



RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
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Rhode Island Relay 711

TO: David Kerins, Acting Chief Hearing Officer
Administrative Adjudication Division

FROM: W. Michael Sullivan, Ph.D., Director

RE: Bruce Gardner, et. al.
AAD NO. 08-007/ISA

W. Michael Sullivan
6/9/10

I have received and reviewed your Recommended Decision and Order and the Administrative Adjudication Division's administrative file in the above captioned matter. The Recommended Decision and Order and file are attached hereto and are hereby returned to the Administrative Adjudication Division. My review of the Recommended Decision and Order reveals several concerns that obligate me to exercise my discretion pursuant to R.I. Gen. Laws §42-17.7-6(a) and Rule 16.00 (b) of the *Administrative Adjudication Division Rules of Practice and Procedure* to reject the Recommended Decision and Order as set forth below. In the exercise of this responsibility, I am fully cognizant of the fact that I may reject recommended findings only if there is other competent evidence in the record to support alternative factual conclusions. Environmental Scientific Corporation v. Durfee, 621 A.2d200 (R.I.1993).

This matter being an appeal of the denial by the Office of Water Resources ("OWR") of the Applicant Bruce Gardiner's request for the issuance of four variances from the minimum standards required in the ISDS Regulations in order to obtain authorization for the residential development of a small lot which measures 116.9 feet by 50 feet located in the vicinity of Green Hill Pond. As such it is the Applicant's burden of proof, at the time of the application, to demonstrate that the variances at the time of the application, were not contrary to the public health, public interest, or environmental quality. ISDS Regulations, SD 20.02 (a). Pursuant to the ISDS Regulations, requests for variances shall be denied when the evidence presented in support of the variance request fails to demonstrate that the same degree of environmental protection provided under the regulations can be achieved without the strict application of the provisions for which the variance has been requested, or if the evidence demonstrates that the ISDS will not function as proposed in the application, or if the evidence indicates that the approval of the system would otherwise be contrary to the public health, the public interest or environmental quality. ISDS Regulations, SD 20.02 (b).

Specifically, it is the Applicant's burden of proof to demonstrate through clear and convincing evidence that a literal enforcement of the regulations will result in

unnecessary hardship; that the system will function as proposed in the application; and that the issuance of a permit will not be contrary to the protection of public interest, public health and environmental quality. ISDS Regulations, SD 21.02 (a).

The Applicant failed to supply adequate evidence to support a finding that there would be no adverse impact to the public health, interest and environmental quality. This is of critical importance because the lot in question is located only 113.7 feet from Green Hill Pond, an already significantly compromised water body. The Pond is located in the Towns of Charlestown and South Kingstown, in the extremely fragile South Shore Management Area. The testimony presented by OWR's expert witness, Mohamed Freij characterized the health and safety threat to the already heavily impacted Pond. The Applicant attempts to override Mr. Freij's testimony by presenting promotional literature for the proposed ISDS device, the AdvanTex AX20. The presented data should be characterized as sales and technical support and does not address methods and statistics comparing this advanced system with others and conventional systems to assess the risk of threat to the fragile ecosystem. Further, I take issue factually with Dr. Dan Urish's testimony that health concerns presented by Mr. Friej can be eliminated by the use of ultraviolet light protocols which Dr. Urish purports to eliminate all concerns relative to bacterial contamination of groundwater and nearby Green Hill Pond.

The Applicant also fails to provide reasonable and reliable evidence that the system will function as proposed in the Application. There was no evidence presented as to how the operation and maintenance required by the proposed systems could reasonably be sustained at all times so as to prevent further nutrient and microbial contributions to Green Hill Pond and thus avoid further degradation of this fragile water body. The reliance again on data from sales and promotional literature does not provide necessary evidence relating to operational disruption and owner maintenance failure statistics. With a lack of evidence to the contrary, I am forced to assume that the proposed system would operate with similar reliability to the global community of advanced systems and thus while reducing nutrient and microbial levels from so called conventional systems, still presents unacceptable risk and would increase the nutrient and microbial contributions to Green Hill Pond.

Further, Applicant has failed to present adequate testimony to overcome environmental and public health concerns relating to a proposed reduction to the setback requirements. The Applicant proposes a reduction of the setback requirements from ten feet to a mere two feet, on this extremely small lot. This two foot setback from the abutting property, in this fragile coastal pond area, does not provide an adequate buffer, and presents a serious public health risk due to potential breakouts of effluent release due to activities occurring on the neighboring property, over which Applicant has no control.

The applicant failed to present convincing evidence that the literal enforcement of the regulations is an unnecessary hardship. Mr. Frisella's testimony suggests that the denial of permission to build a residence represents a lost of all alternative uses 'except agricultural'. This highly developed landscape has many seasonal demands for access portals to the Pond and for recreational uses including but not limited to camping,

vehicular parking and vessel storage sites all of which are at a premium during much of the year. I'd conclude as is suggested by Mr. Freij during his testimony these uses are viable alternatives to residential development.

On the basis of the above, the Applicant's appeal is denied.