STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: March 3, 2017]

CFD REALTY, LLC and JS PALLET CO., INC.	:	
v.	:	**C.A. No. PC-2012-6591**
STATE OF RHODE ISLAND, DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	:	

DECISION

MONTALBANO, J. This matter is before the Court on the complaint of CFD Realty, LLC and JS Pallet Co., Inc. (Appellants) seeking judicial review of a Decision and Order of the Administrative Adjudication Division (AAD) of the Rhode Island Department of Environmental Management (RIDEM), as amended on November 26, 2012. See AAD Decision and Order. The AAD Hearing Officer found that Appellants violated G.L. 1956 § 2-1-21, Rule 7.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, March 1994 and April 1998, as well as Rule 5.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, June 2007. According to the amended Decision and Order, no monetary penalties would be imposed, but the Restoration Requirements in Section D (2) of the Notice of Violation would remain in full force and effect. The matter is before this Court on administrative appeal pursuant to G.L. 1956 § 42-35-15. For the reasons set forth herein, this Court affirms the AAD Decision and Order, as amended on November 26, 2012.

Facts and Travel

The property at issue abuts Lockbridge Street in Pawtucket, Rhode Island and runs along the Moshassuck River into Lincoln, Rhode Island. CFD Realty, LLC is the owner of the property. JS Pallet Co., Inc. is the operator of the facility on the property. Carlos DaSilva (Mr. DaSilva) is the owner of CFD Realty, LLC and the operator of JS Pallet Co., Inc.

On September 23, 2003, in response to a complaint that "indicated there were unauthorized wetlands alterations at the property," Howard Cook (Mr. Cook), a RIDEM senior environmental scientist, met with Mr. DaSilva and inspected the property.[1] AAD Decision and Order 1 (Oct. 31, 2012); See AAD Hr'g Tr. 80. Mr. Cook observed that unauthorized work was occurring within the Freshwater wetlands buffer zone on the property.

In 1980, Gus Delfarno (Mr. Delfarno), a previous owner of the property, received a Notice of Violation (NOV) from RIDEM.[2] See AAD Decision and Order 3 (Oct. 31, 2012); Hr'g Tr. 21. RIDEM received a letter from Mr. Delfarno's attorney indicating either his intent to perform the restorations required by the 1980 NOV or that the remediation was already complete. See AAD Decision and Order 3 (Oct. 31, 2012). The 1980 NOV, however, was never recorded in the Land Evidence Records in Pawtucket or Lincoln, as is required by Rhode Island statute.[3] See AAD Decision and Order 2 (Oct. 31, 2012); § 2-1-24(a).

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[1] See also Joint Ex. 20 (noting in a RIDEM intraoffice memorandum dated July 2, 2008 that the inspection was in response to an inquiry from consultants for JS Pallet, Co., Inc. regarding whether the work requirements under the 1980 NOV had been completed).

[2] See Joint Ex. 15. On August 5, 1980, RIDEM issued a NOV for wetlands buffer zone violations on the property.

[3] Sec. 2-1-24(a). The statute provides, in pertinent part:

> "Any order or notice to restore freshwater wetlands, buffers, floodplains, or other jurisdictional areas is eligible for recordation under chapter 13 of title 34 and shall be recorded in the land evidence records in the city or town where the property subject to the notice is located and any subsequent transferee of the property

On November 20, 2003, after Mr. Cook's previous inspection of the property on September 23, 2003, RIDEM issued a Notice of Intent to Enforce (NOIE) notifying Mr. DaSilva, as operator of JS Pallet Co., Inc., that all materials, pallets and pavement must be removed from the twenty-foot buffer zone. See AAD Decision and Order 2 (Oct. 31, 2012); Hr'g Tr. 80. The NOIE required that the restoration of the wetlands buffer zone be completed by April 15, 2004. See Joint Ex. 4. On December 29, 2003, CFD Realty, LLC acquired the property. See AAD Decision and Order 1 (Oct. 31, 2012).

Approximately six years later, on June 16, 2009, RIDEM conducted a subsequent inspection of the property. This inspection revealed that Appellants did not fulfill the requirements of the NOIE. See AAD Decision and Order 2 (Oct. 31, 2012). Furthermore, Appellants actually made additional alterations to the wetlands buffer zone. See AAD Decision and Order 1-2 (Oct. 31, 2012). For purposes of the AAD hearing, RIDEM and Appellants jointly stipulated that Appellants committed wetlands violations within the prohibited buffer zone after purchasing the property in 2003. See AAD Decision and Order Fact No. 14, at 7 (Oct. 31, 2012). The violations included the storage of pallets and the installation of a large propane tank, heat treatment facility, and additional paving, all within the prohibited buffer zone. See id.

After determining that the NOIE requirements had not been met, RIDEM issued a NOV to CFD Realty, LLC on August 3, 2009, which was recorded in the Town of Lincoln and City of Pawtucket Land Evidence Records. See AAD Decision and Order 2 (Oct. 31, 2012). Appellants filed a timely appeal from the NOV on August 24, 2009. The matter came before the AAD for a hearing on September 25, 2012. The AAD Hearing Officer, David Spinella (Hearing Officer Spinella), issued a Decision and Order on October 31, 2012.

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is responsible for complying with the requirements of the order or notice." Sec. 2-1-24(a).

Appellants contended that they have used the property in the same manner as their immediate predecessor. See AAD Decision and Order 4 (Oct. 31, 2012). Furthermore, Appellants argued in their appeal of the NOV before Hearing Officer Spinella that they are not responsible for violations of RIDEM rules and regulations that were unrecorded and committed by previous owners. See id.

In the AAD Decision and Order, Hearing Officer Spinella concluded that:

> "The flaw in [Appellants'] argument is that after inspection of the property in 2003 by Mr. Cook, new violations were discovered [since Mr. DaSilva took title to the property] . . . . These new violations are interrelated with the still existing wetlands encroachment issues that have plagued this property since the 1980's. Assuming, arguendo, that [RIDEM] recorded a Notice of Violation against [the previous owners] that a title search would have revealed and placed [Mr. DaSilva] on notice before he purchased the property, these [Appellants] caused the clock to be reset with new encroachments/violations they committed that were discovered during Mr. Cook's site inspection in 2003." AAD Decision and Order 5 (Oct. 31, 2012).

Hearing Officer Spinella determined that Appellants were in violation of § 2-1-21, Rule 7.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, March 1994 and April 1998, as well as Rule 5.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, June 2007. Hearing Officer Spinella further ruled that no monetary penalties would be imposed, but the restoration requirement in the Notice of Violation would remain in full force and effect. See AAD Decision and Order 8 (Oct. 31, 2012).

On November 5, 2012, the Office of Compliance and Inspection filed a Motion to Reconsider the Decision and Order. On November 26, 2012, the motion to reconsider was denied in part and granted in part—resulting in the amendment of Conclusion of Law No. 3, which now provides:

> "No monetary penalties pursuant to Section E (1), (2), and (3) of the Notice of Violation (One Thousand and 00/100 Dollars) are assessed or imposed in this matter against Respondents, but the Restoration Requirements in Section D (2) of the Notice of Violation remain in full force and effect in the Decision and Order dated October 31, 2012." AAD Decision and Order 3 (Nov. 26, 2012).

On December 24, 2012, Appellants filed a timely administrative appeal with this Court for review of the AAD Decision and Order, as amended on November 26, 2012.

Applicable Law

Hearing Officer Spinella concluded that the Appellants violated § 2-1-21, which provides, in pertinent part:

> "**2-1-21 Approval of director.**
> (a)(1) No person, firm, industry, company, corporation, city, town, municipal or state agency, fire district, club, nonprofit agency, or other individual or group may:
>> (i) Excavate; drain; fill; place trash, garbage, sewage, highway runoff, drainage ditch effluents, earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; dike; dam; divert; change; add to or take from or otherwise alter the character of any freshwater wetland, buffer, or floodplain as defined in § 2-1-20 without first obtaining the approval of the director of the department of environmental management . . . ." Sec. 2-1-21.

Hearing Officer Spinella also determined that Appellants violated Rule 7.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, March 1994 and April 1998, as well as Rule 5.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, June 2007, prohibiting activities which may alter freshwater wetlands without a permit from RIDEM. See AAD Decision and Order 8. Rule 7.01 outlines general application requirements and provides, in pertinent part:

> "**Rule 7.01 Application Forms and Their Submission**
>
> "A. Forms Available
> "Forms for submitting all applications as set forth in the *Act* and these *Rules* are available at the *Department* . . . .
>
> "B. Where to Submit
> "All applications involving *freshwater wetlands* must be submitted for processing directly to the Freshwater Wetlands Program . . . ." Rule 7.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, March 1994 and April 1998.

Rule 5.01 provides, in pertinent part:

> "**5.01 Prohibitions**
> "A. Except as provided in Rule 6.00, a proposed *project* or activity which may *alter* any *freshwater wetland* may not be undertaken without a *permit* from the *Department*. Specifically, no *person* may *excavate*; *drain*; *fill*; place trash, garbage, sewage, road runoff, drainage ditch effluents, earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; *dike*; *dam*; divert; clear; grade; construct in; add to or take from or otherwise change the character of any *freshwater wetland* as defined herein, in any way, without first obtaining a *permit* from the *Department*.
>
> "B. In addition to those *projects* or activities proposed either partially or wholly within *freshwater wetlands*, *projects* or activities taking place outside of *freshwater wetlands* which in all likelihood, because of their close proximity to wetlands, or because the size or nature of the *project* or activity will result in an *alteration* of the natural character of any *freshwater wet*land, may not be undertaken without a *permit* from the *Department*." Rule 5.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, June 2007.

In the instant appeal, Appellants contend that RIDEM failed to record the 1980 NOV in the Land Evidence Records of Pawtucket and Lincoln, as is required under § 2-1-24(a). Section 2-1-24(a) provides, in pertinent part:

> "Any order or notice to restore freshwater wetlands, buffers, floodplains, or other jurisdictional areas is eligible for recordation under chapter 13 of title 34 and shall be recorded in the land

> evidence records in the city or town where the property subject to the notice is located and any subsequent transferee of the property is responsible for complying with the requirements of the order or notice." Sec. 2-1-24(a).

Section 34-13-2 provides:

> "**34-13-2 Recording as constructive notice**.
> "A recording or filing under § 34-13-1 shall be constructive notice to all persons of the contents of instruments and other matters so recorded, so far as they are genuine." Sec. 34-13-2.

Appellants rely on two cases in support of their equitable estoppel argument: Fleet Constr. Co., Inc. v. Town of N. Smithfield, 713 A.2d 1241 (R.I. 1998) and Town of Glocester v. Olivo's Mobile Home Court, Inc., 111 R.I. 120, 300 A.2d 465 (1973). In Fleet Constr. Co., the Rhode Island Supreme Court held that equitable estoppel can be applied against government entities. 713 A.2d at 1244. In Town of Glocester, the Rhode Island Supreme Court determined that the town should be estopped from enforcing a nonconforming use after the expenditure of a substantial amount of money, and because there was continuous affirmation of the said nonconforming use as a result of the town's acceptance of numerous license payments, and the Town Council's continuous renewal of licenses over the course of several years. 111 R.I. at 120, 300 A.2d at 471. When facts or circumstances indicate that justice so requires, equitable estoppel can be applied against a government agency. See Romano v. Ret. Bd. of Emps.' Ret. Sys. of R.I., 767 A.2d 35, 48 (R.I. 2001) (citing Greenwich Bay Yacht Basin Assocs. v. Brown, 537 A.2d 988, 991 (R.I.1988)) (holding that the doctrine "will not be applied unless the equities clearly [balance] in favor of the parties seeking relief under [the] doctrine"); see also Ferrelli v. Dep't of Emp't Sec., 106 R.I. 588, 261 A.2d 906, 909-10 (1970).

During the hearing before this Court, RIDEM argued for the first time that Appellants waived their estoppel argument by failing to raise it as an issue at the AAD hearing. The raise-

or-waive doctrine provides that "[a]llegations of error committed [below] are considered waived if they were not effectively raised at trial, despite their articulation at the appellate level." State v. Merced, 933 A.2d 172, 174 (R.I. 2007). The Rhode Island Supreme Court has yet to explicitly address whether the raise-or-waive doctrine applies to administrative hearings and subsequent appeals. See E. Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of the Town of Barrington, 901 A.2d 1136, 1153 (R.I. 2006). Judicial review is limited to determining whether there was sufficient competent evidence to support findings made by an administrative agency. Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 812 (R.I. 2000). A primary purpose of the raise-or-waive doctrine is to prevent litigants from being ". . . surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." Sims v. Apfel, 530 U.S. 103, 103 (2000).

Standard of Review

When reviewing the decisions of an administrative agency, the Court ". . . sits as an appellate court with a limited scope of review." Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). The Court's review is governed by the Rhode Island Administrative Procedures Act (APA), §§ 42-35-1, et seq. See Iselin v. Retirement Bd. of Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1048 (R.I. 2008) (citing Rossi v. Emps.' Ret. Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006)); see also Vito v. Dep't of Envtl. Mgmt., 589 A.2d 809, 810 (R.I. 1991). Section 42-35-15(g) provides, in pertinent part:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;

> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error or law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 484 (R.I. 1994)). When reviewing a decision under the APA, the Court may not substitute its judgment for that of the agency on questions of fact. See Johnston Ambulatory Surgical Assocs., 755 A.2d at 805. The Court defers to the administrative agency's factual determinations provided that they are supported by legally competent evidence. See Arnold v. R.I. Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). The Court cannot "weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its findings of fact for those made at the administrative level." E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 373 A.2d 496, 501 (1977). Accordingly, the Court will '"reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record."' Baker v. Dep't of Emp't Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1994) (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)).

The Court is free to conduct a de novo review of determinations of law made by an agency. See Arnold, 822 A.2d at 167 (citing Johnston Ambulatory Surgical Assocs., 755 A.2d at 805). Thus, the Court is limited to the certified record in its determination as to whether legally competent evidence exists to support the agency's decision. Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). Legally competent or substantial

evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981).

Issue

The issue before this Court, regarding whether Hearing Officer Spinella's Decision and Order, as amended, was supported by reliable, probative, and substantial evidence in the record and was not clearly erroneous or affected by error of law, is twofold: (1) whether Appellants' post-purchase use of the property resulted in distinctly new violations of § 2-1-21 and Rules 7.01 and 5.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, and (2) whether Appellants are in fact responsible for such violations, despite RIDEM's failure to record or enforce the 1980 NOV.

Analysis

A

Distinctly New Wetlands Buffer Zone Violations

1

Recordation in Land Evidence Records

Hearing Officer Spinella found as a fact that the 1980 NOV was never recorded in Land Evidence Records in Pawtucket or Lincoln. See AAD Decision and Order 2. This Court must defer to Hearing Officer Spinella's determinations as to the credibility of witnesses. See E. Grossman & Sons, 118 R.I. at 276, 373 A.2d at 501. The Court defers to the administrative agency's factual determinations provided they are supported by legally competent evidence. Arnold, 822 A.2d at 167. Applying that standard, this Court finds that Hearing Officer Spinella's determination that the 1980 NOV was never recorded, based on the testimony of both

Mr. Cook and Mr. Ellis, was supported by reliable, probative, and substantial evidence on the record and was not clearly erroneous or affected by error or law. See also Joint Ex. 20 (providing a RIDEM intraoffice memorandum indicating that RIDEM has no record that the 1980 violation was recorded in the municipal Land Evidence Records).

2

Enforcement of 1980 NOV

Hearing Officer Spinella found as a fact that in response to the 1980 NOV, Mr. Delfarno—a previous owner of the property—agreed to remediate the violations and a Consent Agreement was prepared, but never signed. See AAD Decision and Order 3. In addition, Hearing Officer Spinella determined that RIDEM received letters from Mr. Delfarno's attorney that either indicated his intent to remediate the violations or that he actually completed the restoration plan. See AAD Decision and Order 3 (Oct. 31, 2012); Joint Ex. 15. At the AAD hearing, Mr. Cook described a letter from Mr. Delfarno's attorney to RIDEM dated June 9, 1988 that indicated "the work along the bank of the Moshassuck River [had] been completed and the seed which [had] been planted [had] taken root." AAD Hr'g Tr. 46. Joint Exhibit 15 includes a RIDEM Complaint Inspection Report indicating that RIDEM took aerial photos of the property in 1970, 1985, 1992, 1995, and 2003. In his testimony, Mr. Cook described the 1992 photos, indicating that the photos depicted small amounts of materials in the buffer zone. See AAD Hr'g Tr. 26. This Court finds that Hearing Officer Spinella's determinations that agreements were reached to complete the restoration work, correspondence was shared, and evidence existed that remediation had been nearly completed or completed were supported by reliable, probative, and substantial evidence on the record and were not clearly erroneous or affected by error or law.

3

Appellants' Post-Purchase Use of Property

For purposes of the AAD hearing, RIDEM and Appellants jointly stipulated that Appellants committed wetlands violations within the prohibited buffer zone after purchasing the property in 2003. See AAD Decision and Order Fact No. 14, at 7 (Oct. 31, 2012); see also AAD Hr'g Tr. 34-35. Hearing Officer Spinella found as a fact that Appellants commenced additional prohibited buffer zone alterations after RIDEM issued the NOIE. See AAD Decision and Order 2-3 (Oct. 31, 2012); see AAD Hr'g Tr. 34-35. Hearing Officer Spinella found as a fact that Appellants commenced additional prohibited buffer zone alterations after RIDEM issued the NOIE. See AAD Decision and Order 2-3 (Oct. 31, 2012); see also AAD Hr'g Tr. 34-35. Furthermore, Hearing Officer Spinella found as a fact that while the property had some unresolved violations from previous owners, new violations had occurred since Appellants acquired the property, which were distinctly different from those existing and unresolved violations committed by prior property owners. See AAD Decision and Order 3 (Oct. 31, 2012); see also AAD Hr'g Tr. 71. During the AAD hearing, Harold Ellis[4] (Mr. Ellis) testified that these new violations included storage of wood pallets and tractors within the twenty-foot buffer zone, as well as asphalt in areas that are required to be loamed and seeded. See AAD Hr'g Tr. 71. Hearing Officer Spinella found that the Appellants' post-purchase use of the property was separate and distinct from Mr. Delfarno's past uses, which were subject to the 1980 NOV. See AAD Decision and Order 3 (Oct. 31, 2012). This Court further notes that Appellants did not, at any time, apply for a permit to alter the wetlands buffer zone on the property as required under § 2-1-21. See AAD Hr'g Tr. 85.

[4] Mr. Ellis is supervisor of the Wetlands Compliance Program in the Office of Compliance and Inspection of RIDEM. See AAD Decision and Order 3.

During the AAD hearing, Mr. Ellis indicated that, at the time of the 1980 NOV, RIDEM took into consideration the "working nature" of the property and accommodated that use by only requiring a twenty-foot buffer zone along the river, instead of a wider buffer zone.[5] See AAD Hr'g Tr. 74. Mr. Ellis noted that Mr. Delfarno "had no problem with that 20-foot buffer" and "[h]ad it been left alone, we would have had a vegetated corridor through this area today, but, because of the way it's being used now, it's totally gone." Id. at 74-75. Hearing Officer Spinella determined that while the past and present violations on the property were interrelated, Appellants had nonetheless created new violations for which they are responsible. Additionally, Hearing Officer Spinella found Mr. Cook's testimony that ". . . when the new violations are resolved, the old issues will be resolved as well" credible. AAD Decision and Order 3 (Oct. 31, 2012); see also AAD Hr'g Tr. 52. This Court finds that Hearing Officer Spinella's determination that the Appellants committed distinctly new wetlands violations was supported by reliable, probative, and substantial evidence on the record and was not clearly erroneous or affected by error or law.

B

Appellants' Responsibility with Regard to Distinctly New Wetlands Violations

1

RIDEM's Raise-or-Waive Argument

At the January 30, 2017 hearing before this Court, RIDEM, for the first time, averred that Appellants waived their estoppel argument on appeal because they failed to raise the issue at the AAD hearing. In response, Appellants took the position that their argument on appeal is

[5] RIDEM has jurisdiction over land within 200 feet of the river's edge. See AAD Hr'g Tr. 74.

essentially the same as their argument before Hearing Officer Spinella and is thereby not waived. Hearing Officer Spinella summarized Appellants' argument at the AAD hearing as follows:

> ". . . previous unrecorded violation against the property, committed by previous owners were not called to [Appellants'] attention prior to purchasing the property in 2003 and therefore, they are not responsible for those violations. [Appellants] further argue that they continued to use the property in the exact manner as their immediate predecessor in title and since no violations were of record, they should not be held responsible for them." AAD Decision and Order 4-5 (Oct. 31, 2012).

This Court finds that Appellants' argument on appeal is essentially the same as their argument before Hearing Officer Spinella. The only difference is that now, instead of stating they should not be held responsible, Appellants claim that RIDEM should be estopped from enforcing the violations. The estoppel issue was not waived by Appellants because RIDEM should not have been surprised by this argument on appeal. Thus, the raise-or-waive doctrine does not apply. See Sims, 530 U.S. at 103 (holding that "litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."). Both parties presented evidence at the AAD hearing regarding whether Appellants' violations were new or merely a continued past use and whether RIDEM recorded and enforced the 1980 NOV. Therefore, the record from the administrative hearing contains sufficient competent evidence to support a determination by this Court on the issue of estoppel. See Johnston Ambulatory Surgical Assocs., 755 A.2d at 812 (noting that judicial review is limited to determining whether there is sufficient competent evidence to support a hearing officer's findings). Consequently, this Court finds that Appellants did not waive the estoppel issue.

2

Appellants' Estoppel Argument

First, Appellants contend that RIDEM should be estopped from enforcing the current NOV because RIDEM failed to record the 1980 NOV, depriving Appellants of constructive notice of the previous RIDEM violation on the property. See AAD Hr'g Tr. 82-83. Secondly, Appellants argue that RIDEM "took NO steps to follow through on the former violation" for over thirty years. See Appellants' Brief 5. This Court finds that Appellants' estoppel argument fails for three reasons: (1) RIDEM did take steps to remediate the 1980 NOV;[6] (2) Appellants committed violations after purchasing the property that were distinctly new from the 1980 violations; (3) Appellants, in anticipation of their intended and distinctly new commercial uses of the property, should have performed environmental due diligence prior to purchasing.

Equitable estoppel can be applied against administrative agencies "where justice would so require." Romano, 767 A.2d at 48. Furthermore, the doctrine of equitable estoppel ". . . will not be applied unless the equities clearly must be balanced in favor of the parties seeking relief . . . ." Greenwich Bay Yacht Basin Assocs., 537 A.2d at 991. Here, the Court finds that the equities do not balance in favor of Appellants.

This Court affirms Hearing Officer Spinella's determination that Appellants created distinctly new wetlands buffer violations after purchasing the property. The Court further notes that several of these violations actually occurred after RIDEM issued a NOIE to Mr. DaSilva, as operator of JS Pallet Co., Inc. See AAD Decision and Order 2-3 (Oct. 31, 2012); AAD Hr'g Tr. 34-35. This Court also affirms Hearing Officer Spinella's finding that communications between

[6] See Joint Ex. 15 (demonstrating mutual efforts between RIDEM and Mr. Delfarno to remediate the 1980 NOV and other interactions between the previous property owners and RIDEM during that time period).

RIDEM and Mr. Delfarno indicating continued remediation efforts and restoration of the 1980 NOV was complete or nearly complete. See AAD Decision and Order 3 (Oct. 31, 2012); AAD Hr'g Tr. 44-46; Joint Ex. 14. This Court notes that even if RIDEM did fail to enforce the 1980 NOV, such facts would still be distinguishable from the facts in Town of Glocester—a case on which Appellants rely in support of their estoppel argument. 111 R.I. at 120, 300 A.2d at 471. In Town of Glocester, the Court applied the doctrine of equitable estoppel because the town continuously and actively confirmed that a land use was permissible, only to later declare that the same use was prohibited. Id. In this case, however, Appellants contend that it was RIDEM's inaction or lack of enforcement that justifies invoking the estoppel doctrine. See id. While this Court finds that RIDEM did enforce the 1980 NOV, it also finds that RIDEM's actions in this case were sufficiently distinguishable from those of the town in Town of Glocester. Id.

Finally, RIDEM was required by statute to record the 1980 NOV in the Land Evidence Records, which would have provided Appellants with constructive notice of previous wetlands issues on the property. See § 2-1-24(a). The Court notes that the November 20, 2003 NOIE was issued to Mr. DaSilva, as operator of JS Pallet Co., Inc., prior to CFD Realty, LLC's acquisition of the property. The NOIE provided Appellants with actual notice of RIDEM's wetlands buffer zone concerns with regard to the property. See AAD Decision and Order 1 (Oct. 31, 2012). Nonetheless, Appellants, in preparation for their distinctly new commercial uses of the property—separate from those subject to the 1980 NOV—should have performed "environmental due diligence" prior to the purchase. Wilson Auto Enters., Inc. v. Mobil Oil Corp., 778 F. Supp. 101, 105 (1991) (citing Schnapf, Environmental Liability: Law & Strategy for Businesses and Corporations § 13.01 (1990) (noting that environmental due diligence is both a common and crucial step in purchasing property); see Lawrence P. Schnapf, Environmental

Issues in Business Transactions 379 (ABA, Business Law Section 2011) (highlighting the fact that environmental liability can interfere with business objectives and environmental due diligence can help identify and estimate these liabilities). Hearing Officer Spinella found as a fact that Appellants' installation of a propane tank, heat treatment facility, and additional paving and storage resulted in new wetlands violations on the property. See AAD Decision and Order 2 (Oct. 31, 2012). In planning for land development, such as Appellants' new installations and storage needs a potential buyer must be aware of the potential for federal and state permitting requirements. See N. Deems, S. Jennette, E. Kelly, A Practical Guide to Winning Land Use Approvals and Permits § 4.08[2] (2015). Moreover, a potential buyer must also anticipate that a certain piece of property might not be subject to development due to environmental regulations. See id.

Hearing Officer Spinella found as a fact that RIDEM's 2003 inspection of the property was in response to a "wetlands complaint." See AAD Decision and Order 1 (Oct. 31, 2012). However, in a July 2, 2008 RIDEM intraoffice memorandum, RIDEM reported that the 2003 inspection was instead in response to an inquiry from consultants for JS Pallet, Co., Inc. asking whether the 1980 NOV remediation work had been completed. See Joint Ex. 20; AAD Hr'g Tr. 70-71. Even if consultants for JS Pallet Co., Inc. did inquire about the status of the 1980 NOV, environmental due diligence should have been performed by CFD Realty, LLC prior to the purchase, and its due diligence should have included a review of the applicable federal and state statutes and RIDEM regulations.

This Court holds that RIDEM should not be estopped from enforcing the present NOV against Appellants. RIDEM made continuous efforts since the 1980 NOV to ensure that the wetlands violations would be remediated by the landowner and/or operator of the property.

Furthermore, Appellants—in their post-purchase use of the property—committed distinctly new wetlands violations. Finally, while RIDEM did not record the 1980 NOV in Land Evidence Records as required, Appellants nonetheless should have anticipated their intended and distinctly new commercial uses of the property and reviewed environmental requirements, both state and federal, in order to ensure that those intended uses were permitted on the property. This Court further finds that the equities in this case do not balance in favor of the Appellants, and justice does not require that RIDEM be estopped from enforcing its wetlands regulations as applicable to Appellants' use of the property. See Romano, 767 A.2d at 48.

Conclusion

After review of the entire record, this Court finds that Hearing Officer Spinella's Decision and Order, as amended on November 26, 2012, was supported by reliable, probative, and substantial evidence on the record and was not clearly erroneous or affected by error or law. Appellants post-purchase use of the property resulted in distinctly new violations of § 2-1-21, Rule 7.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, March 1994 and April 1998, as well as Rule 5.01 of the RIDEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, June 2007; Appellants, therefore, are responsible for those violations.

Accordingly, this Court affirms the AAD Decision and Order, as amended on November 26, 2012. As a result, Appellants' request for attorneys' fees pursuant to § 42-92-3(b) is moot. See Compl. 3; see also § 42-92-1.

Counsel shall submit the appropriate Judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	CFD Realty, LLC and JS Pallet Co., Inc. v. State of Rhode Island, Department of Environmental Management
CASE NO:	PC 2012-6591
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 3, 2017
JUSTICE/MAGISTRATE:	Montalbano, J.
ATTORNEYS:	
For Plaintiff:	Thomas More Dickinson, Esq.
For Defendant:	Joseph J. Lobianco, Esq.