STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF GROUNDWATER AND FRESHWATER WETLANDS

IN RE: THOMAS S. CHRISTENSEN
CASE NUMBER 8813-148

D E C I S I O N A N D O R D E R

This matter is before the Hearing Officer on the application of Thomas S. Christensen for a variance from enforcement of regulations pertaining to site suitability in the installation and operation of an individual sewage disposal system. An administrative hearing concerning application number 8813-148 was commenced on November 8, 1990, and concluded on November 15, 1990. The hearing on November 8, 1990, was conducted at the Department of Environmental Management - Conference Room, 289 Promenade Street, Providence, Rhode Island. The hearing on November 15, 1990, was conducted at the Department of Administration - Administrative Adjudication Division of the Department of Environmental Management - One Capitol Hill, Room 2C, Providence, Rhode Island. The Hearing Officer was in receipt of a completed transcript on or about December 1, 1990. The Hearing Officer was in receipt of post-hearing memoranda from the parties on or about December 31, 1990.

The hearing was conducted pursuant to the Administrative Procedures Act (R.I.G.L. 42-35-1, et. seq.) and the

Administrative Rules of Practice and Procedure of the Department of Environmental Management. Hodosh, Spinella & Angelone, by Paul J. Bogosian, Jr., represented the applicant. Stephen H. Burke, Deputy Chief Counsel, represented the Department of Environmental Management.

Prior to the commencement of the hearing, the parties and the Hearing Officer discussed the marking of documents, possible stipulations, and expert testimony. As a result of those discussions, the following documents were entered by agreement of the parties:

EXHIBITS

JOINT

A Binder - Gendrow to Christensen

B Purchase and Sale Agreement - Gendrow to Christensen

C DEM Application 8713-120

D Settlement Sheet - Gendrow to Christensen

E Warranty Deed - Gendrow to Christensen

F Application - DEM/Christensen

G DEM Application - Freshwater Wetlands (Christensen) 10/28/87 (with substitute page 5)

H DEM approval F.W.W. 87-0963D

I Suspension Notice - DEM to Christensen

J DEM 8813-148 - request for variance

K Robert Hawley - Vitae

L Resume - James Fester

M Inspection Report - 8713-203

N Appeal Notice 8813-148

O Power of Attorney

P Complaint

APPLICANTS

A Correspondence from Glocester Building Inspector - 12/10/87

B Attested Copy - Meeting Minutes

C Drawing - Hawley

DEM

A Hawley Groundwater Determinations - March, 1987

B Correspondence Hawley to Mattera - 9/13/88

The witnesses were as follows:

1.	Thomas S. Christensen	Applicant
2.	Robert Hawley	Applicant
3.	James Fester	DEM

Steven Morin was also present throughout the hearing but did not testify. Mr. Morin is the division chief in the department of Groundwater and Freshwater Wetlands within the Department of Environmental Management.

Each witness was cross-examined by opposing counsel.

Departmental regulations outline the burden (on appeal) of the applicant from the denial of a variance from the provisions of any rule or regulation in a matter. The director, or her designee, must find that a literal enforcement of the regulations

for the subject unimproved property, namely, Assessor's Plat 7, Lot 77, Putnam Pike, Glocester, Rhode Island. This conveyance was conditional upon the Seller obtaining a transferrable permit for a state approved individual sewage disposal system. The department issued the permit after review of the Seller's application therefor. The closing occurred on September 24, 1987. The applicant paid the sum of $15,000.00 for said property.

On June 23, 1988, the applicant received from the department a notice to suspend installation of the individual sewage disposal system. The applicant complied. Thereafter, the applicant applied for the subject variance and submitted new design plans for the disposal system which plans, purportedly, satisfy the departmental regulations and concerns. On January 27, 1989, the variance was denied. The applicant filed a timely appeal of the denial on February 15, 1989.

The applicant purchased the subject property from Frank Gendrow, who, it appears, presently resides in Arizona and who, it also appears, so resided at the time of the sale in September, 1987.

Mr. Gendrow engaged Robert Hawley, a consulting engineer, to prepare the original application for the permit for the installation of the subject individual sewage disposal system. Mr. Hawley testified, with great candor, that he misinterpreted the departmental regulations pertaining to site suitability.

will result in unnecessary hardship to the applicant and that such variance will not be contrary to the public interest and public health. In addition to this burden, the applicant must also establish, by clear and convincing evidence, to the satisfaction of the director or her designee, that the system, as located, installed, and maintained, will not contaminate a drinking water supply or tributary thereto; that waste from such system will not pollute any body of water; that waste from such system will not interfere with the public use and enjoyment of any recreational resource; that waste will not create a public or private nuisance.

It is my opinion that the applicant failed to sustain this burden of proof and, I recommend to the director, that the denial of the applicant's request for a variance be upheld.

The applicant, in a well presented case, argues:

A. That a literal enforcement of SD 15.02 will result in unnecessary hardship to the applicant;

B. That granting the variance will not be contrary to the public interest and public health;

C. That the risks involved in granting this variance are present but do not rise to the level of being contrary to the public interest or public health.

The department, obviously, argues otherwise.

The facts of this matter are straightforward. On July 24, 1987, the applicant entered into a Purchase and Sale Agreement

This misinterpretation formed the basis for the application which, ultimately, led the department to approve same.

I must admit that I read the department's brief, pertaining to Mr. Hawley, with a degree of indignity and disgust. I will not tolerate "witness-bashing" either at the hearing or in memorandum. Advocacy and witness-bashing are not synonomous terms. Had the applicant's counsel not objected to the department's brief as pertains to this issue, I would have stricken such, sua sponte. However, I yield to the objections filed by counsel, and sustain same. There is no evidence in the record that Mr. Hawley "negligently misrepresented" anything to the department. Further, it is not ever for department's counsel to assert that an expert is guilty of professional negligence for which said expert will monetarily compensate the applicant (or anyone else) for the alleged loss sustained. These remarks do not even deserve the title "argument" and are stricken per the objections of the applicant.

Further, there is no evidence whatsoever that the applicant is attempting to "coerce" the department into granting a variance to "save him the trouble of getting his money back." The applicant's objection to these flailing assertions is sustained. These remarks, too, are stricken.

The parties dispute whether or not this application forms the substance of a true variance, as opposed to, a deviation. The parties site a leading zoning case decided by the Rhode Island

Supreme Court in 1987 (Gara Realty v. Zoning Board of Review, 523 A.2d 855). In Gara, the Supreme Court ruled that in the case of a true variance, the petitioner (for the variance) must satisfy the unnecessary-hardship standard by establishing that a literal enforcement of the ordinance will deprive the petitioner of all beneficial use of a property. In a deviation matter, the petitioner need only demonstrate a mere inconvenience to satisfy the unnecessary hardship standard.

In that our Supreme Court has not determined whether or not the subject site suitability regulation carries the higher or lesser burden of proof in the unnecessary hardship standard, it is left to me to determine whether or not to apply the Gara decision herein and, if so, to rule as to the applicable burden. In that zoning ordinances are governmental land use regulations and in that department regulations pertaining to individual sewage disposal systems, to a degree, regulate land use, I am amenable to applying the Gara decision. Further, I rule that this is a true variance and not a deviation. The applicant is seeking to use the property beyond a "permitted use." Fill material is considered to be improper soil, that is, unsuitable soil for the function of an individual sewage disposal system. Installation of a disposal system in fill is, quite simply, not permitted by the regulations.

Accordingly, an issue is whether or not the applicant established that should the appeal not be sustained and the

variance granted, that the applicant will be denied "all beneficial use" of the property. The evidence fairly established that the applicant will be denied the intended use of the property, that is, construction of a single family residence. That is all the evidence establishes on this issue.

Further, the applicant did not demonstrate by clear and convincing evidence that untreated or insufficiently treated effluent from the proposed individual sewage disposal system would not reach the surface water in the adjacent wetland or the well proposed to be located on the property.

In the traditional, if not colloquial, battle of experts, I am not persuaded that the system designed by Mr. Hawley will function within the fill material so as to properly treat the effluent preventing contamination and/or pollution. I want to make it clear that I find Mr. Hawley's testimony sincere and credible, I just cannot find that such meets the burden of clear and convincing evidence on the issue. I can, however, without any degree of uncertainty, find that the testimony of the department's expert, James Fester, is clear and convincing on this issue. If this system does not properly treat the effluent, there is danger that public health and interest will be jeopardized by such diseases as typhoid or cholera. Further, if this system does not function, public drinking water supplies, tributaries, and private water supplies may also be compromised.

Waste from this system may pollute a body of water and may create a public or private nuisance. These risks cannot be trivialized. These risks are substantial and worthy of respect, if not fear.

FINDINGS OF FACT

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

1. A prehearing conference was held on November 8, 1990.

2. Public hearings were held on November 8, 1990, and November 15, 1990.

3. All hearings were conducted in accordance with the provisions of the "Administrative Procedures Act" (chapter 42-35 of the General Laws) and in accordance with the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems of the Department of Environmental Management.

4. The Department of Environmental Management has jurisdiction over this application.

5. The applicant seeks a variance to install an individual sewage disposal system on a parcel located at Assessor's Plat 7, Lot 77, Putnam Pike, Glocester, Rhode Island.

6. The system would be installed in fill material and not in the original soil.

7. On April 14, 1987, the applicant's predecessor in title, Frank Gendrow, received an approval of an application to permit

installation of an individual sewage disposal system at the subject property.

8. On or about October 8, 1987, said permit was transferred to the applicant.

9. On or about June 23, 1988, said permit was suspended based upon new information received by the department pertaining to fill material at the site and that the groundwater table was not located two (2) feet below the original ground surface as initially asserted in the Gendrow application.

10. Thereafter, the applicant submitted the instant application for a variance and, on January 27, 1989, such was denied.

11. The denial was based upon standard regulatory language, namely, that literal enforcement of the regulations would not result in an unnecessary hardship to the applicant nor would granting the variance be in the public interest or public health.

12. The applicant filed a timely appeal on February 15, 1989.

13. The applicant testified that he will be frustrated in the intended use of the subject parcel, to wit, construction of and residence in a single family home, in the event that the denial is sustained.

14. The applicant's expert testified that the system designed for installation at the present site will function in properly treating the effluent and that there will be no

unreasonable risk, if the system is properly installed and maintained, that the public health or public interest will be jeopardized or compromised. This testimony is proferred despite the admission that the site consists of fill material and that there were mismeasurements in the initial application pertaining to the groundwater table and ground surface.

15. The department agrees that the denial of the variance will frustrate the applicant's intended use of the property but contends that the applicant will not be denied all beneficial use of said property by virtue of the denial of the variance.

16. The department contends that the proposed design of the disposal system will not function properly in the fill material and that there is a risk to the public health and public interest.

CONCLUSION OF LAW

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

1. All hearings were held in accordance with the Rhode Island General Laws, the Administrative Rules for Practice and Procedure for the Department of Environmental Management and the Department's Rules and Regulations Governing Individual Sewage Disposal Systems.

2. The denial of application number 8813-148 is correct as a matter of law.

3. The department's finding that literal enforcement of the regulations will not result in unnecessary hardship to the applicant is correct as a matter of law.

4. The Department's finding that granting the variance would be contrary to the public interest and public health is correct as a matter of law.

5. The applicant has the burden of establishing by clear and convincing evidence that the granting of said variance would not be contrary to the public interest and public health. The applicant did not meet the burden of proof as a matter of law.

6. The applicant did not establish, as a matter of law, that literal enforcement of the regulations will result in unnecessary hardship to him by depriving him of all beneficial use of said property.

THEREFORE, IT IS

O R D E R E D

Application No. 8813-148 to install an individual sewage system in variance of departmental regulations is denied.

I hereby recommend the foregoing Decision to the Director for issuance as a final ORDER.

PATRICIA A. SULLIVAN, IN MY CAPACITY AS HEARING OFFICER

The within Decision and Order is hereby adopted as a Final Decision and Order.

March 8, 1991

Louise Durfee

LOUISE DURFEE, DIRECTOR
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT.

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage prepaid, to Paul J. Bogosian, Jr., Esq., Hodosh, Spinella & Angelone, 128 Dorrance Street, Providence, Rhode Island 02903 and via inter-office mail to Stephen H. Burke, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 11th day of March, 1991.

Jacqueline Ballard

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