

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island

IN RE: DANIEL KAPLAN

AAD No. 92-004/WRE
CRMC File No. 90-07-91
March 22, 1993

DECISION ON DIVISION'S MOTION TO DISMISS

This matter came before Hearing Officer McMahon for oral argument on November 12, 1992 pursuant to the Defendant's (sic) Motion to Dismiss filed by the Division of Water Resources ("Division") and the Memorandum in Support of Objection to Motion to Dismiss filed by counsel for Mr. and Mrs. Kaplan (hereinafter referred to as "Petitioners"). A separate Objection has not been filed.

The Division seeks dismissal on three grounds: due to the Administrative Adjudication Division's ("AAD") lack of subject matter jurisdiction; failure to state a claim upon which relief can be granted; and failure to join an indispensable party.

Background

On June 17, 1992 Petitioners' attorney John B. Webster filed a request for hearing on the revocation by the Division of Water Resources of the Kaplans' Water Quality Certificate. On August 13, 1992 the Coastal Resources Management Council ("CRMC"), after considering the Kaplans' application to construct and maintain a timber pier, ramp and float for residential use in Nanaquaket Pond in Tiverton, Rhode Island, on land and in tidal waters adjacent to 294 Nanaquaket Road, Tiverton, Rhode Island, issued its final decision denying the application. Among its findings of fact was that "the evidence showed that the RIDEM has denied water quality certification to the applicant." Daniel and Kim Kaplan, No. 90-3-91, CRMC Decision dated July 21, 1992, issued August 13, 1992, at 8.

Arguments

Division's counsel Gary Powers contends that the Division's examination of the water quality was requested by the CRMC as part of its consideration of the various aspects of Petitioners' application for a construction permit and that the final decision of the CRMC denying the application was rendered prior to the Division's adverse determination as to water quality. Thus, the CRMC denial was based upon factors other than the Division's determination as to water quality.

If the CRMC had indeed relied upon the Division's denial¹, Mr. Powers argues, then the avenue for proper review was through appeal of the CRMC Decision. He stated that the water quality certificate, and its revocation, was merely an advisory ruling by the Division.

Attorney Webster, on the other hand, asserts that the denial or revocation of a Water Quality Certificate is a final agency decision ripe for an appeal and the fact that CRMC requires the certificate prior to it acting on an application is irrelevant. In oral argument, Mr. Webster further contended that even if he were successful in overturning the CRMC decision, his client could not proceed with the proposed project until he had obtained a water quality certificate; he needs two documents to build: a favorable decision from CRMC and a water quality certificate from DEM.

DECISION AND ORDER

¹ The record indicates that water quality certification was denied prior to the CRMC final decision—as set forth in paragraph 20 of the CRMC Decision.

Section 8.00 of the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters (“AAD Rules”) provides that parties in contested matters before the ADD may make such motions “which are permissible under these Rules and the R.I. Superior Court Civil Rules of Procedure (sic)” (“Court Rules”). The Division seeks dismissal pursuant to Court Rule 12 and claims three grounds therefor: Rule 12(b)(1)—lack of jurisdiction over the subject matter; Rule 12(b)(6)—failure to state a claim upon which relief can be granted; and Rule 12(b)(7)—failure to join an indispensable party. Petitioner argues that although the Division’s motion is phrased as a “motion to dismiss”, it seeks to present “evidence” that is outside the confines of the pleadings and, as such, must be treated as a motion for summary judgment.

Court Rule 12 addresses the circumstances in which a motion to dismiss is deemed one for summary judgment:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

The above provision, while it clearly applies to certain 12(b)(6) motions, is not applicable to the Division’s motion on the two grounds of subject matter jurisdiction or indispensable party.

On the issue of subject matter jurisdiction, the AAD has been granted jurisdiction over “[a]ll contested enforcement proceedings, all contested licensing proceedings and all adjudicatory proceedings” wherein an administrative penalty is sought. R.I.G.L. 42-17.7-2. The Division avers that the determination of impact on water quality served solely as an advisory ruling which could be considered by the CRMC and that the only license herein is the CRMC permit which was denied and is presently on appeal to the Superior Court. Petitioners assert that the water quality certificate and its revocation constitute the contemplated “contested licensing proceeding” which brings it properly before the AAD.

The role of water quality certificates in the permitting process has been clarified through the issuance of the Rhode Island Policy on the Application of Water Quality Standards in October 1990 and again in March 1991. In the March 1991 Policy iteration, water quality certificates are defined as “statements of a proposed project’s compliance with water quality regulations” and are “only to advise agencies as to whether a proposed project would violate water quality standards.” at pp. 1-2. In interpreting its own regulations and guidelines, the Division has determined that certifications are only advisory in nature, and under *Gryguc v. Bendick*, 510 A.2d 937, 939 (RI1986), such interpretation must be given great weight.

In addition, this tribunal has addressed the function of water quality certification where applications to alter freshwater wetlands are concerned:

The Policy states that the Division of Water Resources should not issue or deny permits, but merely advise the Coastal Resources Management Council, the Wetlands Section, or any other agency as to whether a proposal would violate water quality standards. Page two of the [October 1990] Policy clearly indicates that issuance of a water quality certificate means that an application to alter freshwater wetlands met water quality standards but that an application may be denied if a certificate is not approved. The appeal would be on the application’s denial, not on the certificate. *Richard Alegria*, AAD No. N/A; No. 88-0894F (Decision and Order dated March 2, 1991, p. 12), appeal pending (footnote omitted).

In *Alegria*, this tribunal concluded that because the Wetlands Section had identified the proposed project’s impact on water quality as a concern and a basis for denial of the application, the water quality certificate issue was properly before her, “though not a matter giving rise to a separate right to an adjudicatory hearing” at 12. The within matter obtains a similar result with the CRMC permit.

As for counsel's argument that his client will be cited with a Notice of Violation ("NOV") should he build without a water quality certificate, I do not accept this as a quid pro quo. The Division has acknowledged that its certificates are merely advisory; there is no independent regulatory requirement wherein if one is not obtained, an NOV will be issued. It is certainly conceivable, however, that absence of a certificate indicating a project will have no adverse impact on water quality may cause the Division to inspect to determine whether there is adverse impact and an NOV may indeed be issued upon such a finding. In such an instance, Respondents would certainly have a right to a hearing and the Division would thereupon bear the burden of proving each and every act or omission alleged. R.I.G.L. 42-17.6-4.

Accordingly, in reviewing the arguments of counsel and the pertinent statutes and regulations, I find that water quality certification serves only as an advisory opinion as to the impact of a proposed project on water quality and is not a "license" as contemplated in AAD's jurisdictional statute. Having found that AAD is without subject matter jurisdiction herein, it is unnecessary to address the Division's remaining grounds for dismissal.

Wherefore, after consideration thereof, it is hereby

ORDERED

That Petitioners' request for hearing is hereby denied and dismissed.

Entered as an Administrative Order this 8th day of March, 1993.

Mary F. McMahon
Hearing Officer

The within Decision and Order is hereby adopted as a Final Agency Order this 22nd day of March, 1993.

Malcolm J. Grant
Director (Designated)