

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF GROUNDWATER
AND FRESHWATER WETLANDS

IN RE: FERLAND CORPORATION AND VILLAGE PARK
PARTNERSHIP II (FRESHWATER WETLANDS
APPLICATION NO. 88-709F); PETITION FOR
DECLARATORY RULING

THE PETITION

Applicant, Village Park II, requests that the (Designated) Director declare Condition 11 of the Division of Groundwater and Freshwater Wetlands' September 28, 1990 wetlands alteration permit invalid. Condition 11 requires that authorized construction adjacent to wetlands and water courses take place during the period of low (water) flow, being a period of four months beginning on July 1 and extending through October 31 of any given year. The applicant forwarded numerous arguments in support of its petition. The Division of Groundwater and Freshwater Wetlands objected to applicant's Petition on January 8, 1991.

ORDERED

For the reasons set forth below, applicant's Petition to declare Condition 11 of the Department's permit of September 28, 1990 invalid is DENIED except that said permit shall remain in force through October 31, 1991.

1. The Director's authority and that of his duly authorized agents to condition issuance of a freshwater wetlands permit pursuant to Section 2-1-22(d) of the Freshwater Wetlands Act and Rule 8.01(a) of the Department's Freshwater Wetlands Regulations is clear and specific and is circumscribed by the issuance of a Final Agency Decision only to the extent that such permit conditions may not contradict or otherwise invalidate any conditions attached to the Final Agency Decision and Order or have the effect of overturning an order of approval. While the applicant alleges that this is, in fact, the effect of Condition 11, it identifies no condition in the Final Agency Decision which Condition 11 contradicts or invalidates and its argument that Condition 11 "invalidates", "undermines" and/or is "not in conformance with" (unspecified) "terms" of the Final Agency Decision is, in fact, unsubstantiated and unpersuasive.

2. The significance the applicant attaches to the absence of hearing testimony on the issues addressed by Condition 11 is unfounded since those issues were not among the three reasons cited by the Department for its March 13, 1989 denial of Application No. 88-709F, were consequently not in dispute at the hearing on applicant's appeal of that denial, and would not, therefore, have been properly before the Hearing Officer at that appeal hearing. Applicant's arguments notwithstanding, it had no right in the context of the appeal hearing (or

obligation for that matter) to challenge the issues addressed by Condition 11 since these played no part in the denial under appeal; applicant's only obligation on appeal being to rebut the three specific reasons for denial identified by the Department in its letter of March 13, 1989. There is, moreover, no provision in the Department's Rules and Regulations for an administrative (Departmental) appeal of conditions attached to the issuance of a permit.

3. The fact that the Department did not appeal the absence of a Condition 11 in the Final Agency Decision has no legal significance and certainly does not suggest that the Department waived its right to condition the permit it issued on September 28. Each of the regulators involved in this application; from the Division employees who signed the September 28 permit, to the hearing officer, to the Designated Director, acted under the same body of authority vested in the Director pursuant to the Freshwater Wetlands Act and its implementing regulations. Applicant would place the Director in the rather schizophrenic position of appealing his own decision, a right which cannot be waived since it does not exist.

4. Applicant is correct that given the September 28, 1990 issuance and one year life of its freshwater wetlands alteration permit the Department could in theory cut short by approximately one month the July 1 through October 31 construction "window" permitted by Condition 11 if it did not

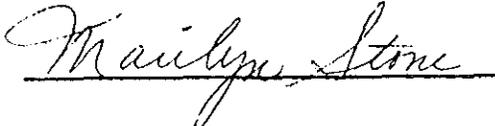
renew applicant's permit when it expires on September 28, 1991. While there is nothing to suggest that the Department would, in fact, deny a renewal petition, the applicant's concern is readily addressed by the simple expedient of extending the permit life through the last day of October as was contemplated by Condition 11.

ENTERED AS AN ORDER this 25 day of January, 1991.


Malcolm J. Grant,
In His Capacity As Designated
Director Pursuant To An
Assignment Of Functions Dated
May 14, 1990

CERTIFICATION

I hereby certify that a copy of the above Petition was mailed postage prepaid to Michael A. Kelly, Esquire, 2300 Hospital Trust Tower, Providence, R.I. 02903, Patricia K. Rocha, Esquire, 2300 Hospital Trust Tower, Providence, R.I. 02903, Joseph Baffoni, Esquire, Administrative Adjudication, One Capitol Hill, Providence, R.I. 02903 and Catherine Robinson Hall, Esquire, Office of Legal Services, 9 Hayes Street, Providence, R.I. 02908 on this 25th day of January, 1991.



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