

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

RE: WILLIAM R. REAGAN (APPEAL FILED BY URANIA, LTD.)
AAD NO. 95-004/ISA ISDS PERMIT NO. 9336-3452

DECISION AND ORDER GRANTING DIVISION'S MOTION TO DISMISS

This matter is before the hearing officer on the Division of Groundwater and ISDS' Motion to Dismiss the Request for Hearing filed by Urania, Ltd. concerning issuance of an Individual Sewage Disposal System ("ISDS") permit to William R. Reagan on February 13, 1995.

By way of background, the Division of Groundwater and ISDS ("Division") issued permit No. 9336-3452 to William R. Reagan for property located at 5 Meadow Lane, Westerly, Rhode Island. Urania Ltd., owns real property in the town of Westerly abutting the Reagan property. On March 15, 1995, Urania Ltd., filed a request for hearing requesting interim suspension of the permit, an adjudicatory hearing before the Administrative Adjudication Division for Environmental Matters ("AAD") concerning the correctness of the permit issuance and an order revoking the permit. The Division filed a Motion to Dismiss on March 23, 1995 asserting that Urania Ltd. has no right to request a hearing and that AAD lacks jurisdiction over the matter. Urania, Ltd. filed an objection to the motion and oral argument was held on April 14, 1995 concurrently with the status conference. This is a matter of first impression at the AAD.

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The Division's position is that the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations") do not provide a right to appeal the Division's decision to AAD by persons other than the applicant. Accordingly, the Division maintains that AAD is without jurisdiction to entertain Urania's request for hearing. The Division references the ISDS Regulations, specifically SD 21.00 entitled "Right to Appeal". SD 21.00 states

Any person whose permit application is denied may appeal to the Director for review of the decision on which the denial is based by filing an appeal with the Administrative Adjudication Division.

Urania Ltd. does not contest that the ISDS Regulations provide for appeals by persons whose permits have been denied and contain no provision for abutters who wish to contest the issuance of an ISDS permit at the agency adjudicatory level. Instead, Urania Ltd. argues that Rule 7.00 of the Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters ("AAD Rules") allows for administrative review of the **issuance** of ISDS permits at the agency administrative adjudication level. Rule 7.00(a) provides as follows:

7.00 Commencement of Formal Adjudicatory Proceedings

a) Request for Hearing. Any person having a right to request a hearing shall follow the procedures set forth in R.I.G.L. §42-17.1-2(u) and other applicable statutory and regulatory requirements. Such requests shall be sent directly to the Administrative Adjudication Division for Environmental Matters.

Urania argues that the agency adjudication level is appropriate for review of decisions made by a division of the agency and allows for a broader review of the division action than would an appeal of the agency action in the Superior Court.

Although Urania's argument has initial appeal, AAD is a creature of statute and its jurisdiction is circumscribed by its enabling legislation and other statutes conferring specific jurisdiction. The Rhode Island General Laws, Title 42, Chapter 17.7 establishes the Administrative Adjudication Division for Environmental Matters. §42-17.7-2 authorizes the AAD to hear, inter alia, all contested licensing proceedings. Proceedings of the AAD are governed by the Administrative Procedures Act, Chapter 35 of Title 42 of the General Laws (hereinafter referred to as the "APA"). The APA defines a contested case as a proceeding including licensing in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing. The Rhode Island Supreme Court has held that in order for a proceeding to constitute a contested case subject to the requirements of the APA, a hearing must be required by law. Property Advisory Group, Inc., et al. v. Rylant, 636 A.2d 317, (R.I. 1994). §42-17.7-3(2) allows the Director of the Department to promulgate such rules and regulations as are necessary to carry out the purposes of Chapter 17.7. AAD's Rules of Practice and Procedure were adopted in accordance with the provisions of

WILLIAM R. REAGAN (URANIA)
AAD NO. 95-004/ISA
PAGE 4

the enabling statute and consistent with the APA. Chapter 17.7 did not create new rights of parties to have environmental disputes heard by AAD but rather created a formal adjudication division to adjudicate disputes between parties whose rights and/or privileges were already established by statute or regulation. Nothing in AAD's enabling legislation authorizes the AAD or Director to expand the rights of either the divisions within the Department or the rights of private persons. Moreover, our Supreme Court acknowledges that it "... has consistently prevented state administrative agencies from expanding their jurisdiction through strained interpretations of unambiguous statutes". Caithness Rica Ltd. v. Malachowski, 619 A.2d 833 (R.I. 1993) at 836.

Rule 7.00, cited by Urania as a basis for conferring jurisdiction, provides the mechanism for filing a request for hearing by those persons "... having a **right** to request a hearing..." (emphasis added). In the instant matter, the ISDS Regulations define those persons entitled to appeal the Division's determination of an application to construct and install an ISDS system. As cited previously, and as acknowledged by Urania, the ISDS Regulations do not provide for appeals of the issuance of an ISDS permit by abutting landowners. Urania does not cite any statute or regulation which creates a right to a hearing under the circumstances of this matter.

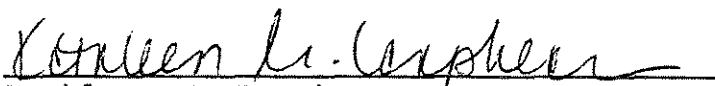
By way of illustration, I invite the parties attention to R.I.G.L. §23-18.9-9 which governs the procedure for issuance and appeal of a solid waste management facility license. §23-18.9-9(5) specifically creates a right for persons other than the applicant to appeal the decision of the director to the AAD. Once that right is created, Rule 7.00 of the AAD's Rules of Practice and Procedure establishes the **manner** in which the appeal shall be filed. §23-18.9-9 is an example of the legislature's choice to afford an appeal to persons other than an applicant. The legislature determined that the grant or denial of a solid waste management facility license was of sufficient import to accord a right to appeal to persons other than the applicant. There is no analogous statute or regulation that accords a similar right to persons other than an applicant concerning the grant or denial of an ISDS permit. AAD does not, as Urania suggests, acquire jurisdiction by implication. It is clear from existing statutes that the legislature recognizes its ability to create a right to a hearing and does so by statutory enactment when it deems appropriate. Absent a statute or regulation creating a right to appeal a determination made by the ISDS Division, AAD is without jurisdiction to entertain the request for hearing.

Based on the foregoing analysis and after consideration of the motions, memoranda and arguments of counsel it is hereby

ORDERED

that the Motion to Dismiss is hereby GRANTED.

Entered as a Recommended Decision and Order this ^{5th} 26 day of
April, 1995.



Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

Entered as a Final Agency Order this 28th day of April,
1995.



Timothy R. E. Keeney
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within
order to be forwarded, via regular mail, postage prepaid to J.
William W. Harsch, Esq. and John Marks, Esq., 170 Westminster
St., Providence, RI 02903; William R. Reagan, c/o Cherenzia and
Associates, P. O. Box 513, Westerly, RI 02891 and via interoffice
mail to John A. Langlois, Esq., Office of Legal Services, 9 Hayes
Street, Providence, RI 02908 on this 1st day of ^{May} ~~April~~, 1995.

