

Department of Environmental Management  
 Administrative Adjudication Division  
 State of Rhode Island  
 Re: Eagle of the North Realty Trust And MacLean Family Trust  
 AAD No. 05-017/ISA  
 Variance Application No. 0232-2267  
 February 2007

**DECISION AND ORDER**

This matter came before the Administrative Adjudication Division (“AAD”) on a request for an adjudicatory hearing filed by Eagle of the North Realty Trust and MacLean Family Trust (“Applicants”) following the denial by the Department of Environmental Management (“DEM” or “Department”), Office of Water Resources (“OWR” or “Office”) of the Applicants' application and request for variances to install an individual sewage disposal system (“ISDS”) on real property located in the Town of South Kingstown, Rhode Island, identified as Lots 60 and 61 Assessor's Plat 95-1 of the Town of South Kingstown (“Site”).

**Background and Travel**

On or about May 27, 2005, Eagle of The North Realty Trust filed an application with OWR requesting a permit to install an ISDS to service two single family residences. One structure currently exists on Lot 60 and is serviced by an existing cesspool. The other residence is to be constructed on Lot 61. The proposed system would service both residences. Because the proposed system does not meet the existing Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems, (“ISDS Regulations”), Applicants requested variances from the following ISDS Regulations:

SD 2.14 Construction in Area Served by Private Wells - Before an approval can be granted to construct an individual sewage disposal system for a building being served by a private well, sufficient additional area must be available for the replacement of the disposal field, in case of failure. This area must be on the property of the individual seeking approval and meet all the minimum distance requirements set forth in these regulations.

SD 3.05 Location - The horizontal distances between the parts of an individual sewage disposal system and the items listed in the following table shall not be less than those shown.

**MINIMUM DISTANCES**

Distribution Box Disposal				
Dosing Tank	Trench, Bed	Seepage Building	Privy	
Septic Tank	or Chambers	Pit	Sewer	r
(ft)	(ft)	(ft)	(ft)	(ft)
1. Private well (f) 75(i)	100(h)	200(h)	50(a)	50

SD 19.02 Special Requirements for ISDS in the Coastal Pond and Narrow River Critical Resources Areas

SD 19.02.4 Location - General - The horizontal distances between the parts of any individual sewage disposal system and the feature requiring a setback shall not be less than those shown in Table 19.1. Where a minimum distance is not specified, the requirements of SD 3.05 shall apply.

SD 19.02.5 Site Suitability - General

(a) The installation of an individual sewage disposal system is prohibited in any area where the ground water table is within five (5) feet of the original ground surface, or where an impervious layer is within seven (7) feet of the original ground surface except under the following conditions:

(b) Areas With Limiting Conditions - Unless specifically prohibited above, approval may be granted in areas where the ground water table is within 2 to 5 feet of the original ground surface, or where an impervious layer is within 4 to 7 feet of the original ground surface if the requirements of SD 15.02(b) and the following are met:

(1) The minimum distances of Tables 3.1 and 19.1 shall be maintained. In addition, a 25 foot distance shall be maintained from the disposal trench, bed or flow diffuser to any area where the ground water table is less than two (2) feet to the original ground surface, or where ledge rock is less than four (4) feet to the original ground, or any floodplain.

The application and requested variances were denied by the OWR on August 29, 2005. The denial letter stated that the Department evaluated the effect of each variance on the public interest and public health, and determined that the Applicants did not provide convincing evidence to demonstrate that the degree of environmental protection provided under the ISDS Regulations could be achieved without strict application of the particular provisions from which the variances were requested. The denial letter specified that in particular, the Department considered:

1. The effect of the proposed system on any drinking water supply or tributary thereto;
2. The effect of the proposed system as potential cause of any public or private nuisance;
3. The effect of the proposed system on the public health.
4. The effect that the requested variance may have on any body of water, including impacts on ground water and/or surface water quality, on the ability of the body of water to support or maintain plant or animal life, or on other designated use(s) of the water body;
5. The effect that the requested variance may have on public use and enjoyment of any recreational resource.

A timely appeal and request for hearing and the requisite list of abutters within 200 feet were filed by the Applicants.

A prehearing conference was held on November 21, 2005, and the Prehearing Conference Record was entered on December 1, 2005. The hearing request was amended without objection, to include the MacLean Family Trust as an Applicant. The hearing was conducted on December 13, 2005. During testimony at the hearing it was revealed by Robert MacLean, a witness for Applicants, that site conditions on an abutting lot had changed since OWR reviewed and denied the Application. Applicants requested the opportunity to amend the Application to reflect existing site conditions and that request was granted. The hearing was recessed. The revised Application was resubmitted to OWR and again denied on July 28, 2006. On August 15, 2006 AAD received a request from Applicants to reconvene the hearing and a status conference was held on September 18, 2006 in preparation for further testimony. The hearing reconvened and concluded on October 16, 2006. This decision relates to both the original denial and the subsequent denial of the revised plan. The parties were given the option of making closing arguments or filing post-hearing briefs.

At their election, closing arguments were made by counsel and the hearing was deemed closed as of October 27, 2006 upon receipt of the final transcript of proceedings.

The Applicants bear the burden of proof to demonstrate through clear and convincing evidence that: (1) A literal enforcement of the Regulations will result in unnecessary hardship to the Applicant; (2) That the system will function as proposed in the application; and (3) That the issuance of a permit will not be contrary to the public interest, public health and the environment. In order to demonstrate that the proposed ISDS will not be contrary to the public interest, public health and the environment, the Applicant must introduce clear and convincing evidence that:

1. The waste from the proposed system will not be a danger to public health;
2. The disposal system to be installed will be located, operated and maintained so as to prevent the contamination of any drinking water supply or tributary thereto;

3. The waste from the proposed system will not pollute any body of water or wetland;
4. The waste from the proposed system will not interfere with the public use and enjoyment of any recreational resource; and
5. The waste from the proposed system will not create a public or private nuisance.

The following stipulations of fact were agreed upon by the parties:

1. Eagle of the North Realty Trust filed ISDS Application No. 0232-2267 on May 27, 2005 requesting the approval for the installation of an ISDS on real property located in South Kingstown, Rhode Island, on Tax Assessor's Plat 95-1, Lots 60 and 61 (the "Property"). Said application requested variances of Rules SD 2.14, SD 3.05, SD 19.02, SD 19.02-4, and 19.02.5 of the *Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems* ("ISDS Regulations").
2. On August 29, 2005, the Office denied Application No. 0232-2267.
3. Eagle of the North Realty Trust timely appealed the denial of Application No. 0232-2267 to the DEM Administrative Adjudication Division.
4. Pursuant to the order of Hearing Officer Kathleen Lanphear dated January 19, 2006 (the "January 19, 2006 Order"), Eagle of the North Realty Trust submitted revised plans, an additional report dated June 23, 2006, and a variance application regarding ISDS Variance Application No. 0232-2267 to the OWR. A copy of the above documents shall be admitted as full exhibits at the continuance of the hearing of this matter.
5. OWR reviewed the revised plans, report and variance application submitted by Eagle of the North Realty Trust pursuant to the January 19, 2006 Order and issued a decision on July 28, 2006. A copy of the July 28, 2006 decision shall be admitted as a full exhibit at the continuance of the hearing of this matter.
6. OWR relies upon its previously submitted Prehearing Memorandum with regard to the witnesses that it may call at the continuance of the hearing.
7. William Dowdell may be called as a rebuttal witness for Eagle of the North Realty Trust. A list of Exhibits is attached to this Decision and Order as Appendix A.

### **Testimony**

William D. Dowdell testified on behalf of Applicant. Mr. Dowdell is a registered professional civil engineer and he was qualified, by agreement of the parties, as an expert civil engineer and as an expert in ISDS installation and design. Mr. Dowdell testified that he prepared an original application for new construction on Lot 61 which was denied and thereafter prepared the application under appeal. Mr. Dowdell explained that the application for the proposed system to service both an existing structure and a new structure was submitted as an alteration application because it alters an existing cesspool servicing an existing residence. Mr. Dowdell also expressed his belief that such a characterization may be more successful because "they would not deny an alteration". (Tr.18) Mr. Dowdell characterized the application as an alteration because, although there would now be two residences, one of which is new construction, the total number of bedrooms serviced by the system would increase by only one which, in his opinion, meets the definition of alteration. The existing three bedroom residence would be reduced to two bedrooms allowing for, according to Mr. Dowdell's interpretation, an additional new two bedroom residence.

Mr. Dowdell described the proposed system generally as a common bottomless sand filter septic system. He elaborated that it was an Advantex system - a geotech-style filter - that recycles effluent several times in the pretreatment tank then discharging the final "polished" effluent to the bottom of the sand filter. Mr. Dowdell then addressed each of the areas necessary to demonstrate that the proposed system will not be contrary to the public interest, public health and the environment. Specially, Mr. Dowdell opined to a reasonable degree of scientific certainty, that the disposal system to be installed can be operated and maintained to prevent contamination

of drinking water. Mr. Dowdell based his opinion on the fact that the proposed system is set back at least seventy (70) feet from existing wells.

Next Mr. Dowdell addressed the issue of whether the waste from the proposed system will pollute any wetland or body of water. He opined that the waste from the proposed system will not pollute any body of water or wetland. As the basis for that conclusion the witness offered that the application improves the setback from the existing cesspool to Green Hill Pond, increasing the distance from 25 feet currently to 50 feet as proposed. It was his further opinion that installation of the proposed system will safeguard against pollution to the pond. Mr. Dowdell similarly opined that the waste from the proposed system will not create a public or private nuisance. This is because there currently exists a three bedroom residence with a cesspool which would be replaced with a total of four bedrooms with pretreated effluent. Under further questioning from Applicants' counsel, Mr. Dowdell gave his opinion that the system will be an improvement to the existing cesspool in the areas he has testified.

Mr. Dowdell addressed each of the variances requested beginning with SD 2.14. Briefly stated, SD 2.14 requires, for areas served by private wells, an alternative disposal field on the property should a system fail. Mr. Dowdell testified that whether the system were to be installed for one residence or two, or the lots combined, the lots, subdivided long ago, are simply too small for any possibility of compliance with SD 2.14. Accordingly, a variance is required.

SD 3.05 requires several minimum setbacks to private wells in proximity to the site. Mr. Dowdell testified that given the topography of the Site even if both lots were combined, there is no possibility of meeting required setbacks and some variance would be required.

SD 19.02 entitled "Special Requirements for ISDS in the Coastal Pond and Narrow River Critical Resource Areas" addresses several special requirements applicable to the Site based on its proximity to Green Hill Pond. Mr. Dowdell acknowledged that Green Hill Pond is a critical resource area. First, Mr. Dowdell dealt with SD 19.02.5 which, simply stated, requires that the Site have at a minimum, a two foot (2') distance from water table to the original grade. Mr. Dowdell testified that with a nine inch (9") water table at the Site, they cannot meet the requirement of SD 19.02.5.

Mr. Dowdell turned next to the quantity of expected effluent and water usage from the proposed two two-bedroom homes. Under direct questioning from Applicants' counsel Mr. Dowdell opined to a reasonable degree of engineering certainty that effluent discharge and water usage from two two-bedroom homes would be the same as from one four-bedroom home. He based that opinion on the fact that sewage design manuals and the state code size a septic system based on the number of bedrooms. Ultimately, he opined that two separate two-bedroom homes would not result in increased use of the system compared with a single four-bedroom home.

Under cross-examination Mr. Dowdell addressed the requested variance of 100 feet (100') from the minimum setback requirement of 150'. The entire lot is within the one hundred fifty foot (150') setback requirement and Mr. Dowdell stated "best we could do is 100 or is 50". Applicants' current proposal reflects a fifty foot (50') set back from Green Hill Pond which is a critical resource area. Mr. Dowdell explained that the proposed technology is innovative. When asked if the 9" water table was as protective as a two foot water table, Mr. Dowdell deflected the question answering that in this case "we held the critical resource clearance to the verified water table. And we provided the same clearance as any other system down in this area". Tr.45. Mr. Schultz concluded his cross examination by asking Mr. Dowdell if his testimony was that the proposed system will, in fact, have some impact on Green Hill Pond. Mr. Dowdell's response indicated that the proposed system will have less of an impact than the existing cesspool. (Tr. 50).

Applicants next called Mohammed J. Freij to testify. Mr. Freij is a Principal Engineer in the Office of Water Resources. Mr. Freij reviewed the Application and recommended that it be denied. Mr. Freij is qualified, by agreement of the parties, as an expert professional engineer and an expert in the application of and compliance with ISDS Regulations. Mr. Freij acknowledged that it would be impossible to comply with the 150' setback from Greenhill Pond for any system

and that given the size of the lots, it is also impossible, without a variance, to comply with the minimum distance from wells. Like Mr. Dowdell before him, this witness stated that the proposed system would be an improvement over the existing cesspool.

Under questioning from Applicants' counsel, Mr. Freij testified that there are two types of applications - alteration applications and new construction applications. He stated his conclusion that this application is "new construction" because an entirely new house is being built on a separate lot in addition to renovating the existing residence. He distinguished a true alteration, where one upgrades the existing structure and/or system. Here, in addition to such alteration, the application contemplates a new house on a separate lot connecting both the existing residence and new structure to that system.

Mr. Freij next addressed the issue of water usage and effluent flow from two two-bedroom homes compared to one four-bedroom home. While acknowledging that there is no engineering impediment per se to servicing two independent structures with a single septic system, Mr. Freij did assert that water usage for two two-bedroom structures would be greater than that of one four-bedroom structure. His basis is that each dwelling would have a separate kitchen and separate household with meals prepared separately and at different times thereby using more water and creating more effluent than a single four-bedroom residence.

Under cross-examination Mr. Freij opined that the application does not meet the requirements of SD2.01(c)(2) and does not meet the regulatory definition of alteration. His basis, again, is that the Application not only contemplates renovating an existing house and system, but it goes far beyond what is contemplated by the ISDS Regulations to propose new house construction on Lot 61.

This witness further opined that two two-bedroom homes would have a different effect, an increase in flow to the system, because in the ISDS Regulations design flow is based on one house. He acknowledged that in his review he based his recommended denial on the total design flow for a single four-bedroom house, but that in practice, the actual flow for two two-bedroom homes would be even greater.

Mr. Freij testified that each of the five requested variances reduces the minimum setbacks required by the ISDS Regulations. The minimum setbacks are designed to protect public health and the environment. Mr. Freij clearly departed company with Mr. Dowdell stating that elevating the septic system and thereby providing a two foot (2') clearance to the water table, as proposed by Applicants, does not compensate for the detrimental effects of the nine inch (9") water table present on the Site. He testified that when a design reduces the distance between a system and a well, treatment of the effluent will be reduced before reaching the well. Similarly, when a design reduces the minimum distance to the water table, treatment of the effluent is reduced before reaching the groundwater. Specifically, he noted that sewage leaches from a septic system into the ground and travels in several directions. If the distance to the water table is less than the minimum of two feet, there is less of a natural soil column below the system for treatment of effluent. Because of the very high water table and accompanying wet soil conditions, the treatment of the effluent is compromised before it reaches wells or groundwater and treatment of the effluent is not as effective. This site condition, coupled with the inability to meet the minimum 150' setback from a critical resource (Green Hill Pond), means that sewage will leach into the ground and travel more quickly to Green Hill Pond because of the wet soil conditions and the shorter distance to the Pond. When travel time is reduced (due to either distance or wet soil conditions) treatment of the effluent is reduced and compromised. Ultimately, more nitrates and more fecal coliform will reach Green Hill Pond.

It was Mr. Freij's testimony that the interplay of the multiple variances compelled his conclusion that as a whole, the system as proposed would not be as protective of public health and the environment as if no variances were requested. Again, Mr. Freij candidly acknowledged that the current application would improve existing conditions but it would still have an adverse impact.

He indicated these impacts could be further reduced by proposing fewer bedrooms. He opined that such a reduction would be more protective of the environmental quality of Green Hill Pond. Mr. Freij indicated that his opinions were the same regardless of whether the proposal was characterized as “new construction” or as an alteration.

I find Mr. Freij's testimony to be most persuasive. Mr. Freij was candid in answering questions and provided a logical and detailed basis for his conclusions. I find the testimony of this witness to be more persuasive than that of Mr. Dowdell. Similarly, I find Mr. Freij to be very credible and have accorded his testimony substantial weight.

Robert D. MacLean testified on behalf of Applicants. Mr. MacLean purchased Lot 61 in approximately 1982 or 1983 and acquired Lot 60 in 1985. After spending summers in the existing dwelling on Lot 60, Mr. MacLean now lives at the property year round. He testified that Lot 61 is now owned by Eagle of the North Realty Trust and that Lot 60 is owned by the MacLean Family Trust. The reason Applicants seek to have two structures on the Lots is to leave one house to each of his two daughters. Cross examination revealed that Mr. MacLean is an attorney and has practiced law in Rhode Island for over forty years.

### **Analysis**

Applicants make much of the fact that the proposed system is an improvement, even a vast improvement, over the cesspool currently servicing the existing dwelling on the Site. The standard however, does not require approval for proposed systems that merely improve existing systems or even failing systems. With respect to this issue, the case of Strafach v. Durfee, 635 A. 2d 277 (R.I. 1993) is instructive. In Strafach the Applicant sought to construct an ISDS system on a waterfront site that was an “erosion prone” area as defined by CRMC Regulations. The ISDS Regulations required a minimum setback of one hundred fifty feet (150') from the spring (moon) tide elevation to the edge of the system. One of the variances sought requested approval for a minimum setback of one hundred fifteen feet (115'). Strafach's experts acknowledged at the hearing that the proposed system was in a designated critical erosion area and that the proposed system did not meet the 150' minimum setback requirement of the ISDS Regulations. Qualified as civil engineers, those experts also testified that the proposed system would have no impact on public health or the public interest as defined in the ISDS Regulations. The Applicant in Strafach similarly relied upon the fact that the proposed system would be an improvement over the existing cesspools on the site and would significantly reduce the amount of effluent that would leach into the soil. The Strafachs argued that the new system, although non-conforming in several respects, would have a beneficial effect on public health and the public interest as compared to the existing system. The Rhode Island Supreme Court agreed with DEM's position that “... the new system, if it met all the ISDS Regulations, would be preferable to the old system, the fact that it *does not* meet the regulations cannot be overlooked.” Strafach v. Durfee, 635 A. 2d 277, 281. The Court overturned the Superior Court decision and upheld the Director's denial of the Application.

Mr. Dowdell's expertise in the pending matter was limited to his opinion as a civil engineer and as an expert in ISDS installation and design. Although DEM's expert was similarly limited to his opinion as a civil engineer and an expert in the application of and compliance with ISDS Regulations, the affirmative burden of proof rests squarely with Applicant to prove by clear and convincing evidence that literal enforcement of the Regulations will result in unnecessary hardship to the Applicant; that the system will function as proposed in the application; **and** that the issuance of a permit will not be contrary to the public interest, public health and the environment (emphasis added). Applicant's counsel was reminded of this burden when allowed latitude to question Mr. Freij on this issue over the objections of Attorney Schultz. The following colloquy took place:

Q. And you would agree with me that the proposed system in this application is a significant improvement, is it not, on the existing cesspool on the property...

MR. SCHULTZ: Objection. The issue is not whether the proposed system is improved, but it's whether or not the proposed system meets the minimum standards for variances as laid out in the ISDS regulations. It may very well be better, but that doesn't matter. Irrelevant.

MR. HEALY: I object, your Honor. I think it is relevant. I think that the net import of the application is to actually improve the disposal system on the property. I think it's certainly germane to the proceeding.

THE HEARING OFFICER: I'll allow him to answer. I don't want that confused with what the burden is.

MR. HEALY: Certainly. Not a problem.

Regardless of how much a proposal improves current conditions on a site, compliance with these standards is required for approval and issuance of a permit. After consideration of the evidence adduced at hearing, it is clear that the Application does not meet these standards.

### **The Location and Limitations of the Site**

The parties in this matter agree, and the ISDS Regulations identify, that Green Hill Pond, a coastal pond located in South County, is a critical resource area as set forth in the ISDS Regulations. The Site abuts Green Hill Pond. The testimony is consistent that this is a particularly difficult location which will require some degree of variances regardless of the design. ISDS Regulation 19.02 defines a critical resource area. It reads:

#### **SD 19.00 Critical Resources**

(a) Certain areas have been identified as critical resources which are deemed to be particularly sensitive to the detrimental effects of nutrients, pathogenic organisms, organic chemicals and other substances that may be present in effluent from sewage disposal systems and which are in need of special protection from such effects due to the unique and irreplaceable value of the resource as a public water supply, fisheries habitat and/or public recreation area.

More stringent minimum requirements are set forth in the ISDS Regulations for these areas. Specifically, Section 19.02 entitled "Special Requirements for ISDS in the Coastal Pond and Narrow River Critical Resource Areas provides in sub-part as follows:

##### **SD 19.02.5 Site Suitability - General**

(a) The installation of an individual sewage disposal system is prohibited in any area where the ground water table is within five (5) feet of the original ground surface, or where an impervious layer is within seven (7) feet of the original ground surface except under the following conditions:

(b) Areas With Limiting Conditions - Unless specifically prohibited above, approval may be granted in areas where the ground water table is within 2 to 5 feet of the original ground surface, or where an impervious layer is within 4 to 7 feet of the original ground surface if the requirements of SD 15.02(b) and the following are met:

(1) The minimum distances of Tables 3.1 and 19.1 shall be maintained. In addition, a 25 foot distance shall be maintained from the disposal trench, bed or flow diffuser to any area where the ground water table is less than two (2) feet to the original ground surface, or where ledge rock is less than four (4) feet to the original ground, or any floodplain.

(2) Large systems and seepage pits shall not be permitted in areas with limiting conditions.

It is against this backdrop of a location within a critical resource area governed by more stringent regulatory requirements in light of the "unique and irreplaceable value of the resource as a public

water supply, fisheries habitat and/or public recreation area” that Applicant seeks five variances from the minimum regulatory requirements.

### **Impacts to Green Hill Pond**

It is precisely because of the topography and location of the Site that the degree and extent of the variances must be minimized. Because of the unique and environmentally critical location, any proposed design must keep the flow of effluent to a level that minimizes impacts to the critical resource to the greatest extent possible. Mr. Dowdell and Mr. Freij agree that any proposal will necessitate variances from the minimum standards. For example, the entire Site is within a floodplain; no design can meet the 150” setback requirement from Green Hill Pond; and the minimum distance of two feet (2') to the water table cannot be achieved. It is exactly because these (and other) minimums cannot be achieved that any proposal must strive to minimize the degree of variance sought and the extent of the proposed use. The pending application expands the use in an area that is environmentally critical. Although Mr. Dowdell confirmed that the proposed system is the most efficient system as closely in compliance as possible with the existing regulations and that he couldn't do any better (Tr. 204), he acknowledged that reducing the flow from the system would have a corresponding reduction in effluent entering Green Hill Pond and therefore have less impact on the pond. (Tr. 48-49).

Applicant has not proved by clear and convincing evidence that the waste from the proposed system will not pollute any body of water or wetland. Mr. Dowdell's testimony that the proposed system will have less of an impact on Green Hill Pond than the existing cesspool does not meet the evidentiary burden on this issue. Moreover, the expert engineering testimony of Mr. Freij is compelling - a nine inch (9”) water table coupled with the requested distance of fifty feet (50') to Green Hill Pond will result in less treatment of the effluent. Mr. Freij's testimony establishes that the proposed system will have an impact on this critical resource regardless of the fact that it may improve existing conditions. The proposed system is designed to service four bedrooms. It will result in an increased flow of effluent to the system and have an adverse impact on Green Hill Pond.

### **Unnecessary Hardship**

Because Applicant has failed to prove by clear and convincing evidence that issuance of the permit will not be contrary to the public interest, public health and the environment, it is not necessary to reach the issue of unnecessary hardship. *See, Strafach v. Durfee, 635 A. 2d 277.* Without reaching that issue, it is however important to note that the evidence indicates that other designs may lessen either the extent or degree of the necessary multiple variances and be more protective of public health, the public interest and Green Hill Pond.

### **FINDINGS OF FACT**

After review of all documentary and testimonial evidence of record, I make the following findings of fact:

1. Eagle of the North Realty Trust filed ISDS Application No. 0232-2267 on May 27, 2005 requesting the approval for the installation of an ISDS on real property located in Charlestown, Rhode Island, on Tax Assessor's Plat 95-1, Lots 60 and 61(the “Site”).
2. The application requested variances of Rules SD 2.14 and SD 3.05 (1), 19.02, 19.02.4 and 19.02.5 of the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems (“ISDS Regulations”).
3. On August 29, 2005, the Office of Water Resources denied Application No. 0115-1180.



4. The Applicant filed a "Request for Administrative Adjudicatory Hearing" on September 28, 2005.
5. The MacLean Family Trust was made a party on December 1, 2005.
6. The Prehearing Conference was held on November 21, 2005 and the Prehearing Conference Record was entered by this Hearing Officer on December 1, 2005.
7. The administrative hearing was held on December 13, 2005 and October 16, 2006.
8. The matter was remanded to OWR on December 13, 2005 to entertain a revised application based upon a change in site conditions on an abutting lot and to review the revised application in the ordinary course.
9. All hearings were conducted in accordance with the provisions of the "Administrative Procedures Act" (Chapter 42-35 of the Rhode Island General Laws), the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Design Systems, and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.
10. The Applicants propose to install an individual sewage disposal system to service two two-bedroom single-family residences. One residence currently exists on Lot 60 and the other residence will be built on Lot 61.
11. The proposed ISDS requires five separate variances from the ISDS Regulations.
12. The Site abuts Green Hill Pond.
13. The entire Site sits within the floodplain.
14. The existing residence and proposed new construction will be serviced by a private well on site.
15. The proposed system will lie within one hundred feet (100') of three wells - eighty three feet (83') to the well on Lot 361; eighty-six feet (86') to the well on Lot 360 and eighty-five feet (85') to the well on the Site.
16. The flow of groundwater travels in an easterly, southeasterly direction from the proposed ISDS towards Green Hill Pond.
17. The Application proposes that the residences will be serviced by a private well and there is insufficient additional area available for the replacement of the disposal field on the subject property in case of failure.
18. The nine inch (9") water table in the immediate area of the proposed system directly affects the system's ability to function properly.
19. Greenhill Pond is a critical resource area as defined by ISDS Regulations.
20. The deviation in water table elevation (15" higher than the minimum 2' elevation) will compromise the treatment of effluent from the system and cause nitrates and fecal coliform to enter Green Hill Pond without adequate treatment.
21. The proposed system would be an improvement over the existing cesspool.
22. Applicants have not explored all alternatives to the subject application in order to reduce environmental impacts.
23. Lower design flows to the system will have less impact upon a Green Hill Pond.
24. The proposed application increases the number of bedrooms from three existing bedrooms to four proposed bedrooms which will result in an increased quantity or flow to the system.
25. The flow of effluent from four proposed bedrooms increases the impacts to this non-conforming site.
26. The ISDS Regulations do not mandate approval of a one bedroom increase in use for alterations where the proposed system does not meet the minimum requirements of the ISDS Regulations.
27. Where variances are required for an alteration, an increase in use is evaluated on a case-by-case basis.
28. Because of the topography, shape and size of the Site, the minimum distances required by ISDS Regulations cannot be achieved and variances are required.

29. The proposed system does not minimize to the degree or extent possible the variances sought nor does it minimize the impacts to Green Hill Pond.

## CONCLUSIONS OF LAW

After review of all documentary and testimonial evidence of record, I conclude the following as a matter of law:

1. All hearings were conducted in accordance with Rhode Island General Laws, the ISDS Regulations and the Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.
2. Applicants have failed to prove by clear and convincing evidence that the proposed system will not be a danger to public health.
3. Applicants have failed to prove by clear and convincing evidence that the disposal system to be installed will be located, operated and maintained so as to prevent the contamination of any drinking water supply or tributary thereto.
4. Applicants have failed to prove by clear and convincing evidence that the waste from the proposed system will not pollute any body of water or wetland.
5. Applicants have failed to prove by clear and convincing evidence that the waste from the proposed system will not interfere with the public use and enjoyment of any recreational resource.
6. Applicants have failed to prove by clear and convincing evidence that the waste from the proposed system will not create a public or private nuisance.
7. The variances which Applicants seek will be contrary to the purposes and policies set forth in the Administrative findings and Policy of the ISDS Regulations.
8. The Application does not meet the definition of an "alteration" as defined by the ISDS Regulations.

Entered as an Administrative Order this \_\_\_\_\_ day of February, 2007.

Kathleen M. Lanphear  
Chief Hearing Officer

## NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

Author Not Provided

## APPENDIX A

### EXHIBIT LIST

Joint Exhibits

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JT 1

ISDS System Application; No. 0232-2267; Fifth Avenue Street, Assessor's Plat 95-1, Lot 61; South Kingstown, RI;

	two (2) pages.
JT 2	Copy of July 28, 2006 Decision Letter from OWR
JT 3	Revised Plan dated 12/14/05
JT 4(a)	Copy of Correspondence from Attorney Healy to Attorney Schultz
JT 4(B)	Copy of Correspondence from William Dowdell to Robert MacLean
JT 4(c)	Copy of Photographs of Existing Cesspool on Site
Applicants' Exhibits	
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APP 1(ID)	Original application for installation of ISDS System January 2003
APP 2 (FULL)	Records of Tax Assessor's Office, South Kingstown regarding tax assessments of Lot 61 for years 1938 and 1939.
APP 3(ID)	Aerial photographs of the proposed area demonstrating existence of foundation in 1939.
APP 4 (FULL*)	Certificate of Conformance for Lot 360 *(for limited purpose of showing a change on Lot 360 from the time of Application)
Office of Water Resources' Exhibits	
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OWR 1 (FULL)	ISDS Variance Application No. 0232-2267 Denial Letter; five (5) pages.
OWR 2 (FULL)	Soil Evaluation Form, Application No. 0232-2267, Robert D. MacLean, Fifth Avenue Street, Assessor's Plat 95-1, Lot 61; South Kingstown, RI; four (4) pages.
OWR 3 (ID)	ISDS Inspection Report for Application NO. 0232-2267, one (1) page.
OWR 4 (FULL)	ISDS Variance Application No. 0232-2267; Eagle of the North Realty Trust; Fifth Avenue Street, Assessor's Plat 95-1, Lot 61; South Kingstown, RI; five (5) pages.
OWR 5	Rhode Island Coastal Resources

	Management Council
(ID)	Report of Findings for ISDS Variance Application No. 0232-2267; two (2) pages.
OWR 6	ISDS Variance Review Sheet for Application NO. 0232-
(ID)	2267; one (1) page.
OWR 7	Premier Laboratories coliform and nitrate survey for
(FULL)	ISDS Application No. 0232-2267; three (3) pages.
OWR 8	ISDS Application No. 0232-2267 Permitting Review; four (4)
(FULL)	pages.
OWR 9	Site Evaluation Form; Application No. 0232-2267, Robert
(FULL)	D. MacLean, Fifth Avenue Street, Assessor's Plat 95-1, Lot 61; South Kingstown, RI; two (2) pages.
OWR 10	Map of Fifth Avenue Street, Assessor's Plat 95-1, Lot
(FULL)	61; South Kingstown, RI and surrounding area within two hundred feet (200) of proposed ISDS; one (1) pages.
OWR 11	Plan of Proposed ISDS; Assessor's Plat 95-1. Lot 61;
(FULL)	South Kingstown, RI, Prepared for Dowdell Engineering, Inc., Scale 1"=20', Date: May 5, 2005.
OWR 12	Resume of Russell J. Chateaufneuf, P.E.;
(FULL)	one page.
OWR 13	Resume of Brian M. Moore, P.E.;
(FULL)	two pages.
OWR 14	Resume of Mohammed J. Freij, P.E.;
(FULL)	two pages.