

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

IN RE: Augustino Delfarno AAD No. 92-048/FWE  
Notice of Violation No. A6743, C-200

DECISION ON DIVISION'S MOTION TO DISMISS

This matter came before Hearing Officer McMahon for oral argument on March 10, 1993 pursuant to a Motion to Dismiss and a Motion to Reconsider a previous order issued by the Administrative Adjudication Division ("AAD"), both filed by the Division of Freshwater Wetlands ("Division"). The Motion to Dismiss represented that the Administrative Adjudication Division was without subject matter jurisdiction due to a previously executed Consent Agreement. Respondent has filed an objection to both motions.

Background

The pertinent facts are not in dispute and may be summarized as follows:

- (1) The Division issued a Notice of Violation and Order ("NOVAO") to Respondent dated February 2, 1984, wherein Respondent was notified of alleged violations of R.I.G.L. 2-1-21, ordered to take certain corrective actions, and ordered to pay an administrative fine.
- (2) In lieu of an Administrative Hearing on said NOVAO, the parties entered into a Consent Agreement on or about April 27, 1988, wherein the parties agreed upon the terms and conditions for Respondent to restore the subject wetland.

- (3) Said Consent Agreement also provided that if Respondent failed to comply with any provisions of said Agreement, Respondent shall pay an administrative penalty of \$1,000.00, and an additional \$1,000.00 for each month that Respondent remains in violation of said Agreement, except that the Director of DEM for good cause shown, may defer or reduce such fine.
- (4) Said Consent Agreement further contained a provision that "The parties agree that this Agreement shall be deemed a final administrative decision under the Administrative Procedures Act (Title 42, Chapter 35 of the General Laws of Rhode Island) from which no timely appeal was taken, and which is enforceable by resort to Superior Court."
- (5) The Division wrote to Mrs. Carol DelFarno on or about October 16, 1992, stating that because Augustino DelFarno had failed to comply with certain provisions of the Consent Agreement, Respondent was required to pay an administrative penalty of \$1,000.00 and an additional \$1,000.00 for each month he has remained in non-compliance with the Agreement. Full payment of \$48,000.00 was required to be made within ten (10) days, or this matter would be referred to Division's Legal Services.
- (6) Respondent and Carolyn DelFarno filed the within Request for Hearing on October 28, 1992 wherein they requested a hearing on the administrative penalty "assessed by the Freshwater Wetlands Division in their letter" (the letter referenced in paragraph (5) above) as well as on other matters set forth in the Division's letter.

#### Arguments

The Division contends that this matter is improperly before the Administrative Adjudication Division ("AAD") due to the provision in the Consent Agreement which designated it a final administrative order under the Administrative Procedures

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Act, R.I. Gen. Laws 42-35-1 et seq. Pursuant thereto, any non-compliance with the Consent Agreement would be enforceable in Superior Court, not the AAD.

Respondent argues that they have a right to be heard, not on the original NOVAO, but on the allegations of additional unauthorized alterations as set forth in the Division's letter, and on the Division's statement that they have not complied with the Consent Agreement and are therefore subject to the administrative fine levied in the DEM letter of October 16, 1992. Citing 42-17.6-4 that "[w]henver the director seeks to assess an administrative penalty on any person, the person shall have the right to an adjudicatory hearing . . .", Respondent's counsel argues that the matter is properly before the AAD.

#### DECISION AND ORDER

The sole issue for consideration by this Hearing Officer is whether the AAD has jurisdiction to entertain Respondents' claim for the initiation of formal adjudicatory proceedings after a Consent Agreement has been entered. This same issue was addressed in A. Cardi Realty Corp., AAD No. 92-023/FWE (Show Cause Decision dated May 18, 1992); Joseph & Jean King, AAD No. 92-050/FWE (Decision on Division's Motion to Dismiss dated March 8, 1993); and in Robert B. & Denise Jakob, AAD 031093

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No. 92-049/FWE (Decision on Division's Motion to Dismiss dated March 8, 1993.) Therein, as here, the Consent Agreement was entered into by the parties in lieu of an Administrative Hearing regarding the alleged violations in the NOVAO. Said Consent Agreement contained the terms and conditions of the order agreed upon for resolution of the issues that arose pursuant to the NOVAO as well as an admission of jurisdictional facts. It also provided for the imposition of certain monetary penalties upon Respondents' failure to comply with the Consent Agreement. It was further specifically provided in the Consent Agreement that "The parties agree that this Agreement shall be deemed a final administrative decision . . . from which no timely appeal was taken, and which is enforceable by resort to Superior Court."

In Cardi, after an extensive review of the pertinent statutes, this tribunal held:

A clear reading of the statutes demonstrates that the AAD lacks jurisdiction to entertain Cardi's claims for the initiation of formal adjudicatory proceedings. Cardi has effectively waived its right to an adjudicatory hearing and the Consent Agreement has become a final administrative decision; therefore, it is not subject to an appeal to AAD nor a request for a hearing. The terms of the Consent Agreement are clear and unambiguous. The parties agreed that the Consent Agreement constituted a final administrative adjudication enforceable in Superior Court. The APA itself provides that resort from final administrative adjudications are to the Superior Court. Cardi at 9.

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I reach the same result in this matter. In order for the Division to obtain the relief sought in its letter dated October 16, 1992, it may have to pursue an action in Superior Court and meet the concomitant burden of proof. In such a forum, Respondent would be afforded the opportunity to present his case.

As for the "additional unauthorized alterations" alleged in the Division's letter, they are not yet the subject of a Notice of Violation and a resulting request for hearing which would bring the matter properly before the AAD.


Based on the foregoing, Respondent's request for hearing must be denied and this matter dismissed for lack of subject matter jurisdiction.

Wherefore, it is hereby

ORDERED

1. That Respondent's request for hearing is hereby denied and dismissed.

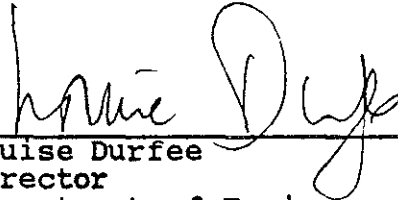
Entered as an Administrative Order this 11th day of March, 1993.

  
Mary F. McMahon  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
One Capitol Hill, Third Floor  
Providence, RI 02908

031093

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The within Decision and Order is hereby adopted as a  
Final Agency Order this 15<sup>th</sup> day of March, 1993.



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Louise Durfee  
Director  
Department of Environmental Management  
9 Hayes Street  
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within  
Decision on Division's Motion to Dismiss to be forwarded via  
regular mail, postage prepaid to George M. Prescott, Esq., P.  
O. Box A/300 Front Street, Lincoln, RI 02865 and via  
interoffice mail to Patricia C. Solomon, Esq., Office of Legal  
Services, 9 Hayes Street, Providence, RI 02908 on this 15<sup>th</sup>  
day of March, 1993.

