Entered as an Administrative Order this 13th day of March, 1992.

Kathleen M. Lanphear

Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th floor
Providence, RI 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 Dennis Esposito, Adler Pollock & Sheehan, Inc., 2300 Hospital Trust Tower, Providence, RI 02903 and to Michael K. Marran, Esq., Two Charles Street, Providence, RI 02904-2269 on this 13th day of March, 1992.

Dennis L. Stewart