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

IN RE: Everett Campbell AAD No. 91-014/FWE
Notice of Violation No. C91-0025

DECISION AND ORDER ON DIVISION'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Hearing Officer on written Motion For Partial Summary Judgment ("Motion") filed by the Division of Freshwater Wetlands ("Division") of the Department of Environmental Management ("DEM") in the above-captioned matter.

Said motion is properly before this Hearing Officer pursuant to the Freshwater Wetlands Act R.I.G.L. Section 2-1-18 et seq., as amended (hereinafter "Act"), and R.I.G.L. Section 42-17.1-2 and Chapter 42-17.6; statutes governing the Administrative Adjudication Division R.I.G.L. Section 42-17.7-1 et seq., as amended; the Administrative Procedures Act R.I.G.L. Section 42-35-1 et seq., as amended; the duly promulgated Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act; and the Administrative Adjudication Division Rules of Practice and Procedure ("AAD Rules").

The Division issued a Notice of Violation and Order ("NOVAO") to the Respondent on February 11, 1991. which was received by Respondent on February 13, 1991.

The NOVAO alleged a violation of Section 2-1-21 of the General Laws of Rhode Island, 1956, as amended, in that the Respondent proceeded to alter freshwater wetlands in one (1) instance without having first obtained the approval of the Director of the Department of Environmental Management. Said NOVAO alleged specifically that an inspection of a portion of property owned by the Respondent and located immediately east of Saunders Brook Road, approximately 30 feet south of the intersection of Saunders Brook Road and Chestnut Hill Road, Assessor's Plat 11, Lot 72 now merged with Westcott Beach Plat, addition 1, lot 68 in the Town of Glocester, Rhode Island, on November 14, 1990 at 9:30 a.m. revealed that in violation of R.I.G.L. Section 2-1-21, Respondent did accomplish or permit alterations of freshwater wetlands by:

Instance (1)

> House, shed, and Tennis/Basketball Court construction with associated paving, filling, grading, and clearing into that area of land within 100 feet of the edge of any flowing body of water less than 10 feet in width. Said alterations have resulted in the loss and disturbance of approximately 15,000 square feet of wetland.

Said NOVAO ordered the Respondent pursuant to R.I.G.L. Sections 2-1-23, 2-1-24, 42-17.1-2(v) and 42-17.6 to cease and desist immediately from any further alteration of the above-described freshwater wetland(s), and to restore said freshwater wetland to its state as of July 16, 1971, insofar

as possible before March 1, 1991, and also imposed an administrative penalty in the sum of One Thousand Dollars ($1,000.00) to be paid within ten (10) days of receipt of said NOVAO.

Respondent filed a timely request for an administrative hearing which was received by the Division on February 19, 1991. The Administrative Adjudication Division conducted a Prehearing Conference ("PHC") and the requisite PHC Record was entered on August 13, 1992 by the Hearing Officer who conducted said PHC. Said PHC specified the stipulated facts which were agreed to by the parties and listed the issues to be resolved after hearing.

After the PHC, the Division filed the instant Motion for Partial Summary Judgment, which included its Memorandum of Law, and an affidavit of Stephen J. Tyrell, a Principal Natural Resource Specialist with the Division, in support of its Motion.

Everett Campbell ("Campbell"/"Respondent") thereupon filed a timely written objection to Division's Motion and set forth therein his arguments in support of his Objection to Division's Motion.

A hearing on the Motion was held before this Hearing Officer on March 22, 1993.

Rule 8.00 of the AAD Rules specifies that "The types of motions made shall be those which are permissible under these Rules and the R. I. Superior Court Civil Rules of Procedure."

Rule 56 of the Superior Court Rules governs Motions for Summary Judgment and 56(c) provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

The Division maintains that no genuine issue as to any material fact relating to Respondent's liability (or responsibility) exists in this matter, nor as to Division's entitlement to complete restoration of the subject site, and that it is, therefore, entitled to partial summary judgment as to liability and restoration as a matter of law.

Division asserts that the stipulated facts in the PHC Record, the Respondent's Response to Request for Admissions, and the Affidavit of Division's expert, Mr. Tyrell, establish: (1) that the subject property is now owned by the Respondent and that he owned said property prior to and at

the time the NOVAO was issued, (2) that a freshwater wetland exists on said property, (3) that Respondent constructed or permitted the construction of an addition on the house, a tennis court, a shed and a driveway on said property, subsequent to the passage of the Act, (4) that Respondent altered said freshwater wetland without the requisite permit, and (5) that said alterations alter the character of the one hundred (100') foot riverbank wetland on the site.

It is the Division's contention that its Motion should be granted since there is no dispute whatsoever as to the material facts that give rise to the legal conclusion that Campbell is responsible for the wetlands alterations, and that there are no disputed facts which should bar Division's entitlement to complete restoration.

It is argued by Respondent that his Response to Division's Request for Admissions does not mean that the addition to the existing house, the tennis court, the shed and the driveway were not there prior to Respondent's purchase of the subject property. Respondent contends that he responded to requests which were in the alternative, i.e., that he either (1) constructed said items or (2) they existed on the property when he purchased it; and that Respondent is not responsible for alterations that occurred prior to his purchase of said property.

Respondent further argued that the requests for admission were only made to Everett Campbell and not to the other three owners of the property; that the property was purchased in its current state (except for the tennis court); and that the activities complained of predated Respondent's ownership of the subject property.

The NOVAP states that an inspection of said property on November 14, 1990 revealed that Respondent did accomplish or permit certain alterations in violation of the Act.

The parties in the PHC Record stipulated that the Respondent was the legal owner of the subject property at the time the NOVAO was issued and that he is the current owner of said property.

Mr. Tyrell in his affidavit states that on November 14, 1990 he inspected the site and "determined that Everett B. Campbell, III et ux et als ("Campbell") altered or permitted the alteration of the freshwater wetlands on the site." The affidavit asserted that he has personal knowledge and is very familiar with the subject property; that he personally investigated the circumstances and activities that led to the Division's issuance of the NOVAO; that in his opinion the freshwater wetland on the site was altered; that the alterations for which Respondent was cited change and alter the character of said wetland on the site; and that

prior to issuance of the NOVAO he reviewed aerial photographs and concluded that the alterations which he observed "occurred during Campbell's period of ownership of the site."

Division did not specify what, if any activities (excavation, bulldozing, clearing, grading, filling or construction work) were actually being conducted during its inspection on November 14, 1990, and although the standard cease and desist order was included in the NOVAO, it is unclear whether the alterations were completed prior to said date. The record does not indicate when Respondent acquired the property nor the encompassing period of ownership.

The Division's conclusions as to the Respondent's responsibility for the alterations, and the time frame during which prohibited activities were conducted apparently were based essentially upon certain of Respondent's responses to Division's Request for Admissions.

The parties differ as to the meaning of the pertinent responses to Request for Admissions, and Respondent contends that he was responding to Requests which were in "the alternative." The Respondent refutes the purported admissions, and controverts Division's allegations that Respondent is responsible for the activities "complained of" by the Division. Respondent affirmatively represents that

the subject properly was purchased by him in its present state, and asserts that the prohibited alterations in question predated his ownership of the property.

The Respondent refutes the conclusory assertions set forth in the Affidavit of Division's expert that "On November 14, 1990, I inspected the site and determined that Everett B. Campbell, III et ux et als (Campbells) altered or permitted the alteration of the freshwater wetlands on the site."

Respondent affirmatively denied the conclusion of the Division's expert that the alterations occurred during Campbell's period of ownership of the site. Said expert stated that he utilized aerial photographs to arrive at this conclusion, but no explanation was offered as to how he was able to determine that said alterations were conducted during the period of time when Respondent owned the property. Since the Division did not assert that Respondent was the owner of the subject property at all times from the effective date of the Act through the date when the prohibited activities were conducted, it therefore remains to be determined whether Respondent owned said property at the time said alterations occurred and also whether Respondent or his agents conducted said alterations.

Respondent did not submit an affidavit to substantiate his position; however, there is no absolute requirement under Rule 56 that the non-moving party submit an affidavit opposing a motion for summary judgment. Despite such failure, when the moving party fails to establish the absence of a material issue of fact, the motion should be denied. Nichola v. John Hancock Mut. Life Ins. Co., 471 A.2d 945 (R.I. 1984).

The Hearing Officer's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 447 U.S. 242 (1986). The purpose of summary judgment is issue finding, not issue determination. Saltzman v. Atlantic Realty Co., Inc., 434 A.2d 1343 (R.I. 1981).

Respondent has sustained his burden of setting forth specific facts showing that there is a genuine issue of material fact to be decided. Respondent has specified the facts which he maintains will substantiate his contention that neither he nor his agents nor servants altered or permitted the alteration of the wetlands.

After reviewing the pleadings, the admissions on file, together with the Division's affidavit, the Memorandum and arguments of counsel in this matter, I find that a genuine issue of material fact exists and that Division is not entitled to partial summary judgment as a matter of law, wherefore, Division's Motion should not be granted.

Therefore, it is hereby

ORDERED

1. Division's Motion for Partial Summary Judgment is denied.

Entered as an Administrative Order this 15th day of April, 1993.

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

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CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order on Division's Motion for Partial Summary Judgment to be forwarded via regular mail, postage prepaid to Arlene Violet, Esq., 147 County Road, P. O. Box 85, Barrington, RI 02806 and via interoffice mail to Patricia C. Solomon, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 16th day of April, 1993.

Bruce L. Stewart