

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

IN RE: Cumberland Park Homes, Inc.
(Application No. 88-0882F)

AAD No. 91-017/FWA

DECISION AND ORDER

This matter is before the Hearing Officer on the Motion to Dismiss filed by the Division in the above entitled matter. The Applicant timely filed an objection to the Motion and requested oral argument. Pursuant to that request oral argument was held on October 29, 1991. Paul L. Foster, Esq., represented Cumberland Park Homes, Inc. (hereinafter "Applicant") and Michael K. Marran, Esq. represented the Division of Freshwater Wetlands (hereinafter "Division").

The following facts are undisputed. The Division of Freshwater Wetlands issued a denial letter to the Applicant dated August 9, 1991. The return receipt was signed for by Applicant on August 14, 1991. A request for hearing was deposited in the mail on August 24, 1991. The hearing request was received and date-stamped by the Clerk of AAD on August 27, 1991.

The Division contends that the appeal by Applicant of the the Division's denial of his application to alter freshwater wetlands should be dismissed as untimely. The Division asserts that since the appeal is untimely the Hearing Officer is without jurisdiction to entertain the appeal. As grounds for its argument the Division cites the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act ("Regulations") and the Rules of Practice and Procedure of the Department of Environmental Management's Administrative Adjudication Division for Environmental Matters ("AAD Regulations").

Specifically, the Division argues that Rule 5.04 of the Regulations requires that a request for hearing be made within ten days of the applicant's receipt of the denial letter. Moreover, the Division argues that AAD Regulation 5.00 (a) (2) clearly states that papers deposited in the U.S. Mail shall be deemed filed on the date stamped by the Clerk of AAD. In this case the hearing request was received by the Clerk and date-stamped on August 27, 1991. The Division contends that the appeal period expired on August 24, 1991 and accordingly the request is untimely rendering the AAD without jurisdiction to entertain the appeal.

The Applicant filed an objection to the Motion and stated several grounds in support of its objection. Briefly summarized, Applicant argues that Applicant's actions constituted timely notice of its intention to appeal; that the actions of the Division deny Applicants' their right of appeal by restricting unreasonably and unlawfully the ten day appeal period; that the denial letter misled and denied Applicants their rights; and generally that the action of the Division is in violation of law, contrary to the language of the denial letter and in violation of Applicants' rights.

Adequacy of Notice

Applicant argues at length that the denial letter dated August 9, 1991 is defective as it fails to apprise the Applicant fairly and accurately that the request for hearing must be delivered in hand to the AAD within ten days. Applicant argues that the denial letter merely states that a request for hearing may be made within 10 days and must be timely filed. Applicant

contends that it is customary in most agencies to recognize mailing as filing and if Applicant is required to deliver a request in hand within 10 days the Division has an affirmative obligation to so inform the Applicant.

I find Applicant's argument to be unpersuasive. The denial letter states in pertinent part:

... your application for proposed alterations is hereby DENIED.

If you are aggrieved by this decision, you may, within 10 days of the receipt of this letter, request an adjudicatory hearing in writing. Your written request for an adjudicatory hearing must be timely filed and also should conform to the requirements of Rule 6.00 (b), ...

The denial letter adequately and correctly informed the Applicant that any request for hearing must be made within 10 days and must be timely filed. The letter continues on to inform Applicant that the hearing request must be forwarded to the AAD. The letter properly informs Applicant of the ten day time limitation and that the request must be timely filed.

The terms of AAD Regulation 5.00 a) require a filing within the time limits set by the controlling statute or Department Regulation. In this case Regulation 5.04 provides a ten day period for making a request for hearing. Moreover, the AAD Regulations further provide the manner in which time is computed and what action(s) constitutes a filing. Applicant had actual notice that a request for hearing must be made within 10 days and that the request must be timely filed and had constructive notice, under properly adopted AAD Regulations that deposit in the U.S. Mail does not constitute a filing for purposes of an appeal.

Timely Filing

R.I.G.L. § 2-1-20.1 delegates to the Director the authority to promulgate rules and regulations relating to the Freshwater Wetlands Act. The delegation of powers to the Director to enforce the Act has been found to be a proper delegation. J.M. Mills, Inc. v. Murphy, 116 R.I. 54, 352 A2d 661 (1976). As a general matter, procedural and legislative regulations, if within the scope of authority conferred upon the agency by governing statute, have the force and effect of law. Kenneth Culp Davis, Administrative Law Treatise, 2nd edition, § 7:9.

Under the authority granted in R.I.G.L. § 2-1-22 the Division of Freshwater Wetlands adopted the Regulations. Regulation 5.04 entitled "Appeal of Director's Decision" states in pertinent part: "...the applicant may within 10 days of receipt of the decision, request in writing a public hearing before a designee of the Director of DEM to appeal the decision...".

Subsequent to promulgation of these Regulations the Administrative Adjudication Division for Environmental Matters ("AAD") was created by the legislature to hear, inter alia, all contested licensing matters. R.I.G.L. § 42-17.7-2. Pursuant to the authority granted by § 42-17.7-2 the AAD Regulations were promulgated. Rule 5.00 of the AAD Regulations defines the phrase "timely filing". It states:

5.00 Time

a) Timely Filing. Papers required or permitted to be filed under these regulations, or any provision of applicable law, must be filed with the clerk at the Administrative Adjudication Division office within the time limits for such filings as are set by Department regulation, or the Hearing Officer, or other provision of law.

Rule 5.00 (a) continues to specifically define "timely filing" for documents deposited in the mail. It states:

Papers filed in the following manner shall be deemed filed as set forth herein:

. . . .
2. Mailing: Papers deposited in the U.S. Mail shall be deemed filed on the date stamped by the Clerk of the Administrative Adjudication Division. In the event that no date stamp by the clerk appears, papers shall be deemed filed on the date so postmarked. All papers shall show the date received by the Administrative Adjudication Division.

The AAD Regulations, Rule 5.00 (b) also provides the manner in which the time of filing is computed. It provides:

b) Computation of Time. Unless otherwise specifically provided by law or these rules, computation of any time period referred to in these rules shall begin with the first day following the act which initiates the running of the time period. The last day of the time period so computed is to be included unless it is a Saturday, Sunday, or legal holiday or any other day on which the Administrative Adjudication Division is closed, in which event the period shall run until the end of the regular business hours of the next following business day. When the time period is less than seven (7) days, intervening days when the Administrative Adjudication Division is closed shall be excluded in the computation.

Computing the "within 10 days" appeal period from the day following receipt of the denial letter, namely August 15, 1991, the appeal period should have expired on Saturday August 24, 1991. Because Saturday and Sunday are excluded from the computation pursuant to AAD Rule 5.00, the appeal period actually expired on Monday, August 26, 1991. It is undisputed that the appeal in this matter was received by the Clerk and noted as filed on August 27, 1991. Accordingly, the appeal was filed one (1) day after expiration of the appeal period.

In the case of Mauricio v. Zoning Board of Review, R.I. 590, A.2d 879, (1991) the Rhode Island Supreme Court addressed the issue of an appeal deposited in the mail within the time limitation but not filed until after expiration of the appeal period. Under that comparative set of facts the Court stated "... the necessary act is the filing, not the mailing or sending notice to an adversary. Only the filing sustains the validity of the appeal if made within the required period." Id, 590 A2d at 880. Accord, Domenic DiRuzzo and Bruce Cappola v. Corner Pizza, Inc., C.A. No. 89-2915, Rescript Opinion filed June 11, 1991, Bourcier, J. The reasoning and holding of the Court in Mauricio is applicable to the case at bar. Accordingly, the Administrative Adjudication Division lacks subject matter jurisdiction to hear and issue a recommended decision on Applicant's appeal of a denial to alter freshwater wetlands.

Therefore it is

ORDERED

That the appeal of Cumberland Park Homes, Inc. is DISMISSED.

I hereby recommend the foregoing for adoption as a Final Agency Decision and Order this 13th day of November, 1991.


Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

I adopt the within as a Final Agency Decision and Order.

November 14, 1991
Date

Louise Durfee
Louise Durfee
Director
Department of Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded registered mail, postage pre-paid to Paul L. Foster, Esq., 132 Old River Road, Lincoln, Rhode Island 02865; Michael K. Marran, Esq., 2 Charles Street, Providence, Rhode Island 02904-2269; Joseph Pacheco, Cumberland Park Homes, Inc., 1334 Mendon Road, Cumberland, RI 02864; and regular mail, postage pre-paid to Michael K. Marran, Esq., 2 Charles Street, Providence, Rhode Island 02904-2269 on this 14th day of November, 1991.

Joseph Pacheco