

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

**RE: J.T. O'CONNELL REALTY COMPANY
APPLICATION NO. 03-0025**

AAD No. 03-002/FWA

ORDER OF DISMISSAL

This matter came before Hearing Officer Baffoni for consideration of the motions to dismiss the appeal of Kirk Hindman ("Appellant"). The Appellant is a neighbor to property that was the subject of an application by J.T. O'Connell Realty Company ("Applicant") for a permit to alter Freshwater Wetlands on the subject property located on Assessor's Plat 128, Lot 2, Bristol, Rhode Island (the "Property"). The Department of Environmental Management ("DEM") Office of Water Resources ("OWR") issued a "Permit to Alter Freshwater Wetlands" (the "Permit") to Applicant on July 2, 2003. The Appellant filed a hearing request (concerning the Permit) with the Administrative Adjudication Division for Environmental Matters ("AAD") on July 14, 2003. The OWR filed its Motion to Dismiss on August 15, 2003. On August 22, 2003, Applicant filed its Motion in Support of DEM's Motion to Dismiss. Pursuant to an Order extending time for Appellant to respond or object to OWR's Motion to Dismiss, Appellant filed an Objection to Motion to Dismiss on August 29, 2003. Oral arguments on the Motion to Dismiss were presented on September 3, 2003.

The Motion to Dismiss asserts that the AAD is without jurisdiction to hear Appellant's appeal because Kirk Hindman has no right to request a hearing, and that therefore AAD lacks jurisdiction over the matter. OWR argues that the Rules and Regulations Governing the Administrative and Enforcement of the Freshwater Wetlands Act ("Freshwater Wetlands Regulations") provide that an applicant may request an adjudicatory hearing, but they do not provide a right to appeal the OWR's decision to the AAD by persons other than the Applicant. OWR references the Freshwater Wetlands Regulations, specifically Rule 9.05(E)(4)(a). It is further argued by OWR that Mr.

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Hindman is not a "person" having a right to request a hearing at the AAD pursuant to Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters Rule 7.00(a), and also that Mr. Hindman is not a "party" entitled to an Administrative appeal at the AAD pursuant to R.I. GEN. LAWS § 42-35-9(a). Accordingly, OWR maintains that the AAD is without jurisdiction to entertain the Appellant's request for a hearing.

Applicant joins and supports OWR's Motion to Dismiss the instant appeal. Applicant posits that Mr. Hindman is not the Applicant of the Permit, and therefore has no standing to request an adjudicatory appeal of DEM's decision to issue the Permit pursuant to Rule 9.05(E)(4)(a) of the Freshwater Wetlands Regulations or under R.I. GEN. LAWS § 42-35.

Appellant contends that DEM and OWR failed to apply their own regulations in reviewing the Applicant's request to alter the freshwater wetlands on the Property. It is argued by Appellant that although Appellant may not perfectly fit the definitions in the statutes or regulations, the AAD process is Appellant's only remaining administrative remedy. Appellant, in his memorandum in support of his objection to the Motion to Dismiss, presents a rather lengthy dissertation of the events and proceedings that took place regarding the instant application and a prior application processing procedure concerning the subject Property. However, Appellant presented little or nothing to address the issue of AAD's jurisdiction to entertain the appeal.

The jurisdiction of AAD is circumscribed by its enabling legislation and other statutes. The AAD was established by Chapter 17.7 of Title 42 of the R.I. GEN. LAWS. § 42-17.7-2 authorizes the AAD to hear inter alia all contested licensing proceedings. Nothing in AAD's enabling legislation authorizes the AAD or Director to expand the rights of private persons. The Rhode Island Supreme Court has ruled that it " has

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consistently prevented state administrative agencies from expanding their jurisdiction through strained interpretations of unambiguous statutes.” Caithness Rica Ltd. v. Malachowski 619 A.2d 833 (R.I. 1993).

Rule 9.05(E)(4)(a) of the Freshwater Wetlands Regulations entitled “Right to Appeal” provides as follows:

“Within twenty (20) days of the receipt of a decision from the Department regarding an Application to Alter a Freshwater Wetland, the applicant may request an adjudicatory hearing to appeal the decision, or portions thereof.”

Mr. Hindman does not contest that the Freshwater Wetlands Regulations provide for appeals by persons whose permits have been denied (or permittees who wish to contest the terms of an approval of a Freshwater Alterations permit) at the agency adjudicatory level. A review of the Freshwater Wetlands Regulations demonstrates that they contain no provision for appeals to the AAD by abutters or neighbors.

AAD Rule 7.00 governs the Commencement of Formal Adjudicatory Proceedings at the AAD. Rule 7.00(a) entitled “Request for Hearing” provides as follows:

“Any person having a right to request an adjudicatory hearing shall follow the procedures and timelines set forth in R.I.G.L. § 42-17.7-9 and other applicable statutes and regulations.”

The term “Adjudicatory Proceeding” is defined in AAD Rule 2.00(c)(1) as: a proceeding before the AAD in which the legal rights, duties or privileges of specifically named persons are determined after opportunity for an agency hearing. Admittedly, Mr. Hindman is not a specifically named person in either the statutes or regulations.

Proceedings of the AAD are governed by the Administrative Procedures Act, Chapter 35 of Title 42 of the R.I. GEN. LAWS (“APA”). Section 42-35-9(a) provides that “In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.” Section 42-35-1 contains the following definitions:

(c) "Contested case" means a proceeding . . . in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing.

(f) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.

It is well established that in order for a proceeding to constitute a contested case subject to the requirements of the APA, a hearing must be required by law. Property Advisory Group, Inc. et al. v. Rylant, 636 A.2d 317, (R.I. 1994). Appellant does not cite any statute or regulation which creates a right to a hearing under the circumstances in this matter. Absent a statute or regulation creating a right to appeal a determination by the OWR, the AAD is without jurisdiction to entertain the instant request for hearing. Clearly the statutes and regulations governing Freshwater Wetlands do not grant the right to appeal to anyone other than an Applicant.

In somewhat analogous matters concerning the appeals of neighboring landowners (involving ISDS permits), the AAD and the Director have ruled previously that absent a statute or regulation creating a right to appeal a determination by a Division of DEM the AAD is without jurisdiction to entertain the request for hearing. See Re: Crispi, Robert & Hilda, AAD No. 01-002/ISA, and Re: William R. Regan (Appeal filed by Urania, Ltd.), AAD No. 95-004/ISA.

Based on the foregoing, and after consideration of the memoranda and arguments of counsel, I conclude that the Appellant has no standing to request an adjudicatory appeal of OWR's decision to issue the Permit, and therefore the AAD lacks jurisdiction to entertain the Appellant's request for a hearing. Wherefore, it is hereby

ORDERED

1. That the Motion to Dismiss filed by the Office of Water Resources and joined in by J.T. O'Connell Realty Company is hereby GRANTED.

2. That the appeal filed by Kirk Hindman is DISMISSED.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 15th day of September, 2003.

Joseph F. Baffoni
Hearing Officer
Administrative Adjudication Division
Department of Environmental Management
235 Promenade Street, Third Floor
Providence, Rhode Island 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this 25th day of September, 2003.

Jan H. Reitsma
Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid, to Gerald J. Petros, Esquire, Hinckley, Allen & Snyder LLP, 1500 Fleet Center, Providence, RI 02903 and Kirk Hindman, 33 Lisa Lane, Bristol, RI 02809 and Darryl J. Paquette, Esquire, Montaquila & Summer, P.C., Calart Tower, Suite 3A, 400 Reservoir Avenue, Providence, RI 02907; via interoffice mail to: Gregory Schultz, Esquire, Legal Services, 235 Promenade Street, 4th Floor, Providence, RI 02908, on this 25th day of September, 2003.

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If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.