

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

**RE: TIVERTON FOUR CORNERS PROPERTIES, INC. AAD NO. 16-001/ISA
APPLICATION 1233.0218**

DECISION AND ORDER

This matter came before Hearing Officer David M. Spinella on August 10, 2016 for a Status Conference. Counsel for the Office of Water Resources ("OWR"); Four Corners Properties, Inc. ("FCP Inc."), and the Town of Tiverton ("Town") were in attendance. The OWR and FCP, Inc. stated that they would like a ruling on their Motions to Dismiss made pursuant to Section 8 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters ("AAD Rules") and Rhode Island Superior Court Rules of Civil Procedure 12 (b) (6) and 12 (b) (1). They do not wish to make arguments on their Motions but will rest on their pleadings. The Town asked for additional time to file Objections and Supporting Memoranda in response to the OWR and FCP Inc.'s Motions to Dismiss.

The following relevant pleadings have been filed:

1. 7/2/16 Town of Tiverton's Request for Hearing.
2. 7/21/16 The Rhode Island Department of Environmental Management/ Office of Water Resources Motion to Dismiss.
3. 7/25/16 Tiverton Four Corners Properties, Inc. Motion to Dismiss the Town of Tiverton's Request for Hearing.
4. 8/4/16 the Town of Tiverton's Objection to Four Corners Properties, Inc. Motion to Dismiss.
5. 8/4/16 Town of Tiverton's Motion for Extension of Time to File Objection and

Supporting Memorandum to OWR and Four Corners Motion to Dismiss.

Facts and Travel

On or about March 30, 2016, FEP, Inc. filed a System Suitability Determination Application-Commercial (“Application”) with the OWR. The Application sought a determination from the OWR as to whether the use of an existing Onsite Wastewater Treatment System (“OWTS”) could be expanded. On or about June 14, 2016, the Application was approved by the OWR with the following noted in the “Comments” box at the bottom of the Application form: “Approved for a maximum of 405 gpd for various events (see attached). Composting toilets to be abandoned and removed accordingly. No cooking on premises is allowed.”

On or about July 12, 2016, a document entitled “Town of Tiverton’s Request for Hearing” was filed by Tiverton with the Rhode Island Department of Environmental Management’s Administrative Adjudication Division (“AAD”). Said document purports to request “a hearing on the Issuance of an OWTS Compliance Certificate for the above properties”.

The Town of Tiverton does not specify any statute or regulation upon which it has any right to a hearing on the approval of a System Suitability Determination. Based on the fact that Tiverton submitted a check for \$1,500 to the AAD consistent with Rules 49 and 50 of the *Rules Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Onsite Wastewater Treatment Systems* (“OWTS Rules”) it appears that Tiverton believes it is entitled to a hearing pursuant to Rule 49 according to the OWR.

The OWR then filed its Motion to Dismiss as did FCP, Inc. Both of these parties argue in their Memoranda that the AAD lacks the subject matter jurisdiction to hear the Town’s Request

for Hearing and the Town has failed to state a claim upon which relief can be granted.

On August 4, 2016 the Town filed a Motion for Extension of Time to File Objection and Supporting Memorandum to the OWR and Four Corner's Motion to Dismiss.

Both the OWR and FCP, Inc. filed a Response to the Town's Motion for Extension of Time and argued that it was filed beyond the seven day period allowed for filing a motion per Rule 8.00 (a) (2) and 4.00 (c) of the AAD Rules.

According to the OWR and FCP, Inc., in addition to Tiverton's Motion to Extend being untimely it is also moot as the jurisdictional issues are dispositive in this matter.

A. **Subject Matter Jurisdiction.**

The OWR argues that Rule 49 of the Onsite Wastewater Treatment Rules limits the right to a hearing to those who have filed an application. Rule 49 reads as follows:

RULE 49. APPEALS

49.1 Right to Appeal- Any person whose permit application is denied may appeal to the Director for review of the decision on which the denial is based by filing an appeal with the Administrative Adjudication Division. (Emphasis added).

The Town never filed an application in this matter. The owner of the property, FCP, Inc. was the sole applicant. Its application was not denied, therefore the OWR argues that this matter is not a contested case per the Administrative Procedures Act, specifically, R.I.G.L. §42-35-1(c) and case law that has previously discussed this issue. See *Property Advisory Group v. Rylant*, 636A. 2nd 317, 318 (R.I. 1994); *Bradford Associates v. Rhode Island Division of Purchases*, 772 A. 2nd 485 (R.I. 2001).

The AAD has previously held that absent specific statutory or regulatory authority, appeals of OWTS applications by parties other than the applicant must be dismissed for lack of

subject matter jurisdiction. See for example *Re: James O'Neil (filed by abutter Carole Kalba*, AAD No. 08-018/ISA. It should be noted that the applicable ISDS regulation which is a predecessor to the current OWTS Rule, contained identical language to the current OWTS Rule 49.1.

B Failure to state a claim upon which relief can be granted.

The OWR and FCP, Inc. state that OWTS Rule 49.1 directly addresses the right to appeal an OWTS application and limits that right to those who have filed an application. The Town argues that new statutes enacted by the Rhode Island General Assembly, specifically, R.I.G.L. § 2-1-20.1 (2015), Rhode Island Freshwater Wetlands Act, set deadlines for the Rhode Island Department of Environmental Management (“RIDEM”) at the Coastal Resources Management Council (“CRMC”) to promulgate new wetlands and OWTS regulations. Tiverton states that the RIDEM timely enacted the OWTS Standards (June 2016) but failed to enact certain wetlands regulations in a timely fashion which, in turn, precluded the Town from properly enforcing its local requirements in this matter.

In short, the Town argues that the changes outlined by the General Assembly are the basis for the Town’s instant appeal.

Standard

Section 8.0 (a) (1) of the AAD Rules sets forth as follows:

A Party may request of the AAD or AHO any order or action not inconsistent with law or these regulations. Such a request shall be called a motion. The types of motions made shall be those, which are permissible under these Rules and the R.I. Superior Court Civil Rules of Procedure.

Rule 12 (b) (1) of the R.I. Superior Court Rules of Civil Procedure allows for the filing of a motion to dismiss for "lack of jurisdiction over the subject matter," while Rule 12 (b) (6) allows for the filing of a motion to dismiss a claim for "failure to state a claim upon which relief can be granted." Any court or quasi judicial body must have subject matter jurisdiction over any matter before it. "Subject matter jurisdiction, an indispensable ingredient of any judicial proceeding, can be raised by the court *sua sponte* at any time and can be neither waived nor conferred by consent of the parties." State v. Kenney, 523 A.2d 853, 855 (R.I. 1987). When a court renders a decision and it is later determined that the court did not have subject matter jurisdiction, that decision lacks validity. Petition of Loudin, 219 A.2d 915 (R.I. 1966).

The primary purpose of a motion to dismiss pursuant to Rule 12 (b) (6) is to test the competency of a plaintiff's claim on which relief might be granted. This rule does not measure the likelihood of success but instead "the validity of a Plaintiffs' bare-bones allegations and the availability of relief. Hyatt v. Vill. House Convalescent Home, Inc., 880 A.2d 821, 824 (R.I. 2005). A Rule 12 (b) (6) motion should be granted where it is clear beyond a reasonable doubt that the plaintiff is not entitled to relief under any set of facts that could be proven in support of Plaintiffs' claim. See Hendrick v. Hendrick, 755 A.2d 784 (R.I. 2000).

Discussion

The OWR and FCP, Inc. point out that a System Suitability Determination was issued by the OWR to the owner of the system as required by Rule 49 of the OWTS Rules. Those Rules, as well as prior decisions from this Division and the case law previously cited herein allow appeals of the denial of System Suitability Permits to be taken to the AAD by the applicant. Therefore, I agree with the OWTS and FCP, Inc. that pursuant to Rule 12 (b) (1), this Division lacks subject matter jurisdiction to hear the Town's appeal. Additionally, I agree that pursuant to Rule 12 (b) (6), the Town is not entitled to relief under any set of facts that could be proven in support of its claim because it was not the applicant for the System Suitability Determination.

Findings of Fact

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the parties.
2. On or about March 30, 2016, FCP, Inc. filed a System Suitability Determination Application- Commercial with the OWR.
3. FCP, Inc. sought a determination from the OWR as to whether the use of an existing Onsite Wastewater Treatment System could be expanded.
4. On or about June 14, 2016, the application was approved by the OWR.
5. On or about July 12, 2016 a document entitled "Town of Tiverton's Request for Hearing" was filed with the AAD.
6. On or about July 21, 2016 the OWR filed a Motion to Dismiss the Town's Request for Hearing.

7. On or about July 25, 2016 FCP, Inc. filed a Motion to Dismiss the Town's Request for Hearing.
8. The Town, on or about August 4, 2016 objected to both Motions to Dismiss.
9. On or about August 4, 2016, the Town filed a Motion for Extension of Time to File Objection to OWR and FCP, Inc.'s Motions to Dismiss.
10. The parties counsel attended a conference on August 10, 2016 and indicated they did not wish to argue their respective Motions and asked for a decision to be rendered based on all of the pleadings filed.

Conclusions of Law

1. The within proceeding was conducted in accordance with the Statutes governing the Administrative Adjudication Division for Environmental Matters (RI General Laws § 42-35-1 et. seq.) and the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters.
2. The Town of Tiverton's Appeal must be dismissed as the Administrative Adjudication Division lacks the subject matter jurisdiction pursuant to Rule 12 (b) (1) to hear Tiverton's appeal as Rule 49 of the Onsite Wastewater Treatment Rules limits the right to a hearing to those who have filed an application. Tiverton did not file an application for system suitability determination.
3. The Town of Tiverton has failed to state a claim upon which relief can be granted pursuant to Rule 12 (b) (6) as it does not have standing to request a hearing on the application filed by FCP, Inc.

Wherefore, it is hereby ORDERED that:

1. The Motion of the Town of Tiverton for an Extension of Time to File Objection to OWR and FCP, Inc's Motions to Dismiss is **DENIED.**
2. The OWR and FCP, Inc.'s Motions to Dismiss pursuant to Section 8.00 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters and Rhode Island Rules of Civil Procedure 12 (b) (6) and 12 (b) (1) is **GRANTED.**
3. The Clerk of the Administrative Adjudication Division shall refund the Town of Tiverton's deposit of one thousand five hundred (\$1,500.00) dollars.

Entered as an Administrative Order this 14th day of September, 2016.



David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Status Conference Order to be forwarded, via regular mail, postage prepaid to: S. Paul Ryan, Esquire, 201 Washington Road, Barrington, RI 02806; William M. Dolan, Esquire, Donoghue Barrett & Singal, One Cedar Street, Suite 300, Providence, RI 02903 and via interoffice mail to Joseph LoBianco, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 14th day of September, 2016.



NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.