

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

IN RE: A. Cardi Realty Corp.

AAD No. 92-023/FWE

SHOW CAUSE DECISION

This matter came before Hearing Officer Baffoni on April 24, 1992 pursuant to an Order for A. Cardi Realty Corp., Inc., (Cardi) to show cause why its Request for Hearing/Notice of Claim for Adjudicatory Hearing should not be summarily dismissed by this tribunal for lack of subject matter jurisdiction.

Melody A. Alger, Esq., of Adler, Pollock & Sheehan represented Cardi and Catherine Robinson Hall represented the Division of Freshwater Wetlands (Division) of the Department of Environmental Management (DEM).

The parties argued orally at the Show Cause Hearing and each presented their respective positions.

The pertinent facts are not in dispute and may be summarized as follows:

(1) The Division issued a Notice of Violation and Order ("NOVAO") to Cardi (Respondent therein and Applicant in the instant matter) dated July 11, 1988, wherein Cardi was notified of alleged violations of R.I.G.L. 2-1-21, ordered to take certain corrective actions, and ordered to pay an administrative fine.

(2) In lieu of an Administrative Hearing on said NOVAO, the parties entered into a Consent Agreement on or about September 18, 1988, wherein the parties agreed upon the terms and conditions for Cardi to restore the subject wetland and for payment of \$500.00.

(3) Said Consent Agreement also provided that if Cardi failed to comply with any provisions of said Agreement, Cardi shall pay an administrative penalty of \$1,000.00, and

an additional \$1,000.00 for each month that Cardi remains in violation of said Agreement, except that the Director of DEM for good cause shown, may defer or reduce such fine.

(4) Said Consent Agreement further contained a provision that "The parties agree that this Agreement shall be deemed a final administrative decision under the Administrative Procedures Act (Title 42, Chapter 35 of the General Laws of Rhode Island) from which no timely appeal was taken, and which is enforceable by resort to Superior Court."

(5) The Division wrote to Cardi on or about February 19, 1992, stating that because Cardi had failed to comply with certain provisions of the Consent Agreement, and Cardi was required to pay an administrative penalty of \$1,000.00 and an additional \$1,000.00 for each month Cardi had remained in non-compliance with the Agreement. Full payment of \$39,000.00 was required to be made within ten (10) days, or this matter would be referred to Division's Legal Services. Also, Cardi was informed that it should comply immediately to prevent the continued accrual of penalties; and Cardi was advised that the processing of Application 91-0452F had been stopped until the outstanding violation was resolved.

(6) Cardi, as Applicant herein, filed the instant "Request for Hearing/Notice of Claim for Adjudicatory Hearing" on March 25, 1992, wherein it claimed a right for the initiation of formal adjudicatory proceedings and requested that its Application for Hearing be granted.

Cardi based its claim for the initiation of formal adjudicatory proceedings/application for hearing on R.I.G.L. § 42-35, et seq. and 42-17.1 et seq. (1956); the Administrative Rules of Practice and Procedure for the Department of Environmental Management, as amended (Rule 6.0), and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters (Rule 7.0).

Chapter 42-17.1 of the R.I.G.L. establishes the DEM and specifies the powers and duties of the Director thereof.

Chapter 42-35 of the R.I.G.L. entitled, "Administrative Procedures" (APA) governs hearings and final orders in contested cases, and the adoption of rules and regulations by agencies.

Section 6.00 of the Administrative Rules of Practice and Procedure for DEM provides for the Initiation of Formal Adjudicatory Proceedings, and § 6.00 (a) states that "Any person having a right to request a hearing shall follow the procedures set forth in R.I.G.L. § 42-17.1-2 (u) and other applicable statutory and regulatory requirements."

Section 7.00 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters provides for the Commencement of Formal Adjudicatory Proceedings, and § 7.00 (a) states, "Any person having a right to request a hearing shall follow the procedures set forth in R.I.G.L. § 42-17.1-2 (u) and other applicable statutory and regulatory requirements. Such requests shall be sent directly to the Administrative Adjudication Division for Environmental Matters."

The sole issue for consideration by this Hearing Officer is whether the Administrative Adjudication Division has jurisdiction to entertain Applicant's claim for the initiation of formal adjudicatory proceedings after a Consent Agreement has been entered.

It was argued by Cardi that it is entitled to the relief requested before the AAD pursuant to the APA and the provisions of R.I.G.L. § 42-17.6-4 and § 42-17.7-2.

§ 42-17.6-4 states that:

Whenever the director seeks to assess an administrative penalty on any person, the person shall have the right to an adjudicatory hearing under chapter 35 of this title, the provisions of which shall apply except when they are inconsistent with the provisions of this chapter.

(a) A person shall be deemed to have waived his or her right to an adjudicatory hearing unless, within ten (10) days of the date of the director's notice that he or she seeks to assess an administrative penalty, the person files with the director or the clerk of the administrative adjudication division a written statement denying the occurrence of any of the acts or omissions alleged by the director in the notice, or asserting that the money amount of the proposed administrative penalty is excessive. In any adjudicatory hearing authorized pursuant to chapter 35 of title 42, the director shall, by a preponderance of the evidence, prove the occurrence of each act or omission alleged by the director.

(b) If a person waives his or her right to an adjudicatory hearing, the proposed administrative penalty shall be final immediately upon the waiver.

§ 42-17.7-2 states that:

All contested enforcement proceedings, all contested licensing proceedings and all adjudicatory proceedings under chapter 17.6 of title 42 shall be heard by the division of administrative adjudication pursuant to the regulations promulgated by the director of

environmental management provided, however, that no adjudicatory proceeding in hearing prior to establishment of said division shall be subject to the provisions of this chapter. Notwithstanding the foregoing, the director shall be authorized in his or her discretion to resolve contested licensing and enforcement proceedings through informal disposition pursuant to regulations promulgated by the director.

Cardi urges that the AAD is the appropriate forum for a hearing concerning its request for relief. Cardi maintains that the statutes and rules entitle it to the relief requested and that due process requires that a hearing should be held before the AAD prior to the levy of the \$39,000.00 fine.

Division maintains that the AAD lacks jurisdiction to hold a hearing to determine if the subject penalty was properly or improperly imposed. It is argued by the Division that the penalty was assessed in accordance with the terms of an executed Consent Agreement, which is a final adjudication and therefore not subject to appeal.

§ 42-35-9 (d) provides that informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. § 42-17.7-2 authorizes the Director of DEM in her discretion to resolve contested licensing and enforcement proceedings through informal disposition pursuant to regulations promulgated by the Director.

§ 16.00 (1) of the Administrative Rules of Practice and Procedure for the DEM provides that the parties to a hearing may dispose of a matter by entering into a consent order. § 16.00 (2) states that "Every agreement shall contain, in addition to an appropriate order, an admission of all jurisdictional facts and express waivers of further procedural steps before the Hearing Officer and of the right to appeal and shall also state that such agreement is enforceable as an order of the Director in accordance with procedures prescribed by laws."

The Consent Agreement was entered into by the parties in lieu of an Administrative Hearing regarding the alleged violations in that NOVAO. Said Consent Agreement contained the terms and conditions of the order agreed upon for resolution of the issues that arose pursuant to the NOVAO as well as an admission of jurisdictional facts. It also provided for the imposition of certain monetary penalties upon Cardi's failure to comply with the Consent Agreement. It was further specifically provided in the Consent Agreement that "The parties agree that this Agreement shall be deemed a final administrative decision under the APA from which no timely appeal was taken, and which is enforceable by resort to Superior Court."

Although it is not within an administrative Hearing Officer's jurisdiction to decide issues of constitutional import, issues involving interpretation of pertinent statutes and regulations concerning adjudicatory administrative penalties and adjudicatory hearings must of necessity be considered by Hearing Officers.

Cardi cites Aminoil, Inc. v. United States E.P.A. 599 F. Supp. 69 (1984) to establish its entitlement to an adjudicatory hearing under the present circumstances. A closer scrutiny of said case reveals that it does not support Cardi's position. The United States District Court held that certain provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) establishing daily penalties and treble damages for noncompliance with administrative orders, issued pursuant to emergency provisions of the Act, requiring submission and implementation of response plans, violated due process rights, since no opportunity was provided for hearing prior to issuance of an administrative order and no procedure was provided through which alleged responsible parties promptly could challenge the validity of the administrative order or assessment of penalties.

The Court in Aminoil ruled that "The daily penalty and treble damage scheme set forth in CERCLA clearly falls within the scope of this due process limitation. No opportunity is

provided for a hearing involving the alleged responsible parties prior to the issuance of the administrative order. More importantly, no procedure is provided through which an alleged responsible party promptly could challenge the validity of the administrative order or the assessment of penalties."

CERCLA did not provide for a judicial or administrative hearing prior to the accrual of the daily penalties and treble damages, whereas the Rhode Island statutes clearly provide a right to an adjudicatory hearing whenever the Director seeks to assess an administrative penalty.

The situation in Aminoil is clearly distinguished from the instant matter. In Rhode Island, a person upon whom a notice of violation has been served may request a hearing within ten (10) days. Thereupon, the Director must prove each act or occurrence alleged by a preponderance of the evidence in order for a compliance order to be established. The alleged responsible party, however, may waive the right to such a hearing by not claiming same, or (as here) by resolving the enforcement proceedings through informal disposition via a Consent Agreement.

Cardi clearly was afforded an adequate opportunity to contest the validity of the NOVAO prior to said NOVAO becoming a compliance order and without the imposition of any sanctions if it did not prevail at said hearing.

The Court in Aminoil in a footnote on Page 75 took note of the fact that both the Clean Air Act and the Surface Mining Control & Reclamation Act of 1977 provide the alleged responsible party with a hearing in those instances of alleged noncompliance with the statute, whereas CERCLA was silent on this point.

Unlike Aminoil, Cardi was provided with a procedure through which Cardi could promptly challenge the validity of the NOVAO; and Cardi was not left to await the results of further action while penalties continued to accrue without entitlement to a hearing at a meaningful time and in a meaningful manner.

A clear reading of the statutes demonstrates that the AAD lacks jurisdiction to entertain Cardi's claims for the initiation of formal adjudicatory proceedings. Cardi has effectively waived its right to an adjudicatory hearing and the Consent Agreement has become a final administrative decision; therefore, it is not subject to an appeal to AAD nor a request for a hearing. The terms of the Consent Agreement are clear and unambiguous. The parties agreed that the Consent Agreement constituted a final administrative adjudication enforceable in Superior Court. The APA itself provides that resort from final administrative adjudications are to the Superior Court.

Based on the foregoing, Applicant's request for hearing must be denied and this matter is dismissed for lack of subject matter jurisdiction.

Based on the foregoing, it is hereby

ORDERED

1. That Applicant's Request for Hearing/Notice of Claim for Adjudicatory Hearing is hereby denied and dismissed.

The foregoing is hereby submitted to the Director as a Recommended Decision and Order this 14TH day of May, 1992.

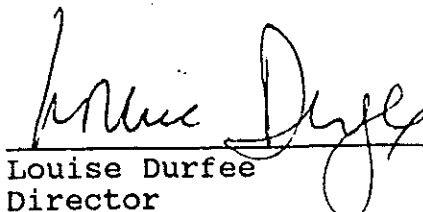


Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th floor
Providence, RI 02908
(401) 277-1357

The within Decision and Order is hereby adopted as a Final Agency Decision and Order.

5/18/92

Date



Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, RI 02908

A. Cardi Realty Corp., Inc.
AAD No. 92-023/FWE
Page 11

CERTIFICATION

I hereby certify that I caused a true copy of the within Final Agency Decision and Order to be forwarded via regular mail, postage prepaid to Melody Alger, Esq., Adler, Pollock & Sheehan, Inc., 2300 Hospital Trust Tower, Providence, RI 02903 and via interoffice mail to Catherine Robinson Hall, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 18th day of May, 1992.

