

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

**RE: SEMBEL ENTERPRISES, INC. / 75 GOFF AVENUE AAD NO. 03-002/WME
REALTY TRUST / YOHANNES BEIN / SIMRET ZEMRHT
NOTICE OF VIOLATION OC&I/UST 02-00544**

ORDER OF DISMISSAL

This matter came before Hearing Officer Baffoni on June 26, 2003 for oral argument on the Motion of the Office of Compliance and Inspection (“OCI”) to Strike the Respondents’ Request for Hearing, which pursuant to the Notice of Oral Argument, the Hearing Officer elected sua sponte to treat as a Motion to Dismiss. Bret Jedele, Esq., represented OCI and Nicholas Lambros, Esq., represented Respondents.

The facts in this matter are not in dispute. A recitation of same is made for consideration, evaluation, and proper disposition of the jurisdictional issue.

The pertinent events and occurrences in this matter are set forth in the following undisputed findings of fact:

1. On or about October 17, 2002, the OCI issued a Notice of Violation (“NOV”) to the Respondents. The NOV clearly stated that, pursuant to R.I.G.L. §§§ 42-17.1-2(u)(1), 42-17.1-2(u)(3), 42-17.6-4(a) and 42-17.7-9, all requests for a hearing MUST be in writing and be RECEIVED by the Administrative Adjudication Division (“AAD”) within twenty (20) days of receipt of the NOV.
2. The NOV was sent by certified mail, return receipt requested, to each of the Respondents on or about October 17, 2002, and was received by all the parties on October 18, 2002.
3. On or about November 12, 2002, the OCI received correspondence from the Respondent (dated November 8, 2002) which requested an “informal hearing.”
4. On January 8, 2003, the Attorney for the Respondents filed a request for a formal hearing (dated January 7, 2003) at the AAD.
5. On May 12, 2003, OCI filed a “*Motion and Memorandum in Support of Petitioner’s Motion to Strike the Respondents’ Request for a Hearing*”.
6. On May 20, 2003, Respondents filed an “*Objection and Memorandum in Opposition to Petitioner’s Motion to Strike the Respondent’s Request for a Hearing*”.

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7. On June 2, 2003, Notice of oral argument was mailed to the parties by the clerk of AAD, in which it was ordered that OCI's *Motion to Strike the Respondents Request for a Hearing* would be treated as a Motion to Dismiss at the oral arguments hearing scheduled for June 16, 2003.
8. Pursuant to a request by the parties, the oral argument hearing was continued to June 26, 2003.
9. The oral arguments were presented on June 26, 2003, and at the conclusion of same the Hearing Officer afforded additional time to the parties to submit memoranda in regards to whether or not jurisdiction to hear or consider this matter appropriately lies with the AAD.
10. OCI filed a Brief Regarding Jurisdiction on August 1, 2003.

OCI argues that the November 12, 2002 letter and the January 7, 2003 letter requesting hearings were filed untimely, thereby causing the subject NOV to automatically become a final agency order, enforceable in Superior Court. It is also argued by OCI that both of foregoing letters fail to meet the basic criteria to establish a legally sufficient request for a hearing, and that jurisdiction in this matter is henceforth with the Superior Court.

It is argued by Respondents that OCI was required to file its Motion to Strike within twenty (20) days after Respondents filed its request Hearing pursuant to Rule 12(f) of the Superior Court Rules of Civil Procedure, wherefore OCI's Motion to Strike should be deemed a waiver and that the Hearing Officer should exercise his discretion and deny the Motion.

R.I. GEN. LAWS §§ 42-17.6-4, 42-17.1-2(u)(1) and 42-17.1-2(u)(3) specifically provide that if no written request for hearing is timely made, the NOV shall automatically become a compliance order. The AAD and the Director have consistently ruled in prior matters that absent a timely filing, AAD lacks subject matter jurisdiction to hear and issue a Recommended Decision on the NOV. See Aram Sarkisian, AAD No. 99-011/WME;

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Brian's Service Station, AAD No. 93-015/GWE.

R.I. GEN. LAWS § 42-17.7-9, which became effective January 1, 2001, mandates that in all enforcement actions, the request for a hearing must be in writing and must be filed with the Clerk of the AAD within twenty (20) days of receipt of the contested agency action. It also mandates that the time and manner of filing established therein are mandatory and jurisdictional. The NOV clearly provided notice of the twenty (20) day appeal period and of the procedures for filing an appeal.

The Respondents' reliance on Superior Court Rules of Civil Procedure Rule 12(f) is misplaced. This rule only pertains to the striking of pleadings of any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter. In matters before the AAD, no further response or pleading to a request for a hearing is required. However, pursuant to Rule 12(b), lack of jurisdiction may be raised by motion. Also, Rule 12(h)(2) provides that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. In any event, lack of subject matter jurisdiction may not be waived and may be raised at any time. La Petite Auberge, Inc., v. Rhode Island Comm'n for Human Rights, 419 A.2d 274 (R.I. 1980).

Respondents did not dispute the date of receipt by the Respondents of the NOV, the date of the receipt by the OCI of the correspondence requesting an "informal hearing", or the date of filing of the request for a formal hearing at the AAD. The earliest correspondence (the November 2002 letter) was not received by the OCI until twenty-five (25) days after receipt of the NOV by Respondents; thereby causing the NOV to automatically become a final agency order, enforceable in Superior Court.

Based on the foregoing, the Respondents failed to file a timely request for hearing

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and the AAD lacks subject matter jurisdiction to hear and issue a Recommended Decision on the NOV. Therefore, it is hereby

ORDERED

1. That the within appeal is DISMISSED.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 5th 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 8th day of September 2003.

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

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CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid, to Nicholas A. Lambros, Esquire, Poore & Rosenbaum, Commerce Center, 30 Exchange Terrace, Providence, RI 02901-1117 and via interoffice mail to Bret W. Jedele, Esquire, Office of Legal Services and Dean H. Albro, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this _____ day of _____, 2003.

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.