

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

IN RE: Charles Greene, Sr.
Notice of Violation No. C-2335
D'Ambra Construction Co.
Notice of Violation No. C-2299
R.I. Department of Transportation
Notice of Violation No. C-2331

DECISION AND ORDER ON RESPONDENT RIDOT'S MOTION TO DISMISS

This matter came before Hearing Officer McMahon on February 17, 1992 pursuant to the Motion to Dismiss filed by the Rhode Island Department of Transportation ("RIDOT") on January 13, 1992. The Department of Environmental Management Division of Freshwater Wetlands ("DEM") and Respondent Charles Greene, Sr. objected.

DECISION AND ORDER

RIDOT presents two issues as grounds for dismissal of this action insofar as it would apply to it as a party: failure to state a claim against RIDOT upon which relief can be granted; and, absence of any activity by RIDOT which would make it subject to DEM's jurisdiction. Both arguments rely on Respondent's claim that any alleged alteration was not conducted by RIDOT or within the agency relationship with its contractor.

The Notice of Violation (NOV) issued to Respondent asserts that the Department owns the property in question and "did accomplish or permit" the alteration without permit authorization. The relief sought by DEM is contained in the "Order" portion of the NOV.

The Rhode Island Supreme Court has ruled that a motion to dismiss based on the failure to state a claim upon which relief can be granted, should not be granted unless it appears beyond a reasonable doubt that the plaintiff is not entitled to any relief under any set of facts which could be proven in support of his claim. Gagnon v. State, 570 A2d 656 (RI 1990). For the purpose of ruling on this motion, the allegations contained in the NOV must be assumed to be true and must be viewed in the light most favorable to plaintiff. Thompson v. Thompson, 495 A2d 678 (RI 1985). The Hearing Officer cannot take into account matters raised by the Respondent that were not disclosed on the face of the NOV; Respondent's assertion that it did not conduct or authorize any activity within DEM's jurisdiction cannot be inserted into the record by means of counsel's representation. See Forecaster of Boston, Inc. v. Woonsocket Sponging Co., 505 A2d 1379 (RI 1986).

Accordingly, based upon the allegations contained in the NOV, I cannot find beyond a reasonable doubt that DEM's claims would be insufficient to obtain the relief sought.

Wherefore it is hereby

ORDERED

Respondent RIDOT's Motion to Dismiss is herewith DENIED.

Entered as an Administrative Order this 18th day of
February, 1992.



Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within
Decision and Order to be forwarded via regular mail, postage
prepaid to Robert D. Goldberg, Esq., 226 Cottage Street,
Pawtucket, RI 02860; Veronica Ridolfi, Esq., Chief Legal
Counsel, Rhode Island Department of Transportation, Room 251,
Two Capitol Hill, Providence, RI 02908; John Boehnert, Esq.,
Partridge, Snow & Hahn, 180 South Main Street, Providence, RI
02903 and via interoffice mail to Patricia Solomon, Esq., Office
of Legal Services, 9 Hayes Street, Providence, RI 02908 on this
~~18th~~ day of February, 1992.

