Filed on October 3, 2005

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

HARTFORD PARK TENANTS ASSOCIATION, DEBRA A. MARTIN, on behalf of herself and as next friend to her minor child MICHAEL J. MARTIN, SHEILA WILHELM, on behalf of herself and as next friend to her minor children, MIKAELAH WILHELM, JOSHUA WILHELM and RICHARD WILHELM, and NICHOLAS J. MARSELLA	:	**C.A. No. 99-3748**
v.	:	
RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, CITY OF PROVIDENCE, RHODE ISLAND SCHOOL BOARD, AND ALAN SEPE, in his capacity as Acting Director of the Department of Public Property of the City of Providence	:	

DECISION

CLIFTON, J. This decision is rendered in accordance with Rule 52 of the Superior Court Rules of Civil Procedure. This Court has jurisdiction pursuant to G.L. 1956 § § 8-2-13, 9-30-1, 9-30-2, 42-35-7, and 42 U.S.C. § 1983.

MOTIONS AND SUPPORTING PAPERS

On July 23, 1999, Hartford Park Tenants Association (hereinafter "HPTA"), Debra A. Martin, individually and on behalf of her minor child, Michael J. Martin, Sheila Wilhelm, individually and on behalf of her minor children, Mikaelah Wilhelm, Joshua Wilhelm, and Richard Wilhelm, and Nicholas Marsella (hereinafter, collectively, "the Plaintiffs") filed a complaint seeking an injunction to halt the construction and operation of certain public schools – now named the Anthony Carnevale Elementary School and the Governor Christopher Del Sesto Middle School – (hereinafter "the Schools") –

located on Springfield Street in Providence (hereinafter "the Site"), which were being constructed at that time. On August 16, 1999, Plaintiffs moved for a temporary restraining order (hereinafter a "TRO") to halt construction of the middle schools and operation of the elementary school. This motion was denied by the court (Silverstein, J) on September 10, 1999. The order was conditioned on the Muncipal Defendants' following certain procedures such as keeping the elementary school windows closed and conducting soil gas monitoring tests. The case subsequently proceeded to trial.

The complaint contained five counts. In Count One, the Plaintiffs alleged that the Rhode Island Department of Environmental Management (hereinafter "DEM") violated G.L. 1956 § 23-19.14-5, the environmental equity requirement of the Industrial Property Remediation and Reuse Act (hereinafter, the "IPRARA), by approving the City of Providence's (hereinafter "the City" or "Providence") plans to construct schools on the Site. In the remaining four counts, the Plaintiffs alleged violations, through actions or inactions with respect to approving and implementing the City's plans to construct the schools, by the DEM, as well as the City, the Providence School Board (hereinafter "PSB"), and Alan Sepe (hereinafter "Sepe"), in his capacity as Acting Director of the Department of Public Property of the City of Providence (hereinafter the DPP) (the latter three hereinafter collectively the "Municipal Defendants"). Specifically, Count Two alleged that all of the defendants had violated the DEM Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases (hereinafter the "Remediation Regulations"); Count Three alleged that the DEM had violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and the regulations promulgated there under by the United States Environmental Protection Agency (hereinafter the

"EPA"), 40 CFR § 7.10 et seq., and that the City and PSB had violated regulations of the United States Department of Education (hereinafter the "USDE"), 34 CFR 100.1 et seq.; Count Four alleged that all of the Defendants had denied Plaintiffs due process of law in violation of the 14th Amendment to the U.S. Constitution; and Count Five alleged that all of the Defendants had deprived the Plaintiffs of equal protection of the laws, also in violation of the 14th Amendment to the U.S. Constitution. Plaintiffs asserted that Counts Three, Four and Five were all actionable pursuant to 42 U.S.C. § 1983, and that Counts Four and Five were also actionable pursuant to Article I, § 2 of the Rhode Island Constitution.

After a preliminary hearing, on March 26, 2003, this Court ruled on multiple motions. This Court denied the following: DEM's and Plaintiffs' cross-motions for summary judgment relating to IPRARA and the Remediation Regulations; the Municipal Defendants' motion for summary judgment against Plaintiffs'claims under § 601 of Title VI and 42 U.S.C. § 1983; Plaintiffs' motion for summary judgment as to their due process and equal protection claims under the federal and state constitutions against the Municipal Defendants; DEM's and the Municipal Defendants' motions to dismiss Plaintiff HPTA on the grounds of lack of standing; DEM's motion for summary judgment on grounds of mootness; DEM's motion for summary judgment as to Plaintiffs' claim for declaratory relief pursuant to G.L. § 9-30-1 et seq. (the Uniform Declaratory Judgment Act, hereinafter the "UDJA"); and DEM's motion for summary judgment as to Plaintiffs' claims under Section 601 of Title VI, 42 U.S.C. § 2000d. At the same hearing, this Court granted the following: DEM's motion for summary judgment as to Plaintiffs' claim for declaratory relief pursuant to G.L. 1956 § 42-35-7 (the section of the

Administrative Procedures Act that provides for declaratory judgment on the validity or applicability of agency rules), DEM's motion for summary judgment on Plaintiffs' claims under Section 602 of Title VI, DEM's motion for summary judgment on Plaintiffs' claims under 42 U.S.C. § 1983, and Plaintiffs' motion for summary judgment against the Municipal Defendants for violation of Remediation Regulations §§ 7.07 and 10.01.

Trial was held from March through May of 2003. On June 13, 2003, DEM filed a motion to reconsider the ruling denying Defendants' motions for Rule 52(c) Judgment as a Matter of Law, which motion was also denied. The Court ordered a schedule for submission of post-trial briefs and replies, and a schedule for copies of the trial transcripts. The Court also accepted proposed findings of facts from the parties and responses thereto.

STANDING

As a preliminary matter, both DEM and the Municipal Defendants assert that the HPTA lacked standing to sue. Defendants' main contention is that as an unincorporated association, the HPTA is subject to the provisions of G.L. 1956 § 9-2-11, which limits the type of suits that may be brought by an unincorporated association and delineates the manner in which such suits may be maintained on its behalf. Under § 9-2-11 a civil action may be maintained on behalf of such an association to:

> "recover any property or upon any cause of action for or upon which all the associates may maintain such action by reason of their interest or ownership therein, either jointly or in common, [and] . . . to recover from one or more members of the association his or her or their proportionate share of any money lawfully expended by the association for the benefits of the associates or to enforce any lawful claim of the association against a member or members." G.L. 1956 § 9-2-11.

Additionally, such a suit may only be maintained on the association's behalf by an officer or member "as trustee," and only if "so authorized by the association." Id. Defendants argue that none of the statutory reasons for bringing suit apply: there is no property of the association at issue, no money to be recovered from members, and no lawful claim against a member or members. Defendants also contend that the claim is not one that could be maintained by all of the associates by reason of their interest in the HPTA. Additionally, no officer or member of the HPTA proceeded in this case as "trustee" on behalf of the HPTA and the HPTA did not establish that the association members authorized the suit. Defendants further assert that the HPTA failed to allege the requisite injury in fact required to achieve standing. Plaintiffs insist that compliance with G.L. 1956 § 9-2-11 only implicates the HPTA's capacity to sue and that Defendants waived this defense by failing to raise it in their answers. Additionally, Plaintiffs assert that the evidence established that the HPTA suffered the requisite injury in fact to establish standing.[1]

Standing is "an access barrier that calls for assessment of one's credentials to bring suit." Ahlburn v. Clark, 728 A.2d 449, 452 (R.I. 1999). In general, "[u]nder Rhode Island law, a plaintiff has sufficient standing to sue if he or she alleges "an injury in fact." Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992) (citing Rhode Island Opthalmological Soc'y v. Cannon, 113 R.I. 16, 26, 317 A.2d 124, 129 (1974)). An "injury in fact" has been defined as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan

[1] Plaintiffs, citing Corrente v. State of Rhode Island, 759 F.Supp. 73, 80 (D.R.I. 1991), profer an additional argument suggesting that the federal claims are exempt from the procedural rules by virtue of Rule 17 (b) of the Federal Rules of Civil Procedure. However, it is axiomatic that federal procedural rules do not apply in a state court. See Johnson v. Fankell, 520 U.S. 911, 920, (1997) (holding that a federal procedural right does not apply in a nonfederal forum).

v. Defenders of Wildlife, 504 U.S. 555, 560 (1974); Associated Builders & Contractors of Rhode Island v. Dept. of Admin., State of Rhode Island, 787 A.2d 1179, 1185-86 (R.I. 2002). "When the suit is one challenging the legality of government action or inaction, . . . to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue." Id. at 561. "If he is, there is ordinarily little question that the action or inaction has caused him injury." Id.

An association has been held to have standing as a representative if its members, "or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." Warth v. Seldin, 422 U.S. 490, 511 (1975). The Supreme Court has additionally required that "the interests the association seeks to protect are germane to the organization's purpose [and that] neither the claim asserted nor the relief requested requires the participation of the individual members in the law suit." United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 553, (1996).

"Capacity has been defined as a party's personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest." Wright, Miller & Kane, Federal Practice and Procedure: Civil §1559 at 441 (2d ed. 1990 & Supp. 2004); see also Tiffany Agency of Modeling, Inc. v. Butler, 110 R.I. 568, 572, 295 A.2d 47, 49-50 (1972). "The distinction between having capacity and having a claim for relief is significant because of its procedural ramifications." Wright, Miller & Kane, § 1559 at 442. In Rhode Island, Sup. R. Civ. P. 17 mandates the procedure required to determine who may be a proper party to a law suit. Specifically,

Rule 17 (b) states that the capacity of an unincorporated association to sue or be sued is to be determined by state law; and, "[i]t is clear that an unincorporated party is not a proper party in a law suit in Rhode Island" unless the party seeking to include the unincorporated party complies with the applicable provisions of G.L. 1956 §§ 9-2-10 through 9-2-15. See Corrente, 759 F. Supp. at 80; Walsh v. Isreal Couture Post, No. 2274 V.F.W. of the United States, 542 A.2d 1094, 1095 (R.I. 1988). However, Sup. R. Civ. P. 9 (a) governs the manner in which the issue of capacity – or lack thereof – must be raised:

> "When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

Courts have held that "[t]he phrase 'by specific negative averment' means that a party must raise lack of capacity to sue in an appropriate pleading or amendment to avoid waiver." Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor, Inc. 929 F.2d 343, 345 (7th Cir. 1991) (interpreting the same words in the corresponding federal rule); see also Tiffany, 110 R.I. at 573, 295 A.2d at 50 (explaining that corporation's capacity should have been challenged in a responsive pleading). Indeed, the Rhode Island Supreme Court has said that even if a defendant should prevail on the issue of alleged incapacity, the plaintiff should be given a chance to cure the defect. Id. "Since it is a threshold defense, somewhat analogous to lack of personal jurisdiction or improper venue, it should be considered as waived under Rule 12(h)(1) if not raised . . .before trial." Wright, Miller & Kane, § 1559 at 442. In World-Wide Computer Resources, Inc.

v. Arthur Kaufman Sales Co., 615 A.2d 122, 124 (R.I. 1992), the Court explained that waiver was particularly appropriate when the defendant should have been timely alerted by the circumstances to the availability of the defense but delayed mention of lack of capacity until it was unfairly prejudicial to the plaintiff. (Defense of lack of capacity deemed waived where raised at trial after case had been pending four years and plaintiff no longer readily able to comply with statute).

Despite Defendants' classification of the issue as one of standing,[2] HPTA's compliance, or non-compliance, with § 9-2-11 is clearly an issue of capacity. Furthermore, DEM's answer,[3] raising the bald affirmative defense that "[t]he Plaintiff, Hartford Park Tenant's Association lacks standing to maintain this suit," was not a "specific negative averment" including "such supporting particulars as are peculiarly within the pleader's knowledge." See Marston v. Am. Employers Ins. Co., 439 F.2d 1035, 1041 (1st Cir. 1971). Additionally, defendants have raised the issue of HPTA's lack of capacity four years after the initiation of the law suit even though they had reason to know of the association's non-compliance at the outset since the lack of a named trustee was patently evident in the complaint. Raising the issue at trial, after years of legal skirmishing, when the member make-up, the officers and, indeed, even the name, of the association had changed, created obstacles to compliance that may be difficult for the association to overcome in an expeditious manner. Therefore, to the extent that

[2] "The word *standing* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our own century. No authority that I have found introduces the term with proper explanations and apologies and announces that henceforth *standing* should be used to describe who may be heard by a judge. Nor was there any sudden adoption by tacit consent. The word appears here and there, spreading very gradually with no discernible pattern. Judges and lawyers found themselves using the term and did not ask why they did so or where it came from." Black's Law Dictionary 1413 (7th ed. 1999) (quoting Joseph Vining, Legal Identity 55 (1978)).

[3] Both DEM's original answer and amended answer listed lack of standing of HPTA as an affirmative defense, while the Municipal Defendants failed to mention standing at all.

defendants are now complaining about the lack of capacity of the HPTA to bring and maintain this suit, the issue is waived per virtue of being unseasonably late.

As to injury-in-fact standing, the credible evidence revealed that the tenants of the Hartford Park Public Housing Project are all members of the HPTA by virtue of their tenancies, that such tenants are predominantly non-white and of low economic means, and that the project's proximity (within one mile) to the Site deemed the children from Hartford Park likely candidates for attendance at the new schools. Clearly, the association members, tenants of Hartford Park, living in close proximity to the Site, among those for whose children the schools were sited and constructed, were the objects of the government actions (or inactions) herein challenged – clearly, they were among "the populations surrounding each site" and were both a "low income and a racial minority population" identified by IPRARA as those whom the statute was designed to protect. G.L. 1956 §23-19.14-5. The HPTA, as a public housing tenants association, operates to advocate for the rights of its members as tenants in matters affecting their living conditions and quality of life. Since its members meet the requirement of injury in fact by virtue of their status as Hartford Park tenants, it follows that the association itself has met the requirement.

In its post trial memorandum, DEM also challenges, for the first time, the standing of each of the other plaintiffs. The Rhode Island Supreme Court has held that failure to raise lack of standing in a timely fashion could result in a waiver of the claim, see Direct Action for Rights & Equal. v. Gannon, 713 A.2d 218, 222 (R.I. 1998) (issue of standing waived for appeal if not raised before trial justice); see also Sup. R. Civ. P. 12(h) ("A party waives all defenses and objections which the party does not present either by

motion as hereinbefore provided or, if the party has made no motion, in the party's answer or reply . . . "). Notwithstanding the waiver doctrine, this Court finds that the individual plaintiffs have established standing. As to the Martins and the Wilhelms, the first having declined the city's offer to have her son attend the Springfield Street schools, the second having sent her disabled daughter to a Springfield Street school three years after the initiation of this law suit because the brand new school had facilities and amenities not available at other city schools; their injuries in fact result from having to choose between the shiny new school on a contaminated site or the older less equipped school elsewhere. See Associated Builders, 787 A.2d at 1185 ("By presenting contractors with the Hobson's choice of submitting a futile bid or not bidding at all, the state caused injury in fact sufficient to satisfy contractors' standing requirements."). Both, too, were among the surrounding populations of lower class and racial minorities that the statute sought to protect. As to Mr. Marsella, he is an abutter of the Site, specifically supposed to be notified both before a site investigation and upon its completion pursuant to IPRARA, who testified that the wind blew soil from the Site during construction onto his property: he is clearly an "object of the government action" and therefore has standing. Lujan, 504 U.S. at 560; see also Associated Builders, 787 A.2d at 1185 ("[T]he line is not between a substantial injury and an insubstantial injury. The line is between injury and no injury.").

STANDARD OF REVIEW

Rule 52(a) of the Rhode Island Superior Court Rules of Civil Procedure provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . ." Sup. R. Civ. P. 52(a)

(2003). In accordance with this authority in a non-jury trial, "the trial justice sits as trier of fact as well as law." Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). When rendering a decision in a non-jury trial, the Rhode Island Supreme Court has interpreted Rule 52(a) to mean that "the trial justice need not engage in extensive analysis to comply with this requirement." White v. Le Clerc, 468 A.2d 289, 290 (R.I. 1983). "Rule 52(a) does not require the trial justice to set forth all facts presented at trial. The rule also does not require the trial justice to explain why each legal result asserted by a party was not accepted by the court." Kottis v. Cerrilli, 612 A.2d 661, 665 (R.I. 1992). Rather, "brief findings will suffice as long as they address and resolve the controlling factual and legal issues." White, 468 A.2d at 290.

FINDINGS OF FACT

A. PARTIES

1. Plaintiff HPTA is tenants' organization consisting of all residents of the Hartford Park public housing project in Providence. The project contains 388 apartments for low-income families, and another 120 for low-income disabled or elderly persons. The vast majority of Hartford Park households with school-age children are either African American or Latino. The housing project is located less than a mile from the Site.

2. Individual Plaintiff Debra A. Martin, a low-income Providence resident who is white, lives with her son, Michael J. Martin. Michael, who is also white, attended Flynn Elementary School in 1999. In 1999, Michael was offered the choice to attend the new elementary school under construction at the Site, and in 2000 was offered the choice to attend the middle school built there, but he attended neither because his mother did not

want him to attend a school built on the "Site". Plaintiff Sheila Wilhelm is a low income resident of Providence, with four children under age 18. Wilhelm's daughter, Mikaelah Wilhelm, is African-American, white and Native American, and disabled and has attended the Springfield Street middle school since May, 2002. Since 1974, Plaintiff Nicolas J. Marsella has owned and lived at 82 Ophelia Street, directly across from the Site.

3. The Defendant City receives federal funds from a variety of sources, including funds from the United States Department of Education (hereinafter the "DOE") to operate public schools in the City. At all relevant times, the City's actions and inactions were made or determined by the City or its agents or employees under color of state law. Defendant Sepe is the Acting Director of the DPP. At all relevant times, Sepe's actions and inactions were made and determined under color of state law. Sepe is white. Sepe performs the duties of the Director of the DPP, which are set forth in the Providence Home Rule Charter, §1006. Defendant PSB operates and administers the public school system in the City, including the three schools constructed on the Site, and receives funds from the DOE to operate them. At all relevant times, the PSB's actions and inactions were made or determined by PSB or its agents or employees under color of state law. The City, PSB, and Sepe are together referred to as the "municipal defendants."

Defendant DEM is a state agency which regulates, inter alia, the cleanup of hazardous waste sites, and receives federal funds in connection with its hazardous waste programs. At all relevant times, DEM's actions and inactions were taken and determined by DEM or its agents or employees under color of state and federal law.

B. FACTS RELATING TO PROVIDENCE PUBLIC SCHOOLS AND STUDENTS

4. In school year 1997-98, according to the Rhode Island Board of Regents 1999 Information Works Report (hereinafter "Information Works"), approximately 77% of Rhode Island's public school population was white and 23% non-white (the nonwhite population consisting approximately of 7% African-American, 3% Asian, 12% Latino, and 1% Native American). That same year, approximately 23% of the City's student body was white and 77% was non-white (the non-white population consisting approximately of 23% African-American, 11% Asian, 43% Latino, and 1% Native American). In future years, the student population in the City's public schools will continue to be predominantly non-white. In 1998, the City's public school population was projected to grow by approximately 9% over the next five years, according to the Rhode Island Department of Education's 1999 Summary of Necessity of Construction Projects. Much of the growth in the school's population is attributable to an influx of Latino families with school age children. Between 1987 and 1999, the percentage of whites in the City's school system decreased over time, from 43% to 19%; the percentage of Hispanics increased from 20% to 48%, the number of blacks and Asians decreased slightly, and were respectively 23% and 10% of the student population in 1999. In 1998, PSB projected that 83% of the students that would attend the Springfield Street Schools would be non-white.

5. The majority of public school students in the City are students from low-income households. Approximately 75% of the student body is eligible for government

subsidized lunch programs, compared to 34% of students statewide, according to Information Works.

6. The actual percentages of white and non-white Students at the Springfield Street Schools for the years indicated were as follows:

	2001		2002	
SCHOOL	**%White**	**%Non-White**	**%White**	**%Non-White**
Springfield Elementary	16.6	83.4	15.15	84.85
Springfield Middle #1	28.27	71.73	19.95	80.05
Springfield Middle #2	24.1	75.9	17.72	82.28

7. Children in the City have higher rates of environmentally induced illness than children statewide. In 1998, according to statistics maintained by the Rhode Island Department of Health, and reported in the 1999 Rhode Island Kids Count Fact Book (hereinafter "Kids Count"), approximately 31.1% of Providence's children due to start kindergarten in the Fall of 2000 were found to have elevated blood lead levels (in excess of 10 :g/dL), compared to 16.1% of such children statewide. In 1998, Health Department statistics indicated that approximately 19.8% of all school-aged children in Providence were found to have elevated blood lead levels (in excess of 10 :g/dL), compared to 10.9% of children statewide. Minority children in Providence suffer disproportionately from high levels of lead poisoning when compared to white children in Providence.

8. Moreover, asthma rates are higher among minority children in Providence when compared with the overall city-wide child population. In 1998, Providence had one of the highest rates of hospitalization for asthma for children under 18 years of age in the

state. According to Kids Count, Providence's asthma hospitalization rate of 4.2 per 1,000 children is roughly 63% higher than the statewide rate of 2.6 per 1,000 children.

9. Low birth weight is an indicator of a population's overall health. Between 1993-1997, according to Kids Count, the percentage of low birthweight infants in Providence was 8.4%, compared to 6.8% statewide.

10. In 1999, Providence school-aged children suffered a higher rate of malnutrition than did school-aged students statewide. Moreover, non-white (or minority) children in Providence experience higher malnutrition rates than do white children in Providence.

C. FACTS RELATING TO THE PROCESS FOR SITING AND FINANCING NEW SCHOOLS

11. The school-siting process was triggered when the Providence school Superintendent determined that a new school was needed, contacted the Director of the DPP, and informed the latter of the need. The Acting Director of DPP gathered information from the School Department, including the number of students in the proposed area, the kind of school that is needed, and when the school is needed. The Acting Director compiled a list of properties available for the school, then investigated the size and location of the site before visiting each. When the Acting Director deemed a parcel to be a potential school site, he shared his list with the School Department.

12. The DPP Director next toured each site with School Department officials, discussing the sites and determining which site should be investigated further. The Director prepared a budget only for those sites under active consideration, and made the decision to prepare a budget for a specific site in consultation with School Department

officials. The DPP also arranged for a preliminary drawing of a site plan, showing the proposed location of the school building(s) on the site.

13. After a site plan is developed, the City engages an environmental consultant to perform a Phase 1 environmental evaluation. If the results of Phase 1 environmental testing show that the site can be built on, the next step is to undertake a Phase 2 environmental evaluation.

14. In 1998 and 1999, there was no custom or practice for the DPP to notify the public that a specific site for a construction of a school was under consideration.

15. To finance construction of new schools, the Providence Public Building Authority ("PPBA") issues bonds. First, the Mayor requests the City Council to approve the bonds, and the request is referred to the Council's Finance Committee. The PSB must then also vote to approve the issuance of bonds. PSB posted its meeting notices at 797 Westminster Street and published them in the *Providence Journal* at least 48 hours in advance of a scheduled meeting. Once the City Council approves a resolution to issue bonds, the PPBA must vote to issue them. PPBA posts its meeting notices at 400 Westminster Street, 48 hours in advance of its meetings.

D. FACTS RELATING TO THE IDENTIFICATION OF THE SITE WHERE THE SCHOOLS WOULD BE BUILT

16. In Fall, 1998, the Superintendent determined that there was a need for an elementary school and two middle schools to open in September of 1999. The need for these schools was based on steady growth in the school's population over the prior five years. For the schools to have opened in September of 1999, construction had to begin by April 1, 1999 or sooner. Upon the Superintendent's determination of need, Sepe,

between the Fall of 1998 and February 1999, identified four possible sites for the schools. These sites included:

The former Almacs Supermarket site on Plainfield Street;

Neutaconcanut Park;

Merino Park; and

The Springfield Street Site where the three schools were ultimately built.

In addition to these sites, the City also considered using a site on Gordon Avenue for the planned elementary school. Had the Springfield Street Site not been available in time for the schools to open in September, 1999, the City would have constructed the elementary school at the Gordon Avenue Site, and transferred the students to Springfield Street the following year.

17. Sepe determined to eliminate the Almacs and Neutaconcacut Park Sites before the preliminary drawing stage of the site selection process. A "chicken scratch site plan" was made for the Merino Park Site, but no environmental tests were conducted there by the municipal defendants. Sepe determined not to proceed with the Merino Park Site after learning it would take a year to get a wetlands permit, and that there were environmental issues relating to the Woonasquatucket River, which abutted the Site.

E. FACTS RELATING TO THE SITE

18. On or about February 10, 1999, the City first announced, to the news media, plans to construct three schools for 1,200 students on the Site. The roughly triangular-shaped site for the three schools is about ten acres, and is bounded by Springfield Street on the east, Hartford Avenue on the north, and a roughly straight diagonal line running from the intersection of Springfield Street and Seton Street towards the intersection of Hartford Avenue and Milo Street. The land surrounding the Site is now primarily residential, with some commercial uses found along Hartford Avenue.

19. The Site was originally an undeveloped wetland which was divided into over 100 individual house lots, but no houses were ever built, and the lots were unfenced. Illegal dumping on the wetland began in the 1950's, and the wetland gradually became an unauthorized municipal landfill, (hereinafter UML). In the mid 1960's, the City assumed operational control of the UML, and operated it until the early 1970's. While in operation, City garbage trucks deposited household trash there, while the City dumped its own trash there on a daily basis, and then bulldozed soil over all of the trash.

20. In the mid 1970's, the City ceased accepting waste at the dump in response to complaints by neighbors of noxious odors and rats. Nonetheless, dumping continued on the site as recently as 1981 and 1982. Approximately 200,000 cubic yards, or 300,000 tons, of waste and fill material was disposed at the Site, of which about 50% is located below the water table. After the City ceased accepting waste, plants and trees sprouted on the soil deposited over the dumped trash. By February, 1999, the Site had become a wooded area.

21. DEM's involvement with the Site dates back to 1989, when DEM inspectors found PCBs present in auto fluff material that had been dumped at the Site. DEM determined the auto fluff material was "not homogenized" and was thus "solid waste as opposed to hazardous waste." Prior to 1999, the general public did not make complaints to DEM about the municipal landfill, nor ask that the municipal landfill be cleaned up.

22. The Site was never a licensed facility for the disposal of solid waste. Neither DEM nor any other state agency ever issued a certificate of closure for the dump.

F. FACTS RELATING TO DEM'S AUTHORITY

23. DEM regulates the cleanup of sites contaminated by hazardous materials. DEM has issued regulations governing the investigation and remediation of hazardous material releases. The Remediation Regulations were promulgated, in part, to implement the Industrial Property Remediation and Reuse Act ("IPRARA"), codified at R.I.G.L. § 23-19.14.1-1 et seq.

24. DEM determines a site is jurisdictional under the Remediation Regulations when it has documentation from laboratory analysis verifying that there are at least minimum exceedances of the Direct Residential Exposure Criteria (hereinafter "Residential Criteria")or some other minimum threshold. The Residential Criteria consist of a series of tables establishing conservative risk-based cleanup levels for commonly encountered hazardous substances. Those tables are found in Section 8 of the Remediation Regulations (RISK MANAGEMENT). CRIR 12-180-001 § 8 (2005).

25. For some sites, DEM may require the party proposing a cleanup plan (defined under the regulations as a "performing party") to conduct a site investigation. Id. § 7.0.

The Remediation Regulations state that DEM must notify a performing party in writing when a site investigation is necessary. Id. at § 7.02.

26. The Sight Investigation Report (herinafter "SIR") is the report documenting the findings of the site investigation. The purpose of an SIR is to "determine the nature and extent of the contaminated site and the actual and potential impacts of the release." Id. at § 7.01. The scope of the site investigation "shall be tailored to specific conditions and circumstances at the site under investigation using processional judgment." Id. In all cases, however, the data collected must "completely characterize the contaminated site." Id. at § 7.03.

27. For those sites that require remedial action, the site investigation process concludes with the selection of a site remedy. The SIR must propose at least two remedial alternatives other than "no action," and the proposed remedial alternatives are to be "consistent with the current and reasonably foreseeable land usage . . . ." Id. at § 7.04. The proposed remedial alternatives must be supported by data in the SIR that documents, *inter alia,* compliance with the Tables in Section 8, and compliance with "State and local laws or other public concerns." Id. After reviewing the SIR, the DEM must then issue a Remedial Decision Letter that directs the performing party to submit a Remedial Action Work Plan (hereinafter "RAWP"). The RAWP describes the technical details of implementing a proposed remedy. Id. § 2.01.

28. Before any remedial action activities proposed in a RAWP may be initiated, the DEM must approve the RAWP. Id. § 10.01. For complex site remedies, DEM's approval of a RAWP occurs via issuance of an Order of Approval; for simple site

remedies, DEM's approval occurs via issuance of a Remedial Approval Letter. Id. § 2.01.

29. DEM also regulates sites at which solid waste has been disposed, regardless of whether it is hazardous or not.

30. The preferred, and most protective remedy for closing a landfill in Rhode Island is known as a RCRA Cap, so named because it was developed in connection with the federal Resource Conservation and Recovery Act, which regulates certain hazardous waste materials. A RCRA cap consists of four layers: a base layer, an impermeable layer of clay or geomembrane, a drainage layer, and a vegetative support layer. The base layer is closest to the subsurface and the vegetative layer is on the surface.

F. FACTS RELATING TO THE CONSTRUCTION OF THE SCHOOLS

31. When the City made its February, 1999 announcement that it intended to build schools on the site, it denied that the site was formerly used as a "dump."

32. On March 1, 1999, then-Mayor Vincent Cianci requested the PPBA to issue bonds to finance construction of an elementary and middle school complex at the Site.

33. On or about March 6, 1999, Sepe sent bulldozers to the Site to clear trees and vegetation. No defendant gave abutting residents advance warning that bulldozers would be clearing the Site. When Sepe made the decision to begin bulldozing, the City neither owned the land where the schools were to be built, nor had a building permit to build them.

34. An environmental consulting firm, ATC Associates ("ATC"), was engaged by either DPP or PPBA to conduct environmental testing at the Site. On March 8, 1999, the municipal defendants received preliminary test results from soil samples taken at the

Site by ATC, which revealed the presence of lead, arsenic, and total petroleum hydrocarbons in excess of the Residential Criteria. The fax cover sheet from ATC to Sepe accompanying the test results stated that "[t]he metals results came in late Friday—the results show lead and arsenic above standards (not surprising) but if we can eliminate exposure through a cap or engineered cover we should be alright [sic]." Id. On March 12, 1999, the Phase I environmental assessment of the Site was completed.

35. On March 15, 1999, the City's Board of Contract and Supply awarded a contract to O. Ahlborg & Sons, Inc. for construction management and building design services for the proposed schools. The request for authorization to enter the proposed contract had actually gone before that Board six to eight weeks earlier.

36. On March 16, 1999, a meeting about the school construction proposal, with ATC and City Council member Igliozzi presiding, was held at the Silver Lake Community Center. The actual March 8, 1999 test results were not shared with the public at this meeting, although the contents of the preliminary test results were discussed.

37. On or about March 25, 1999, the City submitted to DEM a SIR, signed on the City's behalf by Sepe. The SIR indicated the presence of several toxic substances at the Site, including levels of lead, arsenic, and total petroleum hydrocarbons in excess of the Residential Criteria. The report also revealed the presence of volatile organic compounds (herinafter "VOCs") and mercury on the Site. Polychlorinated biphenyls (hereinafter "PCBs") had been found by DEM on the Site in 1988-89. The SIR stated that the City's preferred method to clean up the Site was to: (a) contain, on site, the hazardous waste dumped over the years by depositing two feet of clean fill over the unbuilt areas of the

site; (b) excavate, sift soil on the site, and remove the contaminated soil under the elementary school; and (c) install a soil gas collection system in the two middle schools.

38. On April 2, 1999, the City submitted to DEM a RAWP, which detailed its plans to implement the preferred remedy set forth in the SIR. The RAWP submitted on April 2, 1999 was not complete, and additions were made to the RAWP on or about May 3, 1999 and May 9, 1999. As part of the RAWP, the City proposed that solid waste excavated from the dump be processed through a rotating screener, and bulky waste that did not pass through the screen be disposed of off-site. The City proposed to vent soil gases produced at the Site to the surface through soil gas collection pipes installed under the building housing the two middle schools.

39. Sepe asked DEM more than once to expedite DEM's review of the municipal defendants' SIR and RAWP.

40. On April 8, 1999, the Providence City Council approved then–Mayor Cianci's proposal to permit the PPBA to issue bonds to finance the construction of the school complex at the Site, but did not conduct a public hearing prior to its decision.

41. The next public meeting concerning the schools was held on April 26, 1999 at Providence City Hall. The only notice the City ever gave to abutters regarding the site investigation itself, and the SIR generated as a result of the investigation, was for this meeting, and was accomplished, at Sepe's direction, by mailing a flyer only a few days before the meeting was to take place.

42. The City was aware that there would be opposition expressed at the April 26, 1999 meeting and, by letter to DEM's Terrence Gray, asked DEM to be prepared to

address the public's anticipated question, framed as "would you . . . send your children to this new school?"

43. The April 26, 1999 meeting was sparsely attended, and held, just after the work day ended, outside of the neighborhood where the schools were to be built. According to the notes of the April 26, 1999 meeting, approximately 12 of 15 people who spoke at the meeting raised concerns about the safety of constructing the schools on the dump. Three of the 12 people identified themselves as being representatives of Latino organizations, although opposition to siting the schools on the Site was expressed by both whites and non-whites.

44. Opposition to siting the three schools on the site was also voiced in the April 26, 1999 meetings of the PSB, where members of the public expressed concern about the safety of building the schools on a former landfill. In fact, on April 26, 1999, the PSB itself voted 4-3, along racial lines, to deny the PPBA permission to issue the school construction bonds. The PSB's three white board members voted to approve the issuance of bonds, even though the City had still not finalized all details of the RAWP by that date. Later that night, the PSB voted unanimously to table consideration of the issuance of the bonds until its May 10, 1999 meeting.

45. By the April 26, 1999 meetings, Sepe, on behalf of the City, had incurred expenses on the Springfield Street Schools project in an amount between $300,000 and $400,000.

46. On May 4, 1999, a special meeting of the PSB was held regarding the issuance of bonds for the three schools. Again, the PSB voted along racial lines, by a vote of 5-3, to reject the issuance of the bonds.

47. During the week of May 1-7, 1999 soil was excavated, sifted and stockpiled on the Site.

48. The City did not apply for a building permit for the schools until May 6, 1999. At Sepe's direction, part of the foundation for the elementary school building had already been poured by that date, and piles had been driven to support the middle school building. Sepe testified that he received a verbal approval from the Providence Building Inspector to start construction, and that in some cases the Inspector allows DPP to start construction on projects with only verbal approval.

49. On or about May 10, 1999, a day after the City finally submitted its completed RAWP to DEM for approval, the PSB reversed itself, and voted 7-1 to approve the issuance of bonds to finance construction of the schools. On May 11, 1999, the City sought DEM's approval to reuse, under the new soil cover, the soil it had already screened, but DEM denied this request by letter dated May 13, 1999.

50. On May 18, 1999, the PPBA took several votes relating to the Site. First, it voted to purchase environmental liability insurance for the school buildings. Second, it voted to include the costs of environmental monitoring and remediation as part of the basic rent to be paid by the City when the City leased back the school buildings from the PPBA. Third, it voted to issue bonds to finance construction of the schools.

51. The City did not have a policy permitting construction of City projects on land not owned by the City, however, the City did not condemn the Site until on or about June 15, 1999, by which time, construction on both school buildings was well underway. Sepe testified that this was a unique situation.

52. The foundation permits for the elementary and middle school buildings were not issued until June 23, 1999. The building permit for the elementary school building was not issued until August 31, 1999, and the building permit for the middle school building was not issued until October 14, 1999.

53. The PPBA reaffirmed its vote to issue bonds for the schools at its meetings on June 22, 1999 and July 13, 1999. At the July 13, 1999 meeting, the PPBA also voted to purchase a 10 year $50,000,000 pollution and remediation liability policy for the schools, and to establish an environmental reserve account for the schools to be funded by the City with annual payments of $40,000, until the account reached $200,000. The bonds approved by the PPBA for the schools included $11,400,000 for the costs of the Springfield Street Elementary School Project and $19,007,600 for the Springfield Street Middle School Complex.

H. FACTS RELATING TO DEM'S REVIEW AND APPROVAL OF THE MUNICIPAL DEFENDANTS' SIR AND RAWP FOR THE SITE.

54. DEM first learned that the City planned to build several schools at the Site when several concerned neighbors contacted DEM to complain about the City's plans, which had been announced in a news article on or about February 17, 1999. The same day or the next day, DEM contacted the Mayor's office to make it aware of DEM records indicating there was an unauthorized municipal landfill where the City planned to build the schools. Additionally, between February 22 –26, 1999, DEM received approximately two or three calls a day from neighbors who had concerns about the City's plans to build schools at the Site.

55. In response to the articles and phone calls, DEM met on March 1, 1999 with representatives of the City to discuss the latter's plans for building the schools. At that meeting, the City acknowledged that the Site was a former UML. DEM did not assert jurisdiction over the Site at that time pursuant to the Remediation Regulations. DEM waited until on or about March 10, 1999, when it received sampling information from the City indicating the presence of hazardous materials in excess of the Residential Criteria. DEM reviewed the City's plans only under the Remediation Regulations and IPRARA, but not for compliance with the Solid Waste Regulations. DEM personnel assigned to regulate solid waste facilities were not involved with, or consulted during, DEM's review of the City's plans, other than to review schematic drawings of the proposed sub-slab soil gas ventilation system.

56. When the City began to investigate the Site on February 17, 1999, its consultant ATC informed the municipal defendants that it had found evidence of solid waste disposal on the Site. After this sampling information was sent to DEM, DEM and the City met on March 10, 1999, at which point DEM instructed the City to prepare a SIR for the Site. This instruction was not in writing.

57. DEM officials attended the public meeting at the Silver Lake Community Center on March 16, 1999, where they heard people express opposition to siting schools at the Site for safety reasons. When he learned of this opposition, Terrence Gray, then DEM's Chief of the Office of Waste Management ("OWM"), directed his staff to be present at any public meetings at which the Site was on the agenda, in order that they be available to answer any questions about the use of the Site to build a school.

58. On March 18, 1999, DEM personnel visited the Site and observed construction activity taking place. The next day, March 19, 1999, DEM issued an Immediate Compliance Order, which directed the City to "[i]mmediately cease all excavation and stockpiling activities at the Site until the Site Investigation is completed and approved by OWM and a Remedial Action Work Plan (RAWP) has been submitted to the Office of Waste Management and approved." The order also stated that the City's unauthorized excavation and disposal of hazardous material and solid waste at the Site "presents an imminent hazard to the public health, safety, and to the environment and that the performance required by this Order is necessary to protect the public health and the environment."

59. DEM finally received the City's SIR on March 25, 1999. As part of the site investigation, the City took 23 groundwater samples and sent 5 samples for laboratory analysis, and also took 24 soil samples and 12 soil gas samples, with 4 soil gas samples sent out for laboratory analysis. The SIR listed all of the limited number of hazardous substances for which the City tested. The City did not test for several of the hazardous substances for which safety standards had been promulgated under the Residential Criteria, including metals such as beryllium, copper, cyanide, manganese, nickel, thallium, vanadium, and zinc; pesticides such as chlordane and dieldrin; and semi-volatile organic compounds (Remediation Regulations, Section 8, Table 1). DEM did not determine whether there were concentrations of these substances present at the Site in excess of the regulatory criteria.

60. The SIR proposed three remedial alternatives for the Site: (1) no action; (2) removal of all solid waste at the Site, with replacement of the removed waste with clean

fill; and (3) installation of an "engineered" cover of two feet of clean fill over the unbuilt portion of the Site, with installation of a soil gas collection system under the elementary school building. The report did not propose installation of a RCRA cap, and identified option number 3 as the preferred remedy.

61. On April 2, 1999, ATC submitted a RAWP to DEM without any detailed drawings of the proposed construction or remedial systems. The remedy proposed in the RAWP included the following: (1) placement of two feet of clean fill on the unbuilt areas of the site on top of an indicator barrier, except in unbuilt areas to be covered by pavement, where one foot of clean fill with a geotextile fabric would be placed between the existing ground and the pavement; (2) excavation of waste material underneath the school buildings, and sifting of excavated soil through a screener to separate it from bulky waste, with both the soil and waste disposed of off site; and (3) the installation of a soil gas collection system under the school buildings.

62. On April 9, 1999, DEM issued the City a Remedial Decision Letter, wherein DEM determined that the site investigation was complete, and approved the conceptual remedy proposed by the City in the SIR. In the Remedial Decision Letter, DEM expressly deferred approval of a request by ATC to begin pile driving at the Site "until the public has had the opportunity to comment on this entire proposal." Following the issuance of this letter, the meeting of April 26, 1999 was held at City Hall. DEM did not receive any substantial comments concerning the investigation itself at the March 16, 1999 meeting. Although by March 16, 1999 DEM was aware about public concerns related to the safety of building a school at the Site, it did not direct the City to conduct another public meeting prior to the issuance of the Remedial Decision Letter.

63. DEM did not return the SIR to the City as being incomplete for not testing all of the substances listed in Table 1 of Section 8 of the Remediation Regulations.

64. DEM does not have a policy or practice by which it informs the public that it is reviewing a SIR; DEM maintained that the obligation for notifying abutters that an SIR is under review falls on performing parties.

65. The Remediation Regulations require notice to abutters when the site investigation is complete, yet before April 9, 1999, no notice was sent to abutters by the City informing them that it was complete. Nor was notice sent to abutters regarding the March 16, 1999 meeting at the Silver Lake Community Center. The only notice that was sent by the City to abutters concerning the site investigation was the flier announcing the meeting at City Hall on April 26, 1999. This meeting occurred two weeks after DEM issued its Remedial Decision Letter, in which DEM had already found the site investigation complete.

66. The April 26, 1999 public meeting was planned at a meeting held on April 19, 1999, attended by 12 people, including representatives from DEM, the City, PPBA, ATC, and contractors working on the project. All of the persons attending the meeting were white, with the exception of a person whose race was not remembered. At this planning meeting, DEM and the City agreed that ATC would make a presentation at the April 26, 1999 meeting. DEM arranged to have Dr. Vanderslice from the Department of Health available to answer questions posed by the public. The subject of the City's proceeding with pile driving prior to the public meeting was also discussed.

67. Opposition to siting the schools on the Site was expressed at the April 26, 1999 meeting. DEM did not schedule any additional public meetings about the City's

plans for the Site. DEM did not establish a period to consider public comments with respect to the technical feasibility of any of the competing remedies proposed by the City in either the SIR or the RAWP.

68. Following the April 26, 1999 public meeting, DEM amended the Immediate Compliance Order on April 27, 1999 to allow the City "to commence with only the pile portion of the Remedial Action Work Plan . . . ." That was the only amendment made by DEM to the initial Immediate Compliance Order.

69. By April 27, the City had already proceeded with other activities barred by the original Immediate Compliance Order. Photographs taken by DEM on April 29, 1999 show that the City had begun sifting soil, and DEM had knowledge prior to that date that the sifting had begun. The City had also caused soil to be excavated, and segregated bulky solid waste material from other soil material. Construction of the elementary school had begun by April 29, 1999. DEM had received complaints that people were suffering from adverse health impacts from odors and dust released by the soil sifting activity, and DEM personnel themselves smelled odors of rotting trash at the Site.

70. Although DEM knew that the City's actions violated the Immediate Compliance Order, DEM took no enforcement action against the City. Rather, DEM sent the April 27, 1999 letter amending the Immediate Compliance Order, which indicated that DEM was giving the City "permission to proceed only with pile driving and nothing else."

71. DEM received numerous requests from Sepe, and the City's Mr. Troiano, to expedite its review of the City's SIR and RAWP. DEM agreed to their requests. DEM

did so because the City claimed it had to construct the schools on an expedited schedule in order for them to open on September 1, 1999.

72. DEM viewed this matter as a "voluntary project" under DEM's Remediation Regulations.

73. DEM was aware that there were non-white persons who opposed using the Site for a school. This opposition did not cause DEM to slow down its review of the City's plans for the Site. DEM knew that the Site was in a community with a high population of minority and low-income residents, and that DEM was required to analyze environmental equity issues relative to the Site under IPRARA. DEM did not have any threshold standard to determine whether a particular site is an "environmental equity" site within the meaning of that statute. DEM's review of environmental equity issues was confined to the generic issues, applicable to any population proximate to an IPRARA site, such as the effect that a cleanup would have on surrounding populations, the risk to the community before and after the site was cleaned up, the incremental benefit of the clean up, and the benefit to the community of removing and containing waste.

74. DEM did not specifically address issues of environmental equity for racial minority and low-income populations related to the use of the site for a school. DEM did not directly consider any demographic, public health or statistical data because it "stipulated that [the site] was an environmental equity community." DEM only indirectly considered demographic data by referencing maps of low income and minority communities that were supplied by EPA, and contained in grant applications filed by DEM in previous years. DEM did not prepare any document that contained DEM's consideration or assessment of issues of environmental equity.

75. In 1999, DEM viewed the environmental equity provision of IPRARA as relating only to issues of public participation, and thus did not undertake any other measures relative to environmental equity other than the "minimal" public participation requirements of IPRARA.

76. DEM approved the City's RAWP by Order of Approval dated June 4, 1999. By that date, the first floor of the elementary school building had already been erected, and work on the second floor had begun; foundation work on the middle school building had been started as well.

77. When a site contains contaminants in excess of the Residential Criteria, DEM's policy and regulations require an environmental land use restriction to be placed on the land records, such as the deed. As of the date of trial, the land use restriction was still being drafted.

78. As of the date of the trial, the Site was the only one in DEM's data base of 1,200 contaminated sites on top of which a school has been built. Prior to this matter, DEM did not have any experience with evaluating a cleanup plan for a contaminated site to be used as a school ground.

FACTS RELATING TO HEALTH RISKS FROM SUBSTANCES FOUND AT THE SITE TO CHILDREN ATTENDING THE SCHOOLS BUILT ON THE SITE [4]

79. Lead poisoning in children is exacerbated by additional exposures to lead. Childhood lead poisoning leads to lowered IQ. A child with a lead level of 10 micrograms per deciliter (:g/dL) has a lower IQ on average of about 7 points, and for

[4] No evidence was presented that any child attending the schools had in fact been injured as a direct and proximate result of exposure to any substances at the schools.

those children with lead levels above 10 :g/dL , for every additional 10 :g/dL of lead there is approximately a 5 point decrease in IQ. Children with blood lead levels in excess of 30 :g/dL are five to seven times more likely to drop out of high school. Lead poisoning also causes permanent brain damage.

80. Chronic exposure to low levels of arsenic can cause peripheral nerve damage, resulting in numbness and tingling in the hands and feet. Such exposure also causes organ damage, particularly to the kidney.

81. Chronic exposures to low levels of petroleum hydrocarbons and VOCs can trigger attacks in people who have asthma, cause learning disabilities, and decrease IQ.

82. Asthma is also triggered by metals such as nickel and chromium (particularly chromium 6, or "hexavalent chromium"), and acid gases such as sulfuric acid, nitric acid and hydrochloric acid.

83. Children who are lead poisoned are more likely to absorb higher levels of other environmental contaminants to which they are exposed than children who are not lead poisoned. Since Providence school-aged children have higher rates of lead poisoning than students statewide, children in Providence are more susceptible to intoxication or poisoning from environmental exposures to other substances than are children statewide.

84. Children who are malnourished are more susceptible to environmental hazards as well. When malnourished children are exposed to a given amount of a toxin, they will often absorb more of the toxin than well-nourished children exposed to the same level of toxin. Malnourished children at a site where they may be exposed to toxins are at higher risk of harm from the exposure than children who are not malnourished.

85. When metals such as lead and arsenic are found in soil, those metals can leach out of the soil and enter the groundwater, depending on the type and permeability of the soil, and the pH of the soil and rainwater. The groundwater can transport the dissolved portion of the contaminants, which can be moved within a site or off the site through groundwater.

86. A RCRA cap prevents surface water from infiltrating through contaminated material, which can otherwise leach contaminants into the groundwater, and either travel through the groundwater or, in some instances, percolate to the surface. A geotextile membrane would inhibit groundwater from rising to the surface, whereas the permeable orange indicator barrier actually installed at the Site cannot and will not obstruct groundwater from coming to the surface. The RAWP provided for the installation of a geotextile membrane under the pavement laid for use as a parking lot and playground. A RCRA Cap never came up for discussion during DEM's review of the remedy

87. The exposure pathways for lead are either inhalation of lead dust or swallowing substances containing lead. The exposure pathways for arsenic are the same as lead. Additionally, arsenic may be absorbed into the skin. The exposure pathways for petroleum hydrocarbons are ingestion, inhalation, and absorption through skin and mucus membranes.

89. The RAWP's action level for carbon dioxide is 1,000 parts per million (ppm) or 0.1%. Symptoms of exposures to levels of carbon dioxide in excess of 1,000 parts per million include headaches, dizziness, tiredness and lethargy.

90. When soil gas action levels are exceeded, the RAWP states that the City would conduct a more thorough assessment, including the installation of additional soil

gas monitoring wells; and where excedences still occur, the monitoring wells will be converted to soil vapor extraction wells.

COUNT ONE: THE IPRARA

Plaintiffs contend DEM violated Section 5 of IPRARA in two ways. First, DEM failed to "consider the issues of environmental equity." Second, DEM failed to provide for proper notice and community involvement. DEM counters that IPRARA is inapplicable to the facts of this case or, in the alternative, if the statute does apply, that DEM substantially complied with, or exceeded, its requirements.

Applicability.

The threshold issue for this Court is whether or not Section 5 (a) of IPRARA applies. DEM argues that Section 5 (a) only requires DEM action if a particular site clean-up is performed by a "bona fide prospective purchaser" who enters into a "settlement agreement" and obtains a covenant-not-to sue from the state along with protection from contribution claims by "responsible parties." G.L. 1956 §§ 23-19.14-1, 23-19.14-2, 23-19.14-3(b), 23-19.14-6, 23-19.14-6.1, 23-19.14-10, 23-19.14-12. As a former operator of, and generator and transporter of waste to the Site, the City is a "responsible party" as defined by the statute, and could therefore never be a "bona fide prospective purchaser." Sections 23-19.14-2, 23-19.14-6(a). DEM suggests that any effort on its behalf to encourage public participation in the investigation/remediation process at the Site was a voluntary attempt to adhere to the "spirit of IPRARA" or a result of DEM's own regulatory requirements and was not due to any statutory obligation.

A court's "ultimate goal is to give effect to the purpose of the act as intended by the Legislature." Labor Ready Northeast, Inc. v. McConaghy, 849 A.2d 340, 344 (R.I. 2004) (quoting Stebbins v. Wells, 818 A.2d 711, 715 (R.I. 2003) (quoting Mottola v. Cirello, 789 A.2d 421, 423 (R.I. 2002)). "It is a primary canon of statutory construction that statutory intent is to be found in the words of the statute, if they are free from ambiguity and express a reasonable meaning." Little v. Conflict of Interest Comm'n, 121 R.I. 232, 237, 297 A.2d 884, 887 (1979) (superceded by statute). If a statute is unclear, a Court must give weight and deference to its construction by the agency charged with its enforcement, unless the agency's construction is unauthorized or clearly erroneous. Labor Ready, 849 A.2d at 344 (quoting Little, 121 R.I. at 236, 297 A.2d at 886). However, when the language of a statute is clear and unambiguous, "it declares its own meaning and there is no room for construction." Little, 121 R.I. at 237, 297 A.2d at 887. The Court "presume[s] that the [l]egislature intended every word, sentence, or provision to serve some purpose and have some force and effect . . . [the Court] will not interpret a statute in a manner that would defeat the underlying purpose of enactment." Pier House Inn, Inc. v. 421 Corp., 812 A.2d 799, 804 (R.I. 2002) (citing Dias v. Cinquegrana, 727 A.2d 198, 199-200 (R.I. 1999) (per curiam)).

Section 5 of IPRARA, reads, in pertinent part, as follows:

> "§ 23-19.14-5. Environmental equity and public participation. -
> (a) The department of environmental management shall consider the effects that clean-ups would have on the populations surrounding each site and shall consider the issues of environmental equity for low income and racial minority populations. The department of environmental management will develop and implement a process to ensure community involvement throughout the investigation and remediation of contaminated sites. That

process shall include, but not be limited to, the following components:

(1) Notification to abutting residents when a work plan for a site investigation is proposed;

(2) Adequate availability of all public records concerning the investigation and clean-up of the site, including, where necessary, the establishment of informational repositories in the impacted community; and

(3) Notification to abutting residents, and other interested parties, when the investigation of the site is deemed complete by the department of environmental management.

(b) This community involvement process will be coordinated with the public notice and comment opportunity provided in § 23-19.14-11 when a final settlement is proposed." (Emphasis added).

The plain, unambiguous language of Section 5 (a) is a clear statutory enactment. There is a legal subject (DEM), legal action (shall consider and will develop) and a case to which the legal action is confined (clean-ups or the investigation and remediation of contaminated sites). See Norman J. Singer, Statutes and Statutory Construction § 32 A:6 849(6th ed. 2002). Clearly, the statute mandates DEM's responsibilities in involving the community in the investigation and remediation of contaminated sites. In fact, DEM does not argue that Section 5 (a) is ambiguous, but, rather, the Department contends that Section 5 (b) limits the applicability of Section 5 (a) to those sites subject to a final settlement proposal. ("will be coordinated with . . .when a final settlement is proposed"). DEM suggests that a reading of IPRARA as a whole shows that the public comment provision in Section 11 is contemplated by the public participation requirement of Section 5, such that the two sections work together as part of a continuous process ("Notice without comment doesn't create much involvement by the community." DEM Brief); that the comment provision only applies when a settlement has been proposed;

and, that only "bona fide prospective purchasers" may enter a settlement agreement. The Department also maintains that the overriding intent of the statute, as gleaned from the legislative findings and the declaration of policy, was to encourage "bona fide prospective purchasers" to clean and develop contaminated sites.

However, the plain, unambiguous language of the statute does not conform to DEM's interpretation. Notwithstanding the clarity of Section 5 (a) itself, Section 5 (b) is equally clear and unambiguous. Section 5 (b) contains a legal subject (DEM), a legal action (coordinate with Section 11) and a case to which this legal action is confined (when there is a settlement agreement proposed). Id. The word "when" is used to signal the case "if a single or rare occasion is contemplated." Id. Clearly, in the (rare) event that there is a settlement agreement proposed, DEM must harmonize the public participation process of Section 5 (a) with the notice and comment procedure outlined in Section 11. If the case does not occur, if a settlement proposal is not made, then Section (b) does not apply. There is no language in Section (b) limiting the applicability of Section (a). Section (a) applies and DEM must act whenever there is a site clean-up; Sections (a) and (b) apply whenever there is a site clean-up subject to a proposed settlement agreement.

Additionally, reading the statute in its entirety crystalizes the clear intent of the General Assembly to impose upon DEM the task of developing and implementing environmental equity and public participation processes for the clean-up and remediation of contaminated sites, whether or not a settlement agreement is proposed. In the first place, the prospect of a settlement agreement is purely permissive – "the state may enter into an agreement." Section 23-19.14-10 (a). It follows that the state may also decide not

to enter an agreement, particularly when it "determines that the response action will not be done properly," while still overseeing a site clean-up. Id. Since the occasion for the proposal of a settlement agreement is merely discretionary, the application of Section (b) to the community involvement process of Section (a) is subject to that original discretion. Section (a) clearly intends to provide for community involvement in the site remediation process. Limiting that involvement to times when a settlement agreement is proposed would render the enactment a nullity, since DEM could, at is discretion, never agree to a settlement proposal, and therefore, never involve the public in any site remediation effort. See Pier House Inn, Inc., 812 A.2d at 805.

Furthermore, the statute, arguably, does not limit the option of a settlement agreement to "bonafide prospective purchasers." The statute, which includes a broad definition of person, allows the state to enter such an agreement "with any person to perform any response action if the state determines that that action will be done properly by the person." Section 23-19.14-10. (emphasis added). In fact, the stated reason for a settlement is "to expedite remedial action and minimize litigation." Id. Indeed, a party is deemed to have "resolved its liability to the state under this chapter." Section 23-19.14-12. Finally, the settlement "reduces the potential liability of [other potentially liable persons] by the amount of the settlement." Id.

Basically, IPRARA aims to encourage the reuse and redevelopment of contaminated sites in Rhode Island by qualifying and controlling liability issues. The legislative findings are broad and recognize that there are "hundreds" of contaminated sites; that liability is often an obstacle to redevelopment; and, that "proper redevelopment

and reuse" would yield economic and environmental benefits. Sections 23-19.14-1. Secondly, the declaration of policy asserts that

> "the state will assure that (1) Activities are taken to control and eliminate contamination at industrial properties that are fair, consistent, and compatible with current and reasonably foreseeable use of the property; (2) Environmental barriers to economic redevelopment and beneficial reuse of contaminated properties are removed; (3) Opportunities are available for businesses to realistically manage their environmental liabilities; and, (4) Voluntary and cooperative clean-up actions are encouraged to the greatest extent possible." Section 23-19.14-2.

Neither the findings nor the policy suggests that "bona fide prospective purchasers" will be the only parties encouraged to act in furtherance of the statute's aims. In fact, responsible parties, such as the City, are expressly penalized for failure to do so. Section 23-19.14-6. DEM's own regulations admit that the goal is to protect human health and the environment by encouraging site remediation by both "responsible parties" and "bona fide prospective purchasers." C.R.I.R. 12-180-001 § 2.02 (2005).

While it is uncontroverted that DEM is the agency charged with enforcing IPRARA, see § 23-19.14-18, deference to the department's interpretation is not required where the plain language is clear. Therefore, the clean-up of the Site by the City is subject to the provisions of the statute, specifically Section 5 (a), as well as its "spirit."

Environmental Equity.

Section 5(a) provides: "[t]he department of environmental management . . . shall consider the issues of environmental equity for low income and racial minority populations." Plaintiffs assert that DEM violated this provision when approving the city's SIR and RAWP for the Site. Plaintiffs fault DEM for lacking a policy with which

to address the environmental equity component of IPRARA and for failing to specifically consider environmental equity issues in its handling of the site investigation in this case.

Plaintiffs first call the Court's attention to the fact that the applicable Remediation Regulations make no mention of environmental equity and that the DEM had no other established policy to address environmental equity issues in place at the time of these events. Furthermore, Plaintiffs claim that DEM's review of the Site was confined to generic issues, applicable to any type of population, and that DEM did not specifically address issues related to the use of the Site for a school to serve minority and low income children. The Plaintiffs also argue that because DEM stipulated that the Site was in an environmental equity community, it did not directly consider any demographic, public health, or statistical data.

DEM counters that the requirement of consideration imposed upon it by IPRARA does not amount to a requirement to develop and implement a separate environmental equity policy; therefore, the lack of such a policy and the lack of any mention of environmental equity in the Remediation Regulations does not indicate that the Department failed to consider the issue. DEM suggests that since every site investigation is unique, there can be no fixed formula for determining whether a project will result in a disproportionately negative environmental impact on a particular community. Furthermore, DEM contends its efforts to maximize opportunities for public input about the clean up and redevelopment of the Site, which it claims went beyond the requirements of IPRARA, evidence a serious consideration of the environmental equity issues facing the surrounding low income and minority population. DEM also maintains that it recognized the Springfield Street area as an environmental equity location

immediately, and considered various factors—such as, the nature of the activity proposed, the applicable regulatory standards, and the nature of the approved remedy—as they related to environmental equity. Additionally, DEM argues that the substantial remedial components it added to the City's remedy evidence its consideration of environmental equity. The remedial components DEM specifically required included: (a) the installation of the sub-slab ventilation systems; (b) the removal of 20,000 tons of solid waste (including all waste beneath the elementary school building) in order to increase the separation between the building foundations and any waste that remained on-site and; (c) the installation of a thirty-three perimeter soil-gas monitoring wells and (d) a twenty-year commitment to monitor the sub-slab ventilation systems and the soil-gas and groundwater wells around the property.

This Court presumes the legislature intended every sentence to serve some purpose, see Pier House Inn, 812 A.2d at 804, and gives the words their plain and ordinary meanings. See State v. Santos, 870 A.2d 1029, 1032 (2005). To "consider" is to "think about carefully." Webster's Ninth New Collegiate Dictionary, 279 (1983); see also Greene Citizens for Responsible Growth, Inc. v. Greene County Bd. of Comm'rs, 547 S.E. 2d 480, 482 (2001). "Environmental equity" is a technical term that "refers to the distribution and effects of environmental problems and the policies and processes to reduce differences in who bears environmental risks."[5] U.S. Environmental Protection Agency, Environmental Equity, Reducing Risk For All Communities (1992)." It is irrefutable that the Site is in a neighborhood largely made up of low income and racial

[5] While IPRARA does not define the term, the parties are in agreement as to its technical meaning. DEM asserts that issues of "environmental equity" do not solely effect low income and racial minorities, and that the agency considers such issues as a matter of course when considering such factors as the effects the clean-up would have on surrounding populations

minority populations, and that the anticipated student population of the Springfield Street schools was expected to be a part of this demographic. The question is whether or not DEM has shown that it actually considered issues of environmental equity for these low income and racial minority populations as was required.

Clearly, DEM lacked any established policy or procedure for considering environmental equity issues: the term is not mentioned in the Remediation Regulations, and there is no evidence of any other published policy in effect at the time of the site remediation process. Yet, the IPRARA does not require DEM to develop and implement such policies or procedures, so the deficiency is not fatal to DEM's claim that it did consider environmental equity issues. On the other hand, such a void does not help DEM to show that the department did "think carefully about" the issues. Where, as here, not one of all the documents filed in connection with the site remediation process even mentioned "environmental equity," adherence to a standard procedure for considering the issue could have helped DEM to show that it did address the issue in some fashion.

Despite DEM's assertion that it recognized immediately that the Site was an "environmental equity" site and despite cursory reference to EPA maps containing demographic data showing the make up of the surrounding population, the handling of the site remediation process—applying the Residential Criteria as the proper regulatory standard, holding public meetings, even imposing substantial remedial components—does not lead to an inference that DEM considered issues of "environmental equity." Presumably, DEM would require at least as much effort and compliance if a school were proposed for a remediation site in any neighborhood, low income, minority or otherwise. Whether or not DEM's decisions and requirements for remedy were appropriate in this

situation, they are not evidence, in and of themselves, that issues of "environmental equity for low income and minority populations" were considered. No other credible evidence was proffered to show that DEM did consider issues of environmental equity. Accordingly, this Court finds that the DEM violated the environmental equity provision of the IPRARA.

Community Involvement.

The Plaintiffs contend that DEM also violated Section 5 by failing to implement the mandatory community involvement process. The IPRARA requires that DEM ensure community involvement throughout the investigation and remediation process. Plaintiffs maintain that DEM failed to implement a public participation process that included the three statutory requirements outlined in Sections 5(a).

First, the Plaintiffs allege DEM did not ensure notification to abutting residents of the work plan proposal for the site investigation of the Site in accordance with Section 5(a)(1). Second, the Plaintiffs allege DEM did not make all the public records concerning the investigation and clean-up adequately available in accordance with Section 5(a)(2). The Plaintiffs contend DEM lacks a policy or practice for informing the public that it is reviewing a SIR and that DEM failed to inform anyone before April 9, 1999 that the SIR or RAWP were available or where the documents could be obtained. Third, the Plaintiffs' allege that DEM did not ensure that notification of the completion of the site investigation was timely given to abutting residents and other interested parties as required by Section 5 (a)(3). Plaintiffs maintain that the site investigation was deemed complete by DEM on April 9, 1999 with the issuance of the Remedial Decision Letter.

The Plaintiffs contend the only notice sent to abutters – a one page flyer sent by the City regarding the April 26, 1999 meeting – was untimely and insufficient. The Plaintiffs maintain that the flyer was deficient in that it did not provide notification that the site investigation was deemed complete or information about the remedial alternatives proposed or how to review relevant documents. Additionally, Plaintiffs assert that DEM did not inform "interested parties" under Section 5(a)(3). Plaintiffs argue that DEM's failure to adhere to the community involvement mandate of IPRARA resulted in such a lack of information that interested parties were not able to come forward in time. Plaintiffs also claim DEM did nothing to affirmatively insure that attendants at the public meetings remained informed.

With regard to the notification requirements of Sections 5 (a) (1) and (3), DEM asserts that there is no specific statutory requirement governing the form of notice – printed, published, or otherwise; thus, the manner in which notice is given should be left to the sound discretion of DEM. DEM suggests that public participation opportunities were enhanced by sending DEM representatives to at least eight City Council and School Committee meetings where the Site was on the agenda for discussion, and by participating in ten public meetings relating to the City's plans to build schools at the Site.

More specifically, DEM counters that the exact notice requirements for Section 5(a)(1) – notice to abutting residents "when a work plan for a site investigation is proposed" – could not be met because of the timing of the determination that the Site was a jurisdictional hazardous waste site subject to the IPRARA. According to DEM, the timing disconnect results from the fact that Section 5(a)(1) is aimed at "brownfield sites"

– sites known to be contaminated before a site investigation is begun and where the investigation is intended to determine the level of contamination. The initial investigation at the Site was conducted to determine if there was any contamination to be considered. In other words, the IPRARA did not yet apply because the Site was not yet known to be contaminated. Moreover, since the City did not file a work plan for a site investigation with DEM prior to commencing the site-work, DEM did not know the Site was a jurisdictional hazardous waste site subject to the IPRARA and could not ensure the notification of Section 5(a)(1). DEM maintains that the Site did not become jurisdictional under IPRARA until after the site investigation began; therefore, the initial notice required under Section 5(a)(1) was not legally required. DEM suggests that adequate public notice was provided through a March 16, 1999 public meeting held by the city, one week after the city notified DEM that the Site was, in fact, contaminated. Furthermore, DEM maintains it required that the City hold public meetings because DEM believed that meetings would provide the best mechanism for hearing and responding to community concerns.

With regard to the IPRARA's public record requirement in Section 5(a)(2), DEM argues that the statute was not violated because the Plaintiffs failed to show that anybody sought and was denied access to records. Moreover, the Department maintains that all records pertaining to the Site were available for review at DEM's main office in Providence.

Finally, DEM claims it exceeded the requirements of Section 5(a)(3) by requiring the City to conduct a final public hearing as a pre-condition to approval. This hearing was held on April 26, 1999. DEM claims, in addition to meeting the statutory

notification requirement, this meeting provided an opportunity for public comment and public discourse with DEM officials and that notice of this meeting was provided to all appropriate parties. DEM argues that the IPRARA does not set a specific time frame for the Section 5(a)(3) notification and that the timing of this meeting, more than one month before DEM issued its final approval of the remedy, complies. DEM also maintains that no evidence was produced by the Plaintiffs establishing that any other non-abutting interested party identified itself to DEM or the City, and that none of the Plaintiffs testified that they notified DEM that they were "interested parties."

Section 5(a)(1).

While there was a regulatory process developed by which Section 5(a)(1) notification should occur, see CRIR 12-180-001 § 7.07A. ("Prior to the implementation of the Site Investigation field activities, the performing party must notify all abutting property owners and tenants that an investigation is about to occur."), the regulation was not followed during the investigation of the Site. It is undisputed that neither DEM nor the City provided the abutting residents or tenants with advance notice of when the work plan for the site investigation was proposed. The work plan was proposed sometime in early February and the public meeting allegedly held in satisfaction of this notice occurred on March 16, 1999.

The City announced its plans to build schools on the Site on or about February 10, 1999. In response to the City's announcement, and, more particularly, in response to the 2-3 daily telephone calls generated to DEM as a result of that announcement, DEM contacted the City on or about February 17, 1999 to report that the Department had records on file that the Site had formerly been used as a dump. The DEM records dated

back to 1989 at which time investigators had discovered auto fluff containing PCBs at the Site. The City proceeded with site work and had the soil tested by a private company, ATC. On March 8, 1999 the results of ATC's testing revealed that the Site was contaminated. On March 10, 1999, after receipt of the ATC information, DEM instructed the City to prepare a SIR. This is the point at which DEM suggests the Site became jurisdictional under the IPRARA. On March 16, 1999, the Municipal Defendants held a public meeting at which the ATC data was discussed and which was attended by DEM personnel. At trial, evidence was not produced to show which and how many members of the public were present. DEM contends that notice about the work plan was conveyed at this meeting.

A site that is jurisdictional under the IPRARA is defined by the statute as follows:

> "all contiguous land, structures and other appurtenances and improvements on the land contaminated by the use, storage, release or disposal of hazardous material including the areal extent of contamination and all suitable areas in very close proximity to the contamination where it will be necessary to implement or conduct and required investigation or remedial action." Section 23-19.14-3 (N).

"Brownfields are defined by the EPA as ''abandoned, idled or underused industrial and commercial facilities where an expansion or redevelopment is complicated by real or perceived environmental contamination.''" Francis v. Buttonwoods Realty Co., 765 A.2d 437, 439 (R.I. 2001)(quoting United States General Accounting Office, Superfund: Barriers to Brownfield Redevelopment, GAO/RCED -96-125 (June 17, 1996)). DEM's claim that the property did not fall under IPRARA jurisdiction until after the initial site testing, because it was not a designated brownfield property fails. Certainly, hindsight reveals that the property qualified as a site at all times relevant to this action because it

was, in fact, contaminated. Moreover, the recorded history of PCB contamination, coupled with the outcry indicating a public perception of contamination, suggests that DEM should have assumed jurisdiction as soon as it became aware of the City's plans to redevelop the property and prior to any soil testing or site work. In order to "ensure community involvement throughout" the site investigation process, notification of the proposed work plan should have been given sooner – when the work plan for the initial site investigation was first proposed. Additionally, even if the timing had been correct, the public meeting of March 16, 1999 failed to fulfill the mandate of the statute. While the manner of notice may be discretionary because the statute does not say otherwise, the IPRARA is very clear as to who must be notified. If the notification about the work plan was imparted at the meeting, DEM would have had no way of knowing if the notice reached those statutorily required to receive it, the abutters. By failing to implement the regulatory process, failing to require the City to notify abutters in a timely fashion, DEM did not "ensure" that abutters were notified.

Section 5(a)(2)

Section 5(a)(2) adds another component to the process by which DEM must ensure community involvement. DEM must provide for "[a]dequate availability of all public records concerning the investigation and clean-up of the site, including, where necessary, the establishment of informational repositories in the impacted community." Section 23-19.14-5 (A). To understand what this command entails, the words must be read in light of their plain and ordinary meanings. Santos, 870 A. 2d at 1032. Records are "available" if they are "present and ready for use" or "accessible." The American