

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

IN RE: Justin Parrillo  
Notice of Violation No. C89-0144

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. § 2-1-18 et seq., as amended (hereinafter "Act"), and R.I.G.L. § 42-17.1-2 and Chapter 42-17.6; statutes governing the Administrative Adjudication Division R.I.G.L. § 42-17.7-1 et seq., as amended; the Administrative Procedures Act R.I.G.L. § 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 above-captioned freshwater wetlands enforcement action (NOV No. C89-0144) has previously been consolidated with ISDS Suspension No. IS-8907-2 (both matters involve alleged violations concerning the same Respondent and the same house)

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and the adjudicatory hearing of both matters has been scheduled for hearing commencing on March 23, 1992. Said Motion is deemed to apply only to the NOV No. C89-0144.

The Division issued a Notice of Violation and Order ("NOVAO") to the Respondent on August 23, 1989, which was received by Respondent on August 28, 1989.

The NOVAO alleged a violation of § 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 property owned by Respondent and located east of Brookdale Street, approximately 100 feet north of Wilbur Avenue, opposite pole #2, Assessor's Plat 18, Lot 222 and 223 in the City of Cranston, Rhode Island, on 1 August 1989 at 0930 revealed that in violation of RIGL Section 2-1-21, Respondent did accomplish or permit alterations of freshwater wetlands by:

Instance (1)

Foundation construction, filling, vegetative clearing, grading and creating soil disturbance with a 100 year floodplain and within a riverbank wetland, that area of land within 200 feet of a flowing body of water greater than 10 feet wide (Meshanicut Brook), resulting in the alteration of approximately 10,500 square feet of wetland.

Said NOVAO ordered the Respondent pursuant to RIGL 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 their state as of July 16, 1971, insofar as possible before September 30, 1989; 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 August 29, 1989.

The Administrative Adjudication Division conducted a Prehearing Conference ("PHC") and the requisite PHC Record was entered on November 21, 1991 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 David Vitello, a Senior Natural Resource Specialist with the Division, in support of its Motion.

Justin Parrillo ("Respondent") thereupon filed a timely written objection to Division's Motion and submitted a Memorandum of Law in support of his Objection to Division's Motion.

Neither party requested oral argument. Whereas all parties have responded to said Motion, and oral argument is not warranted since the Motion involves a matter as to which presentation of testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved, I am therefore ruling on said Motion without holding a hearing thereon.

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 exists in this matter, and that it is, therefore, entitled to partial summary judgment as a matter of law.

Division asserts that the Respondent agreed to certain stipulated facts in the PHC record which establish: (1) that the subject property is owned by the Respondent, (2) that there are freshwater wetlands located on said property, (3) that Respondent altered the freshwater wetlands on the site, and (4) that Respondent did not follow the requisite procedure for obtaining the necessary approval.

Additionally, the Division provided Mr. Vitello's affidavit in support of its Motion, wherein he stated that in the conduct of his duties as a Senior Natural Resource Specialist with the Division, he, personally, became familiar with subject property and that he had personal knowledge of the facts set forth in said affidavit. He also stated that in addition to his site inspections, and visual observations, he reviewed aerial photographs, USGS topographical maps, FEMA maps, Cranston Land Evidence Records and the Freshwater Wetlands files. Mr. Vitello proffered his expert opinion that freshwater wetlands were located on Respondent's subject property and that alterations of approximately 10,500 square feet of wetland was accomplished at the site, specifically house construction, filling, vegetative

clearing, grading and creating said disturbances occurred within a 200 foot riverbank wetland and within the 100-year floodplain. He further stated that his review of the Division's records enabled him to determine that although Respondent filed a preliminary determination request, Respondent did not file a formal application to alter the freshwater wetlands.

The Respondent in his Memorandum of Law submitted in support of his Objection to Division's Motion maintains that the Division has failed to carry its burden of proving that there are no genuine issues of material fact outstanding between the parties.

In support of his position, Respondent argues that the Division's request for summary judgment should be denied since the parties have agreed that whether freshwater wetlands are present on the site is one of the issues to be resolved by the Hearing Officer (Disputed Issue No. 1 in the PHC Record). Also, Respondent urges that the Division has failed to show that the subject property contains wetlands since Mr. Vitello has not as yet qualified as an expert.

In order to consider the issues raised by the parties and to resolve seemingly contradictory views, a review of the PHC Record and the governing statutes is warranted.

The PHC Record provides (in pertinent part) as follows:

VI. Stipulations:

The parties agree to stipulate to the following facts:

14. Respondent engaged in foundation construction, filling, vegetative clearing, grading and creating soil disturbance, within a riverbank wetland that area of land within 200 feet of a flowing body of water greater than 10 feet wide (Meshanicut Brook).
15. The Respondent did not file a formal permit application relating to the alteration of freshwater wetlands with the Department.

VII. Disputed Issues:

Disputed issues to be resolved by the Hearing Officer after hearing are as follows:

1. Whether freshwater wetlands are present on the subject site;
2. Whether a 100-year flood plain exists on the subject site;
3. Whether such alterations alter the character of freshwater wetlands and are therefore a violation of the Act, and
4. Whether the Department's issuance of a NOVAO was proper and should be affirmed.

R.I.G.L. § 2-1-21(a) provides that: "No person . . . may . . . add to or take from or otherwise alter the character of any freshwater wetland as herein defined without first obtaining the approval of the director of DEM."

R.I.G.L. § 2-1-20 supplies the definitions of the terms used in said Chapter above:

(d) provides that the term "Fresh Water Wetlands", as used in this chapter, shall include, but not be limited to, marshes; swamps; bogs; ponds; rivers; river and stream flood plains and banks; areas subject to flooding or storm flowage; emergent and submergent plant communities in any body of fresh water including rivers and streams and that area of land within fifty feet (50') of the edge of any bog, marsh, swamp or pond.

Definitions were also supplied in said section for the terms "Flood Plain", "River Bank", "River" and other wetlands mentioned in (d) above.

Said statutory definitions clearly demonstrate that there are various categories of freshwater wetlands protected by the statutes and over which control is vested in the DEM.

The statute, by definition, specifically provides that the term "Fresh Water Wetlands" as used in this chapter shall include, but not be limited to various types of freshwater wetlands as thereafter listed. It is apparent from a reading of said definitions that one category could include other categories or types. Undoubtedly, one freshwater wetland could co-exist or be located within another freshwater wetland.

The NOVAO specified that Respondent (without approval) did accomplish or permit certain alterations of freshwater wetlands "with a 100 year floodplain and within a riverbank wetland, that



area within 200 feet of a flowing body of water greater than 10 feet wide . . . resulting in the alteration of approximately 10,500 square feet of wetland."

The Respondent by stipulation in the PHC Record has agreed that he did engage in the activities for which he was cited in the NOVAO. The Respondent has clearly admitted that he performed the alterations (the activities enumerated in the NOVAO) within a riverbank wetland, but he did not make any admission concerning the 100 year floodplain. A comparison of the language as cited in the NOVAO and No. 14 of the PHC Record amply supports this conclusion.

The Respondent has also admitted that he engaged in said unpermitted alterations without the prior approval of the Department (No. 15 of the PHC Record) and Respondent has not refuted said admission.

The enumerations of the issues in the PHC Record are intended to simplify or clarify the issues to be resolved by the Hearing Officer and are not intended to be Stipulations of agreed facts. A careful reading of Issue No. 1 together with all of the issues listed leaves no doubt that Issue No. 1 contemplated only consideration of what other categories or types of freshwater wetlands (as listed in the statutory

definitions) were present on the subject site. This is further borne out by the inclusion of issue No. 2 (as to whether a 100 year floodplain exists on the site) as one of the issues.

Mr. Vitello's affidavit, in addition to confirming the aforementioned agreed stipulations of fact, also states that he was able to determine within a reasonable degree of scientific certainty the existence of freshwater wetlands on the site by the presence of a flowing body of water and certain plant species, and that said alterations occurred within a 200 foot riverbank wetland and within the 100-year floodplain, and that approximately 10,500 square feet of wetland was altered.

The Respondent admitted that he had engaged in prohibited activities within a riverbank wetland and did not contradict the assertions made by the Division that a 100-year floodplain existed on the site. Respondent only questioned the Division's entitlement to judgment as a matter of law. Clearly, the activities engaged in by Respondent were carried out without a permit from DEM and were conducted in contravention of Statute. Conklin Limestone vs. State of Rhode Island, Department of Environmental Management 489 A.2d 327 (R.I. 1985).

Respondent's reliance on Brill v. Citizens Trust Co., 492 A.2d 1215 (R.I. 1985) is misplaced. The court therein reiterated its oft-expressed view that summary judgment is a drastic remedy that should be applied cautiously; however, the court's decision ordered that summary judgment be entered for the plaintiff since no issue of fact existed in said matter.

Likewise, Respondent's argument that Nichola v. John Hancock Mut. Life Ins. Co., 471 A.2d 945 (R.I. 1984) compels denial of said motion falls short. A closer scrutiny of Nichola reveals that the court also stated that a party opposing a motion for summary judgment "may not rest upon the allegations contained in the pleadings alone to establish the existence of a genuine issue of material fact."

The facts in the instant matter are substantially dissimilar to those in Sarter v. Arkansas Gas Corp., 321 U.S. 620 (1944) which Respondent cited to discount Mr. Vitello's expert opinion. However, it was the ruling of the court in said case that summary judgment should not have been granted solely upon the opinion affidavits of experts which were inconclusive and whose views had been presented in a previous trial of the cause wherein a jury had found contrary to their testimony. Also, there were conflicting affidavits filed by both plaintiff and defendant and the court ruled that the credibility and the

weight to be given to their opinions is to be determined, after trial, in the regular manner.

The Division's motion was properly made and supported as provided in this Superior Court Rule 56 (as to liability), and the Respondent has failed to set forth specific facts showing that there is a genuine issue for trial. Therefore, summary judgment in favor of the Division (as to liability) is clearly appropriate and should be granted.

The Respondent's response in opposition to the motion presented naked conclusory assertions and did not set forth specific facts showing a genuine issue of material fact for trial, and therefore summary judgment should be granted in favor of the Division (as to Respondent's liability). Roitman & Son, Inc. v. William I. Crausman 401 A.2d 58 (R.I. 1979).

Where the landowner in a freshwater wetlands permit matter did not contest the existence of freshwater wetlands on its property or that such wetlands were altered, the court in Conklin Limestone v. State, Department of Envir. 489 A.2d 327 (R.I. 1985) ordered that an application for permit be filed prior to any further alteration of certain wetlands where the court found that the area involved was "shown to be at least three different types of wetlands--swamp, floodplain and river as defined in § 2-1-20."

The Rhode Island Supreme Court upheld a lower court's summary judgment in favor of a plaintiff for child support in an action against a deceased's estate in the case of Grissom v. Pawtucket Trust Co. 559 A.2d 1065 (R.I. 1989) wherein the court stated "Even though the moving party must establish the absence of a material issue, the party opposing the motion has an affirmative duty to establish either by affidavit or other means the material issue of fact to be decided."

In the recent case of Alfano v. Landers, 585 A.2d 651 (R.I. 1991), the court affirmed summary judgment for the defendant and ruled that the question of whether a divider in a parking lot was a public sidewalk within the scope of § 45-15-9 was one of law, and not one of fact.

The United States Supreme Court in a libel case entitled, Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986) conducted a lengthy review of summary judgment proceedings. The court considered the standards to be applied in said case (as to a showing of malice), however, it did state "Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there

is a genuine issue for trial." The court, after condoning the use of caution in granting summary judgment, reaffirmed the accepted rule that "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict."

The Division has established the absence of a material factual issue as to Respondent's responsibility (or liability) and therefore summary judgment should be granted as to: 1) Respondent's ownership of the subject property, 2) the presence of freshwater wetlands on the subject site which are subject to the jurisdiction of the Division, 3) alteration of freshwater wetlands by the Respondent, and 4) that no permit was issued by the Division for said alterations and they were not authorized as required by Statute.

The stipulated facts and Division's affidavit do not establish the absence of material factual issues as to restoration and the administrative penalty. Summary judgment, therefore, should not be granted as to these issues, and said issues will be considered at the evidentiary hearing as previously scheduled.

After reviewing the stipulated facts and issues, the affidavit submitted by the Division, and memoranda of the parties and the pleadings, I find there are no genuine issues of material fact concerning the commission of unpermitted activities by the Respondent, and therefore, the Division's Motion for Partial Summary Judgment should be granted sustaining Respondent's liability<sup>1</sup> for altering freshwater wetlands in violation of the Statute. The Division's request that restoration be ordered is not properly supported and no showing has been made that the administrative penalty was properly assessed. Therefore, Division's Motion should not be granted as to restoration and penalties since genuine issues remain to be considered as these issues.

In view of my determination that blanket Summary Judgment is not appropriate, but that Summary Judgment should be granted solely as to liability but not as to restoration or penalties, I hereby make the following specific Findings of Fact and Conclusions of Law (pertaining to the granting of Summary Judgment in part as specified in this Decision):

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<sup>1</sup> The term "liability" (as it is used herein) is intended to mean "responsibility for".

Findings of Fact

1. Respondent, Justin Parrillo, was the legal owner of the property located east of Brookdale Street, approximately 100 feet north of Wilbur Avenue, opposite pole #2, in Cranston, Rhode Island, identified as Cranston Tax Assessor's plat 18, Lots 222 and 223 ("the site"), at all times relevant to this matter.

2. The Respondent filed a freshwater wetlands Preliminary Determination Application with the Division on June 17, 1987 for alterations proposed on said property.

3. The Division reviewed the Respondent's application and determined that the application constituted a significant alteration of freshwater wetlands.

4. The Division notified the Respondent of its determination by correspondence dated August 11, 1987.

5. The Division issued a Notice of Violation and Order ("NOVAO") to the Respondent on August 23, 1989.

6. Respondent received this NOVAO on August 28, 1989.

7. The NOVAO was recorded in the Cranston Land Evidence Records on August 24, 1989.

8. Respondent duly filed a request for an adjudicatory hearing on August 29, 1989 and September 21, 1989.



9. State jurisdictional freshwater wetlands exist on Respondent's property, consisting of a 100 year floodplain and a riverbank wetland (that area of land within 200 feet of a flowing body of water greater than 10 feet wide, being Meshanicut Brook).

10. Approximately 10,500 square feet of freshwater wetlands on Respondent's property were altered by the Respondent's engaging in foundation construction, filling, vegetative clearing, grading and creating soil disturbance, within said 100 year floodplain and riverbank wetland.

11. The Respondent did not file a formal permit application relating to the alteration of freshwater wetlands with the Department.

12. The freshwater wetlands on the subject property were altered without a DEM wetlands alteration permit and were therefore a violation of the Freshwater Wetlands Act.

13. The Division was warranted in issuing the NOVAO to the Respondent and said NOVAO should be affirmed as to Respondent's liability for said violation.

Conclusions of Law

1. The DEM has jurisdiction over the freshwater wetlands located on Respondent's property.

2. The freshwater wetlands located on Respondent's property were altered without a wetlands alteration permit from DEM.

3. The Respondent altered the freshwater wetlands existing on his property in violation of § 2-1-21 of the RI General Laws as alleged in the NOVAO dated August 23, 1989.

Therefore, it is hereby

ORDERED

1. Division's Motion for Partial Summary Judgment is hereby granted as to Respondent's liability for altering freshwater wetlands without the approval of the Division; and said Motion is denied as to the Penalty Assessment and as to the Order of Restoration.

Entered as an Administrative Order this 17<sup>TH</sup> day of March, 1992.

3-17-92  
Date

Joseph F. Baffoni  
Joseph F. Baffoni  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
One Capitol Hill, 4th Floor  
Providence, RI 02908  
(401) 277-1357

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Entered as an Final Order this 19<sup>th</sup> day of March,  
1992.

March 19 1992

Date

Louise Durfee

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 and Order on Division's Motion for Partial Summary Judgment to be forwarded via regular mail, postage prepaid to Robert S. Powers, Esq., 321 South Main Street, Providence, RI 02903 and via interoffice mail to Patricia Solomon, Esq., and Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 19<sup>th</sup> day of March, 1992.

Jacqueline A. Ballard