

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

RE: HEATH MANAGEMENT COMPANY PETITION FOR
DECLARATORY RULING

**RECOMMENDED FINAL AGENCY ORDER
ON THE PETITION FOR DECLARATORY RULING**

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") upon referral by Acting Director Frederick J. Vincent of DEM for oral argument and preparation of a Recommended Final Agency Order on the Petition for Declaratory Ruling ("Petition") filed by Heath Management Company ("Heath"). The Petition was certified to the Office of the Director on October 14, 2004 and forwarded to The Chief Hearing Officer of the AAD on February 15, 2005 in accordance with Rule 6.00(c)(5) of the Rules of Practice and Procedure of the Department of Environmental Management. A notice scheduling oral argument was sent to the parties on February 22, 2005 and oral argument was held on March 24, 2005. The Petition creates an issue of first impression, specifically, whether the definition of "owner" under the ISDS Regulations includes the holder of special declarant rights under a declaration of condominium.

Background and Travel

Heath is the owner of special declarant rights, pursuant to the Rhode Island Condominium Act ("Act"), concerning real estate identified as 175 Bonnet Point Road, Assessor's Plat N-S, Lots 631, 632, and 633 in the land evidence records of the Town of Narragansett. The property is commonly referred to as the Bonnet Shores Beach Club. The Bonnet Shores Beach Club exists as a condominium form of ownership pursuant to Act. In the Declaration of Condominium of Bonnet

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Shores Beach Club ("Declaration of Condominium"), certain special declarant rights, including the right to develop additional units, were retained by then owner, Seaside Realty Trust. Heath succeeded Seaside as the declarant in June of 1997 and is the present owner of the special declarant rights.

In 2001, site inspections by DEM revealed improperly functioning individual sewage disposal systems (ISDS) and alleged violations of DEM's Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations" or "Regulations"). In October of 2001, DEM's Office of Compliance and Inspection issued a Notice of Intent ("NOI") to the condominium owners through its Association, the Bonnet Shores Beach Club Condominium Association, Inc. ("Association"). The NOI advised that DEM was prepared to take enforcement actions to remedy the alleged violations. In response, the Association engaged a licensed ISDS designer who commenced the necessary work and evaluated the ISDSs. As a result of the Association's efforts to address the NOI, DEM took no further enforcement action. The Association eventually applied to DEM's Office of Water Resources ("OWR") for approval of a new ISDS to be located on lots 631 and 632, beneath a portion of the property that currently serves as a parking area for unit owners, a common element under the Declaration of Condominium. The Bonnet Shores Beach Club Condominium Association, Inc. signed the ISDS Application as the owner of the property. After a lengthy application process with numerous revisions by the Association's designer and comments by OWR, an ISDS permit was approved on July 20, 2004.

Arguments of Petitioner Heath Management Company

Heath has petitioned the Director of DEM for a Declaratory Ruling¹ that it too is an "owner" of the property as defined under the ISDS Regulations. As an owner, Heath maintains that its signature on the permit application was required prior to review and approval by DEM. Heath asks that the Director determine whether Permit No. 0220-2924 issued to Bonnet Shores Beach Club Condominium Association is valid absent the signature of Heath Management Company. Heath argues that the ISDS Regulations should be read broadly, not limiting the definition of owner to one who holds title or fee, but rather, to embrace "a penumbra of property interests that include present possessory or equitable and future remainder or contingent rights". Petition at 3. Heath proposes that the definition of owner, as set forth in the ISDS Regulations, should be construed to encompass one who holds special declarant rights under a declaration of condominium. As an owner of special declarant rights, Heath asserts that it holds a present equitable interest in all common areas and fixtures of the Club and that such an interest transforms Heath into an "owner" under the Regulations. Heath further maintains that the restriction placed on the approved system by OWR, limiting use of the approved system to nine hundred and thirty (930) units, effectively precludes future development of additional units by Heath should it choose to exercise its special declarant rights.

¹ The Administrative Procedures Act, §42-35-8 requires agencies to provide for, by rule, the prompt disposition of petitions for declaratory rulings as to applicability of any statutory provision or rule of the agency. The Rules of Practice and Procedure for the Department of Environmental Management govern such petitions filed with the Department.

Arguments of the Office of Water Resources and Bonnet Shores Beach Club Condominium Association, Inc.

The Office of Water Resources and the Association take the opposite view, contending that the definition of owner under the ISDS Regulations does not include the holder(s) of special declarant rights under the Declaration of Condominium.

OWR first invites the Director's attention to the ISDS Regulations which, *inter alia*, define an owner as one who holds "legal title". The ISDS Regulations, SD 1.00 defines "owner" as follows:

OWNER - The term, "owner," shall be held to mean any person who alone, or jointly or severally with others: (a) holds legal title to any real property; or (b) has possession or control of any real property through any agent, executor, executrix, administrator, administratrix, trustee or guardian of the estate of a holder of a legal title or has possession or control through any lease or purchase and sale agreement. Each such person is bound to comply with the provisions of these rules and regulations.

Although the term "legal title" is not defined in the Regulations, OWR maintains that it applies the ordinary meaning and common usage of that term when determining who is an "owner" under the Regulations. OWR urges the Director to adopt that same usage and to concur that "legal title", as commonly used, contemplates a present possessory interest in the real property that is the subject of the permit. OWR argues that Heath's special declarant rights amount to a future interest, or at most, a present equitable interest that fails to rise to the level of "legal title".

OWR also cites to the Rhode Island Condominium Act, R.I.Gen. Laws § 34-36.1-2.10 ("Act") which provides that a declarant may reserve the right to create additional units in portions of the condominium that were originally designated as common elements. Under the Act, a declarant becomes the owner of any unit

created, but, prior to the creation of units, title to those portions of the condominium is in the unit owners. It is the position of OWR and the Association that, although Heath may possess a future or equitable interest, until Heath declares and builds units, it does not acquire legal title, on par with unit owners, to the common elements of the condominium. Accordingly, these parties conclude that Heath is not an owner as defined by the Regulations.

Public policy considerations are advanced by OWR as a third ground in support of its interpretation of the Regulations. OWR contends that broadening the definition of the term owner, as advocated by Petitioner, would cause disruption and inefficiencies in the administration of its permitting program. In addition to the signature of the person or entity holding legal title to the property, Petitioner's proposed interpretation of owner would require the signature of parties without present possession or control of the realty but who may hold almost any "interest" in the property. OWR claims that limited Department resources, including the efforts of its engineers, would be best directed toward substantive review of applications and not toward determining "the myriad property interests" that may fit the expanded definition of owner urged by Petitioner. (OWR Memo at 11).

The Association echoes the position of OWR. They ask that the Director to find that Heath's equitable interest in the property does not equate to "legal title". Counsel points out that equitable title, which Heath asserts it holds, constitutes the antithesis of legal title. *Black's Law Dictionary (6thed.)* defines legal title as "One cognizable or enforceable in a court of law, or one which is complete and perfect so far as regards the apparent right of ownership and possession, but which carries no beneficial interest in the property, another person being equitably entitled thereto; in either case, the antithesis of 'equitable title.'" The Association asserts that, although the development rights may represent a future interest in the common

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elements, that interest does not presently constitute "legal title" under the Regulations.

Analysis

The question presented to the Director for a declaratory ruling is "Does the definition of "owner" under the ISDS Regulations include Heath Management Company, holder of special declarant rights under a declaration of condominium?" The answer to that question is no.

It is undisputed that the proposed ISDSs, which constitute common facilities, will be located on property which is a common element. The ISDS Regulations define an owner as one who holds legal title to the property that is the subject of the permit application. Although the term "legal title" is not defined by the Regulations, after consideration of the arguments and filings made by counsel, it is apparent that the holder of special declarant rights under a declaration of condominium does not possess an interest in the property sufficient to confer "legal title" as contemplated by the Regulations and thus is not an owner as that term is defined by the Regulations.

The grounds upon which OWR bases its interpretation are objective and reasonable. First, OWR applied the common meaning and usage of the term "legal title" to assess Petitioner's claim that it is an owner as defined by the Regulations. The definition of legal title as set forth in Black's Law Dictionary and quoted earlier, recognizes legal title to be that which is complete and perfect regarding the apparent right of ownership and possession, and which is the antithesis of equitable title. An interpretation which excludes the holder of an equitable future interest is consistent with the common meaning and usage of the term "legal title".

Secondly, the Rhode Island Condominium Act, R.I. Gen. Laws § 34-36-3 (18) establishes that unit owners, as therein defined, means persons owning a unit

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in fee simple and an undivided interest in the fee simple estate of the common areas and facilities of the condominium. The unit owners hold a present possessory interest in all common elements. The Petitioner holds future rights to units and common areas and facilities upon the creation of such units. See, *American Condominium Association v. IDC, Inc.*, 870 A.2d 434 (RI 2005). Until such time, the holder of special declarant rights holds only an equitable interest which does not rise to the level of "legal title" as it is commonly used.

Finally, important policy considerations are implicated. The Regulations, *inter alia*, further the purposes of the Rhode Island Water Pollution Act and the federal Clean Water Act. To that end, the administrative findings and policy underlying the Regulations further the protection of the public interest, public health and the environment. The administrative findings in the Regulations recognize that public health and the environment may be imperiled by improper treatment or discharge of sanitary sewage which can result from improper location, design, construction or maintenance of individual sewage disposal systems. It is the policy of the Department of Environmental Management, and its statutory directive, to ensure that the public health, environmental quality and public interest of this State are protected. The Regulations establish an efficient means of licensing and permitting new systems and approving necessary repairs to existing systems in furtherance of the statutory directive under which the Regulations were adopted. The Department's mandate would be frustrated by the broad interpretation of owner urged by Petitioner. To extend the definition of owner beyond one who holds legal title, to include persons who may hold some form of future or equitable interest, is clearly unwieldy and would be at odds with the purposes and policies underlying the Regulations and the statutes under which authority they were promulgated.

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With regard to Heath's argument that OWR's interpretation of the term owner has foreclosed the development of additional units, issuance of the permit does not preclude Heath's exercise of its special declarant rights. Rather, OWR placed appropriate limits on use and capacity of the approved/permitted system(s) but has not foreclosed additional systems or a new design of the approved system(s) when and if development rights are ultimately exercised by Heath. What was foreclosed, and appropriately so, was additional capacity or redesign of the existing system, or an entirely new system, absent application, review and approval by OWR. A limitation on the capacity of an approved system is a common condition of permit approvals and serves to protect public health and the environment.

While it is true that the approved permit restricts use of the system to nine-hundred thirty (930) units, thereby foreclosing use by additional units, such limitation is not intractable. As is common practice, all ISDS permits limit use of an approved system to a specific flow or to a number of bedrooms or units. As OWR indicated, the restrictions placed in the approved permit may be relaxed in the future, but only upon application with appropriate engineering design and review and approval by DEM to ensure protection of public health and the environment. This restriction, that Petitioner argues is so onerous, is a typical permit condition designed to accomplish OWR's mandate to protect the groundwater and surface waters of our state, especially in an area as environmentally sensitive as the subject site. OWR's construction of the term "owner" does not foreclose Heath, as holder of special declarant rights, from declaring additional units and applying for approval of a new ISDS or system(s) redesign to service those additional units.

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Conclusion**

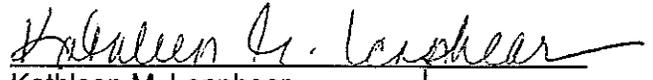
Based on the above analysis, I find that OWR's interpretation of its Regulations is objectively reasonable. The legislature empowered DEM to protect the groundwater and surface waters of our state via enactment of regulations. The introduction to the ISDS Regulations provides that ". . . It is the policy of the Department of Environmental Management to assure the proper location, design, construction and maintenance of individual sewage disposal systems. The public health and environmental quality and public interest of this State requires [sic] that the hereinstated regulations be promulgated and enforced pursuant to the authority of the General Laws." (Regulations at 2) OWR's interpretation of the term "owner" to exclude the holder of special declarant rights under a declaration of condominium is reasonable because it applies the common meaning and usage of the term "legal title"; is consistent with the Rhode Island Condominium Act and its purposes; and is consistent with the statutes under which the Regulations were promulgated and with public policy and the public interest.

Based on the foregoing, it is hereby

ORDERED

1. That the Petition for Declaratory Ruling filed by Heath Management Company is **DENIED**.
2. That the Heath Management Company, as the holder of special declarant rights under a declaration of condominium, is not an "owner" of the property under the ISDS Regulations.
3. Because Heath Management Company is not an "owner" as defined by the Regulations, Heath's signature on the ISDS Application was not required.

Entered as a Recommended Final Agency Order this 13 day of May, 2005.



Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

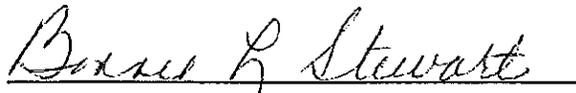
Entered as a Final Agency Order this 24 day of May, 2005.



W. Michael Sullivan, Ph.D
Acting Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, Rhode Island 02908
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CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Peter D. Ruggiero, Esquire, Ruggiero, Orton & Brochu, 20 Centerville Road, Warwick, RI 02886; Richard A. Sherman, Esq., Edwards and Angell LLP, 2800 Financial Plaza, Providence, RI 02903 and Mary B. Shekarchi, Esquire, 33 College Hill Road #15E, Warwick, RI 02886; and via interoffice mail to: Timothy Pavilonis, Esquire, DEM Office of Legal Services, 235 Promenade St., 4th Fl., Providence, RI 02908; on this 25th day of May, 2005.



APPEAL PROCEDURE

If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.