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

In Re: Thomas Grossi AAD No. 93-010/ISA
ISDS Variance Application No. 9015-88

DECISION AND ORDER

This matter came before the Administrative Adjudication Hearing Officer on a request for an adjudicatory hearing following the denial by the Department of Environmental Management of the State of Rhode Island ("DEM") of an application and request for variances for installation of an individual sewage disposal system "ISDS" on property owned by Thomas Grossi "Applicant" located at Pole No. 10 on Mast Street in Jamestown, Rhode Island, identified as Lot 260 on Jamestown Tax Assessor's Plat 14 ("site").

The Applicant filed an application for permission to install a proposed ISDS to service a two (2) bedroom single family residence to be constructed on the site. Applicant requested variances from the following Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Industrial Sewage Disposal Systems, as amended as of June 18, 1992 ("ISDS Regulations"):

> SD 3.05 (1) requiring a minimum distance of one hundred (100') feet from a private well and the disposal trench, bed or chambers of an isds; and
>
> SD 3.05 (4) requiring a minimum distance of ten (10') feet from the property line and the disposal trench, bed or chambers of an isds; and

SD 2.14 requiring an alternate replacement area be available when an isds for a building is being serviced by a private well; and

SD 10.01 requiring the isds be designed to serve a minimum of three (3) bedrooms; and

SD 11.06 (2) requiring the stripping of trees, brush topsoil, subsoil, undesirable material, and soil containing fines to specified elevation or depth, and the bottom of the excavation scarified and backfilled with clean coarse gravel at least five (5') feet on all sides, and removal of trees and bush should extend to ten (10') feet beyond all sides of the leach field.

The application and requested variances were denied by the DEM Variance Board, and the Applicant requested an adjudicatory hearing.

Donald J. Nasif, Esq., represented the Applicant and Mary B. Shekarchi, Esq. and John Langlois, Esq., represented the Division of Groundwater and Individual Sewage Disposal System ("Division").

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

A prehearing conference was held at One Capitol Hill, Providence, RI 02908 on December 23, 1993, and the Prehearing Conference Record was prepared by this Hearing Officer.

The adjudicatory hearings were held before the Hearing Officer on January 19 and 20, 1994 and March 7 and 8, 1994. Briefs were filed on April 25, 1994.

The Applicant has 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 pursuant to the Prehearing Conference Record:

1. The Applicant Thomas R. Grossi ("Grossi") along with Thomas L. Sholl are the owners of the property located at Pole No. 10 on Mast Street in Jamestown, Rhode Island; identified as Plat 14, Lot 260 in the Jamestown Land Evidence Records; and the subject of this administrative adjudicatory hearing.

2. Grossi filed a variance application requesting variances from SD 2.14; SD 3.05(1); and SD 3.05(4); SD 10.01, and SD 11.06 dated received, October 5, 1992 (Application No. 9015-88).

3. The Division denied Grossi's October 5, 1992 Variance Application No. 9015-88 on September 27, 1993.

4. Grossi paid all necessary fees and filed all necessary documents to confer jurisdiction on the Department's Administrative Adjudication Division in this matter.

5. The ISDS Regulations in effect on September 27, 1993 are the operative regulations for this hearing.

The parties agreed upon the admission of the following documents as full exhibits:

JT. 1. Copy of water Table Verification Card bearing No. W9015-24 (1 p.).

JT. 2. Copy of Witnessing of Soil Examinations/ Percolation Tests designed by William Dowdell and verified by Mohamed J. Freij on August 4, 1992 (5 pp.).

JT. 3. Copy of ISDS Application Form for Application No. 9015-88, dated received by the Division on October 5, 1992, and signed as denied on September 24, 1993.

JT. 4. Copy of Variance Request Form dated received by the Division on October 6, 1992 and prepared by William Dowdell (9 pp.).

JT. 5. Copy of site plan entitled, "Proposed Sewage Disposal System for Thomas Grossi, dated 8/2/91 and revised 9/8/92" and signed as denied on September 24, 1993.

JT. 6. Copy of a list of abutters within a 200 foot radius of subject property with attached map, dated December 16, 1992 (4 pp.).

JT. 7. Copy of Water Table Data prepared by William D. Dowdell, P.E., dated January 15, 1993 (1 p.).

JT. 8. Copy of letter of Report for Cumulative Impact Assessment by William D. Dowdell, P.E., and dated received by Division on May 27, 1993 (29 pp.).

JT. 9. Copy of correspondence to Thomas Grossi from Russell Chateauneuf, Chief, dated September 27, 1993 denying variance requests (4 pp.).

JT. 10. Copy of correspondence to DEM Administrative Adjudication Division from Attorney Donald J. Nasif, requesting an adjudicatory hearing, dated November 1, 1993 (2 pp.).

JT. 11. Copy of a radius map for ISDS variance appeal.

JT. 12. Copy of a letter that was sent to the adjoining abutters concerning the test.

JT. 13. Copy of the test results from Rhode Island Analytic on the water samples submitted by Mr. Dowdell.

The following documents were admitted as full exhibits for Applicant:

Appl. 1. Resume of Richard J. Costa.

Appl. 2. Resume of William D. Dowdell, P.E.

Appl. 3. Copy of topographical groundwater map of Wickford Quadrangle of R.I. 1959.

The following documents were admitted as full exhibits for Division:

Div. 1. Resume of Russell J. Chateauneuf.

Div. 2. Copy of ISDS Variance Review Sheet with recommendations by Mohamed J. Freij, P.E., dated February 4, 1993 and final decision by Russell Chateauneuf, Chief, dated February 11, 1993.

Div. 3. Copy of ISDS Variance Review Sheet reviewed by Mohamed J. Freij, P.E., on June 24, 1993 and final decision by Russell Chateauneuf, Chief, on July 2, 1993 (1 p.).

It was stipulated in the Prehearing Conference Record that the following are issues to be considered at the hearing:

1. Whether the denial of the variance constitutes an unfair interpretation of the Regulations thereby prejudicing any substantial rights the Applicant may have.

2. Whether the literal enforcement of the Regulations will result in unnecessary hardship to the Applicant.

3. Whether the proposed ISDS will be located, operated and maintained so as to prevent the adverse effect of any drinking water supply or tributary thereto.

4. Whether the effect of the proposed ISDS will create a public or private nuisance.

5. Whether the effect from the proposed ISDS will be a danger to the public health.

The Applicant submitted the following for consideration as an issue:

1. Whether the denial of the variance will have the effect of depriving the Applicant of the use of his property without due process of law and constitute an undue hardship on the Applicant.

Richard Joseph Costa was the first witness to testify on behalf of Applicant. He was qualified as a real estate expert. It was this witness's opinion that the subject lot is valued at $50,000.00 to $55,000.00; and that without an ISDS permit, the Applicant would lose all beneficial use of said property.

William D. Dowdell, P.E., was the next witness to testify for Applicant. He was qualified as an expert in environmental engineering and ISDS design. He described the proposed septic system designed for the subject premises, and explained that the system is located as far to the north and east as possible to get the maximum distances obtainable from the existing wells of the abutters on either side of Applicant's lot.

Mr. Dowdell stated that they tried to optimize the design for the proposed system by locating it closer to the property line than allowed by the Regulations and also by decreasing the number of bedrooms to two (instead of the minimum of three required by the ISDS Regulations). The system would be located three feet from the property lines to the rear (instead of the required 10 feet), and the Applicant would require relief from the 10 foot stripping requirement of the ISDS Regulations.

A two-bedroom house was proposed by Applicant in order to downsize the size of leaching, and therefore, increase the setbacks to the existing wells of the abutters on either side of Applicant's lot. Applicant offered to record a deed restricting the use of the subject land to a two-bedroom house.

The proposed system is located closer than 100 feet from the existing wells of abutters on either side of the subject lot, i.e. 85 feet from the existing well of the westerly abutter and 89 feet from the existing well of the easterly abutter. It was this witness's opinion that the groundwater at the site flowed in a north, northwest direction (away from said abutting wells), and that the proposed septic systems would not interfere with or flow towards said wells.

Mr. Dowdell described the Cumulative Impact Assessment ("CIA") submitted by Applicant pursuant to Section 20.01(f) of the ISDS Regulations and the instructions given by Division at a meeting of the parties on March 9, 1993. In accordance with said instructions, Applicant requested permission of seven neighboring property owners to take samples of their water in order to compile the baseline water quality of the area as part of the CIA; however, only two of said parties granted permission. The water from these two wells was tested as requested by the ISDS

Section, and the results of said testing indicated that both wells were below the maximum contaminant levels as recommended by the EPA for safe drinking water.

It was this witness's opinion that the system as submitted will not have an adverse effect on any drinking water supply or tributary, it would not create a public or private nuisance, it would not have any adverse effect on public health, and it would not pollute any body of water.

Mr. Dowdell testified that a single-family house cannot be constructed on the subject lot without an ISDS permit; however, he did acknowledge that it might be possible to work out another design for the site if the Division "would sit down across the table from us."

It was elicited in cross examination of Mr. Dowdell that there are approximately ten lots within the 200 foot radius of the subject lot, of which three were vacant lots.

Mr. Thomas Grossi, Applicant, was the next witness called to testify. He stated that he purchased the subject property to construct a single-family dwelling on it; that an ISDS approval is required in order to do so, and that without such approval he would have no beneficial use for this property. Mr. Grossi reviewed the procedures undertaken on his behalf to obtain an ISDS permit, and the difficulties encountered.

It was brought out in cross examination of Mr. Grossi that he refused the Division's offer to assist him in obtaining access to the neighboring wells (for testing), after the impact statement had been submitted.

The Applicant rested his case at the conclusion of Mr. Grossi's testimony. The matter was continued for hearing at a later date, and prior to the next hearing date Division filed a written Motion (and accompanying Memorandum) For Entry of Order upholding the Division's denial of the subject Application pursuant to Rule 41(b)(2) of the Rhode Island Superior Court Rules of Civil Procedure and Rule 8 of the Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters. The Applicant filed an Objection and Memorandum in opposition thereto. The Hearing Officer reserved decision on this Motion, and this Decision and Order acts as a decision on said Motion.

The Division called Russell J. Chateauneuf, Chief of the Division of Groundwater and ISDS, as its only witness. He was qualified as an expert in the field of engineering, ISDS design, ISDS construction and the application of the ISDS Regulations. This witness identified the five variances sought by Applicant,

and described the process of review of same undertaken by the Division. He also explained the reasons for Division's denial of the enumerated variances requested by Applicant.

It was Mr. Chateauneuf's opinion that the proposed ISDS design's failure to include an alternate area in which to locate a leaching field (as required by ISDS Regulation SD 2.14) does not afford the same environmental protection as a system which has sufficient additional area available for the replacement of the disposal field, in case of failure.

Mr. Chateauneuf opined that the failure of the proposed ISDS design to maintain the one hundred (100) foot separation of the ISDS system from two existing wells and one proposed well (required by ISDS Regulation SD 3.05 subsection one) does not afford the same environmental protection as a system that maintains the minimum distance required. He testified that this particular design and the circumstances of the site did not warrant the granting of a waiver of the one hundred foot requirement, because it would not ensure protection of the public health.

This witness testified that because the soil overlying the bedrock in this area is quite thin, and because the wells get their water essentially from fractures and fissures in the rock, it is possible that the installation of a new well, construction of the house and installation of the ISDS system would create a

change in the flow of groundwater in this area so as to cause a problem. He felt that he had insufficient information to conclude what will happen to the groundwater flow direction after the well and ISDS system are installed.

It was Mr. Chateauneuf's opinion that the failure of the proposed ISDS design to maintain the minimum 10 foot distance of the leaching field trench from the property lines (as required by ISDS Regulation SD 3.05 subsection four) would not afford the same environmental protection as provided by maintaining the 10 foot distance. He pointed out that the Applicant's leaching field would be located approximately three feet from the abutting property lines on the north and east sides (for a distance of 34 feet and 19 feet, respectively.) Nearly 50 percent of that leaching field would be located within that confined distance to the property line, therefore the potential activities on abutting properties could interfere with the proper operations of the leaching field. This would cause the system to fail prematurely, and be a threat to public health pending remedial work to remedy the failure.

Mr. Chateauneuf further opined that the failure of the proposed ISDS design to provide for a three-bedroom flow (as required by ISDS Rule SD 10.01) would not afford the same environmental protection, since a system designed for three

bedrooms would be much larger. Also, since a significant portion of the leaching field is located in close proximity to abutters' properties, a three-bedroom design would pose less risk of failure.

It was also Mr. Chateauneuf's opinion that the proposed ISDS design's failure to meet the requirements of ISDS Regulation SD 11.06 subsection two (which requires proper stripping and refilling for at least five feet on all sides of the leaching area and the removal of trees and brush within ten feet of the sides of the leach field), would not afford the same environmental protection as a system that complied with the Regulations in this regard. The proposed system would be three feet away from the property lines on the north and east sides. This close proximity to the property line does not allow the installation of the required five-foot gravel fill around a significant portion of the leaching field, nor does it allow the control of growth of trees and shrubs within the ten-foot area abutting the leaching field trenches. This could later result in the premature failure of the system.

Mr. Chateauneuf described the scope and function of the CIA and his attempts to assist Applicant in the submission of same. He explained that he determined (after review of the file) that a CIA was required by SD 20.01(f) of the ISDS Regulations because

(1) the subject lot was less 10,000 square feet in area, (2) more than one variance was requested, and (3) the ISDS was within 100 feet of private wells. Mr. Chateauneuf reviewed the CIA that was submitted by Applicant, which contained the sampling results of the two locations tested. This witness stated that he was particularly concerned about the nitrate levels indicated in those test results because of the substantial number of variances requested and the large number of private drinking water wells in the area. He felt that he could not approve the subject application because the CIA did not include all of the wells which he requested be tested. Division met with Applicant and Mr. Dowdell in September of 1993, and offered to assist Applicant obtain the water quality levels in the wells that were not included in the CIA. This offer of assistance was declined by Applicant.

The witness explained that because the area involved is densely populated and many of the homes are closely located, the contaminants contained in the wastewater from the proposed ISDS could enter the groundwater and cause pollution of the neighboring wells. One of the contaminants where there is dense on-site sewage disposal systems, the nitrate form of nitrogen, is not removed effectively by septic systems. It can move fairly readily into the groundwater which supplies the drinking water

for the neighboring wells. This could well increase the nitrate/nitrogen level beyond what is considered safe. One of the diseases resulting therefrom (known as blue baby syndrome) can be potentially fatal.

It was Mr. Chateauneuf's opinion that the Applicant did not provide clear and convincing evidence of the following: (1) that the proposed system would not adversely affect any drinking water supply; (2) that it would not create a public or private nuisance; and (3) that it would not adversely affect the public health.

At the conclusion of the hearing, Division renewed its Motion for Entry of Order, or in the alternative, made a Motion for Directed Verdict. The Hearing Officer reserved decision on the Motion, and this Decision and Order acts as a decision on the Motion.

Applicant argues that the evidence introduced by him adequately demonstrates that the septic system will function as proposed; that the issuance of a permit will not be contrary to the public interest, public health, and the environment; and that a literal enforcement of the Regulations will result in unnecessary hardship to Applicant.

It is essentially Applicant's position that Division's concerns are not valid and that the objections posed by Division (as perceived by Applicant) should not result in the denial of a permit.

Applicant also urges that an inference adverse to the Division should be drawn because of Division's failure to call two of its experts (who were listed in Division's Prehearing Memorandum) or to explain their absence.

Division argues that Applicant has failed to meet his burden of proof in this matter as required by the ISDS Regulations and consequently the application and request for variances should be denied.

It is Division's contention that the cumulative impact assessment ("CIA") submitted by Applicant (as required by Rule SD 20.01(f)) was incomplete, since Applicant did not submit certain required information (essentially additional water quality test results) to support is application.

Division maintains that, although the test results for the two wells located at the most western portion of the surrounding area were at acceptable drinking water quality levels, additional information is needed to determine if those test results are typical of the surrounding area.

Division urges that its denial be upheld since the Applicant failed to supply the additional information needed to determine the impacts the proposed system would have on the subject wells, and also because the proposed ISDS can cause an increase in the nitrate levels of the groundwater, which will impact the subject wells and cause the drinking water to be contaminated.

Division also urges that, as a matter of law, no adverse inference should be drawn because of its decision not to present the two additional witnesses listed in Division's Prehearing Memorandum.

No evidence was introduced to support Applicant's request for variances from SD 2.14, SD 3.05(4), and SD 11.06(2); and only meager evidence was presented by Applicant as to SD 3.05(1) and SD 10.01. The testimony of Mr. Dowdell was conclusionary at best, and lacked persuasion. His testimony as to the present direction of the groundwater flow (away from the two neighboring wells) does not suffice to demonstrate clearly and convincingly that the waste from the proposed ISDS would not have any effect on the drinking water and not impact the public health nor create a public nuisance. The testimony of Division's expert, Mr. Chateauneuf, demonstrated that there could be a possible change

in direction of the groundwater flow (by the installation of the proposed ISDS and Applicant's well). This testimony was not directly refuted by Applicant, and remains uncontradicted.

No valid reason was advanced to explain Applicant's failure to have draw tests performed on the wells in question; and no satisfactory explanation was offered to justify Applicant's refusal of Division's offer of assistance (to obtain the water quality levels in the neighboring wells that had not been tested).

The submission of a complete CIA is mandated by the ISDS Regulations. It is especially imperative in the instant matter since (1) the lot in question is 7800 square feet in area; (2) the proposed ISDS requires five variances; and (3) the ISDS will be located within 85 feet and 89 feet of two neighboring wells. It is incumbent on Applicant to supply the requisite information for an appropriate determination of Applicant's variance requests; and no valid reason was advanced to justify the course of action (or inaction) pursued by Applicant following the submission of an incomplete CIA.

It is indeed unfortunate that the size of Applicant's lot presented a number of obstacles to the approval of an ISDS; however, this does not justify ignoring the minimum standards

imposed by the Regulations. Any relief via variances should only be granted upon a satisfactory showing that Applicant has sustained his burden of proof as established by the Regulations.

I find the testimony of Mr. Chateauneuf to be most credible. The thin soil overlaying the bedrock and the existing hydrogeological circumstance in the area make it very possible that the groundwater flow direction could change once Applicant's new well is installed and pumping groundwater from this area and the proposed ISDS is constructed. This could cause the effluents from the proposed system to travel directly to the nearby wells and adversely impact them. The quantum of evidence submitted by Applicant is insufficient to reach the level necessary to demonstrate that the proposed system to be installed will be located, operated and maintained so as to prevent the contamination of any drinking water supply.

The case cited by Applicant, Rosa v. Oliveira, 342 A.2d 601, 115 R.I. 277, July 30, 1975 would obviously allow Applicant to cut overhanging limbs from trees on his neighbor's property, but Applicant has not submitted a plan to curtail or prevent the roots from such trees from growing into and interfering with his system. The roots of any tree or bushes planted by abutting neighbors on their side of the property line might well travel undetected into the proposed system and obstruct the proper

functioning of the ISDS. Also, since the proposed system is only three feet from the abutting property, there is insufficient room for the proper excavation preparation by Applicant. This could cause the system to fail and the unavailability of an alternate area to replace the failed system would not allow the proper disposal of the effluent entering the system. Consequently, Applicant has failed to demonstrate clear and convincingly that the waste from such system will not be a danger to public health and not create a public or private nuisance.

Applicant has failed to prove by clear and convincing evidence that the system will function as proposed and that the issuance of a permit will not be contrary to the public interest, public health and the environment; therefore, it is not necessary to consider whether a literal enforcement of the Regulations will result in unnecessary hardship to the Applicant.

Assuming arguendo that the question of unnecessary hardship should be considered, a review of the evidence demonstrates that Applicant has failed to introduce sufficient evidence to sustain his burden of proving that he will suffer unnecessary hardship.

The standard to be applied in ISDS variance requests has been considered previously, and it is well established that the term "unnecessary hardship" has previously been construed to mean a deprivation of all beneficial uses of one's land. See In re:

Walter J. Kukulka, AAD No. 91-002/ISA, citing R.I. Hospital Trust National Bank v. East Providence Zon. Bd., 444 A.2d 862 (R.I. 1982).

The instant matter concerns minimum distances, minimum number of bedrooms, alternate replacement areas because of a private well, and the distances for excavation preparation, which have been established to protect the public health and interest from improper treatment or discharge of sanitary sewage. It is well settled that requests for variances involving site suitability are considered true variances and not deviations. Thomas S. Christiansen, DEM case No. 8813-148.

Applicant failed to introduce competent evidence that the subject property could only be used for single-family residence. He and his real estate expert testified that the subject property was zoned for one family homes, but neither witness reviewed the actual zoning ordinance to determine if any other appropriate uses were allowed.

Applicant has not presented sufficient evidence to establish that he is entitled to the variances requested. No evidence was presented by Applicant that the subject property could not accommodate a suitable ISDS design, nor that he has explored all reasonable possibilities to design an acceptable ISDS system for

the subject property. The size of the lot certainly posed obstacles to the acceptance of the design as submitted; but Applicant should have accepted Division's offer of assistance in order that the complete picture be presented for a proper determination of this matter.

Applicant's evidence falls short of establishing that a denial of the variances requested will deprive him of all beneficial use of the subject lot. The fact that the premises could be put to a more profitable use does not alone satisfy the requirements of unnecessary hardship. DiMellio v. Zoning Bd. of Review, 574 a.2d 754 (R.I. 1990).

The final issue to be considered herein is whether any adverse inference should be drawn because of Division's failure to call two of its experts. The rule which Applicant seeks to invoke in this matter is frequently referred to as the "empty chair doctrine." Applicant argues that because the Division failed to call Dr. Eid Alkhatib and Mohamed J. Freij, P.E. (both of whom were listed in Division's Prehearing Memorandum) or explain their absence, the trier of facts can infer that the system as designed would have no adverse impact on the environment, would not create a public or private nuisance, and would not be detrimental to the public health or safety.

Division maintains that Dr. Alkhatib and Mr. Freij were listed in its Prehearing Memorandum as possible rebuttal witnesses, and that it decided not to call them after hearing the meager evidence presented by Applicant.

This issue does not appear to have been raised previously before the Administrative Adjudication Division, but the missing witness inference rule has been employed by the courts in varying situations. The Rhode Island Supreme Court considered the applicability of this rule in a case involving a motor vehicle accident wherein the defendant operator failed to call her husband (a passenger in her car) as a witness. The Court held that " '* * * the failure to produce an available material witness to testify may be considered as a circumstance, but the inference to be drawn and the weight to be given thereto is ultimately for the trier of facts to determine upon a consideration of all the evidence. The cases in this state have consistently followed this pattern whether applied to a party or a witness. * * * None of these cases holds that a trier of facts is compelled as a matter of law to draw an unfavorable inference from a party's mere failure to produce a material witness * * *.'" Benevides v. Canario 111 R.I. 204, 301 A.2d 75 (1973). In addition to several other Rhode Island cases, the Court cited 2 Wigmore, Evidence §§ 285-286 at 162-68 (3d ed. 1940).

The applicability of this rule was considered by the Rhode Island Supreme Court in an action brought against the City of Central Falls for injuries sustained by a plaintiff while being arrested by city police officers. The City failed to produce one of the arresting officers who at the time of trial was no longer a member of the Central Falls police department but was employed as a police officer in a nearby Massachusetts community. The court held that "Concededly, a litigant's unexplained failure to produce an available witness who would be expected to give material testimony in the litigant's behalf permits, but does not compel, a factfinder to draw an inference that had the witness testified, the testimony would have been adverse to the litigant." Belanger v. Cross, 488 A.2d 410 (R.I. 1985).

The propriety of allowing the trier of facts to draw adverse inferences in general is not doubted; however, it seems plain that possible witnesses whose testimony would be for any reason comparatively unimportant, or cumulative, or inferior to what is already utilized, might well be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension as to the tenor of their testimony. In other words, put somewhat more strongly, there is a general limitation (depending for its application on the facts of each case) that the inference cannot fairly be drawn except from the non-

production of witnesses whose testimony would be superior in respect to the fact to be proved. 2 Wigmore on Evidence §287 (Rev. 1979).

The weight of authority supports the general rule that the failure of a party to introduce an available witness does not give rise to any presumption or inference that the testimony of the witness, if he had been called, would have been unfavorable to such party, where other qualified witnesses have testified for the party concerning the same matters, and the testimony of the uncalled witness would have been merely cumulative or corroborative. 135 ALR 1376 (1941).

The presentation of two additional expert witnesses by Division would have done nothing more than corroborate the uncontradicted evidence already introduced by Division. The probative value of their testimony is substantially outweighed by considerations of undue delay, waste of time, and needless presentation of cumulative evidence. Said evidence would have been excluded pursuant to Rule 403 of the R. I. Rules of Evidence and no adverse inference can be drawn from Division's failure to call said additional witnesses.

I have carefully scrutinized the facts and circumstances involved in this matter, and I feel that they do not warrant drawing an inference that had these witnesses testified, their testimony would have been adverse to Division.

Applicant should not be allowed to supply the evidence which he has the burden to submit by resort to the adverse inference rule. Applicant has failed to satisfy his burden of proof, and his requests for variances should therefore be denied.

FINDINGS OF FACT

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

1. The Applicant, Thomas R. Grossi ("Grossi") along with Thomas L. Sholl are the owners of the property located at pole No. 10 on Mast Street in Jamestown, Rhode Island, and identified as Assessor's Plat 14, Lot 260 in the Jamestown Land Evidence Records, which property is the subject of this application.

2. On or about October 5, 1992, Grossi filed an application with the Division for permission to install an ISDS on the subject site.

3. On or about October 6, 1992, Grossi filed an application requesting variances from the Division's Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems:

SD 2.14

SD 3.05(1)

SD 3.05(4)

SD 10.01

SD 11.06(2)

4. On or about February 11, 1993, the Division notified Grossi that a cumulative impact assessment was required for the subject application.

5. On March 9, 1993, the parties agreed that Grossi would test the drinking water quality levels for seven wells which would be reported in the cumulative impact assessment.

6. On or about May 27, 1993, Grossi submitted an incomplete cumulative impact assessment to the Division.

7. In September of 1993, the Division offered assistance to obtain the water quality levels in the wells that were not included in the CIA.

8. Applicant declined the Division's offer of assistance and Applicant refused to submit any additional information in support of the subject application.

9. On or about September 27, 1993, the Division denied the subject application.

10. Applicant paid all necessary fees and filed all necessary documents required to confer jurisdiction over this matter upon the Administrative Adjudication Division of the Department of Environmental Management.

11. The Prehearing Conference was held on December 23, 1993 and the record thereof was prepared and submitted by this Hearing Officer.

12. The administrative hearing was held on January 19 and 20, 1994 and March 7 and 8, 1994. Briefs were filed on April 25, 1994.

13. All hearings were conducted in accordance with the provisions of the Rhode Island General Laws; the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems of the DEM and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.

14. The ISDS Regulations in effect on September 27, 1993 are the operative regulations in this matter.

15. The Applicant proposes to install a proposed ISDS to service a two (2) bedroom, single-family residence to be constructed on the site.

16. The subject area is not serviced by a municipal water supply, and there are no municipal sewers available at the present time.

17. The subject lot contains 7800 square feet in area.

18. The proposed ISDS requires five variances.

19. The proposed ISDS will be located within 100 feet of two existing private wells (viz. 85 feet from the westerly abutter and 89 feet from the easterly abutter) and also within 100 feet of the proposed well.

20. The proposed ISDS will be located three feet from the property line at the rear of the subject property.

21. The proposed building will be serviced by a private well and there is insufficient additional area available for the replacement of the disposal field, in case of failure.

22. The proposed ISDS is not designed to serve a three (3) bedroom home as required by the ISDS Regulations.

23. The proposed ISDS is within three feet of the north and east property lines and precludes the proper stripping of trees, brush, topsoil, etc., and the required scarifying and backfilling within five feet on all sides, and also precludes the removal of trees and bush within 10 feet of all sides of the leach field.

24. The Applicant has failed to provide any testimony in support of his variance requests from SD 3.05(4), SD 2.14 and 11.06(2).

25. The cumulative impact assessment submitted by Applicant was incomplete.

26. The test results from the two (2) wells reported in the cumulative impact assessment indicate that the water quality of the two wells tested were impacted by human activities.

27. The area involved is densely populated and many of the homes therein are closely located.

28. The proposed ISDS will cause an increase in the nitrate level of the groundwater, which may impact the subject wells and cause the drinking water to be contaminated.

29. Excessive nitrate levels in the drinking water quality of the wells will contaminate those wells.

30. The contaminants contained in the wastewater will prove hazardous to the health of those consuming the water from said wells.

31. Applicant has not explored all alternatives to the subject application in order to reduce environmental impact, and at the same time, derive a beneficial use of the property.

32. The Applicant will not be denied all beneficial use of his property if the denial is sustained.

33. A literal enforcement of the requirements of the Individual Sewage Disposal System Rules and Regulations will not result in unnecessary hardship to the Applicant nor will it deprive Applicant of all beneficial use of his property.

34. The proposed design of the ISDS will not function properly and the granting of the permit and variances requested will be contrary to the public interest and public health.

35. The Division's decision not to call the two witnesses listed in its Prehearing Memorandum does not merit an inference that had these witnesses testified, their testimony would have been adverse to Division.

CONCLUSIONS OF LAW

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

1. All hearings were conducted in accordance with the Rhode Island General Laws, the Rules and Regulations of DEM for ISDS and the Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters.

2. Individual Sewage Disposal System Regulation SD 2.01(a) requires the Applicant to obtain a permit to install, construct, alter or repair an Individual Sewage Disposal System. The variances from SD 2.14, SD 3.05(1), SD 3.05(4), SD 10.01 and SD 11.06(2) which Applicant seeks will be contrary to the purposes and policies set forth in the Administrative Findings and Policy of the Individual Sewage Disposal System Rules and Regulations.

3. Applicant has not met the burden of proving 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; that the waste from the proposed system will not create a danger to the public health.

4. Applicant has failed to demonstrate through clear and convincing evidence 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.

5. Denial of the variances will not result in a denial of all beneficial use of the property; therefore, a literal enforcement of the provisions of the Individual Sewage Disposal System Regulations will not result in any unnecessary hardship to the Applicant.

6. Application 9015-88 does not conform to the requirements of the Regulations.

7. Applicant has failed to submit an adequate cumulative impact assessment as required under SD 20.01(f).

8. The Division's failure to call two of its nonmaterial witnesses does not compel an inference that their testimony would have been adverse to Division.

Therefore, it is hereby

ORDERED

1. Application No. 9015-88 and the request for variances from ISDS Regulations submitted by Applicant be and they are hereby **DENIED**.

I hereby recommend the foregoing Decision and Order to the Director for issuance as a Final Order this 29th day of AUGUST, 1994.

Joseph F. Baffoni

Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, RI 02908
(401) 277-1357

Entered as a Final Agency Decision and Order this 9th day of September, 1994.

Michael Annarummo
Director
Department of Environmental Management
9 Hayes Street
Providence, RI 02908
(401) 277-1357

CERTIFICATION

I hereby certify that I caused a true copy of the within Final Agency Decision and Order to be forwarded, via **certified** mail, postage prepaid to Donald J. Nasif, Esq., Suite 840, 15 Westminster Street, Providence, RI 02903; Thomas Grossi, 9 Bliss Street, Rehoboth, MA 02769 and via interoffice mail to Mary B. Shekarchi, Esq., and John A. Langlois, Esq., DEM/Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 9th day of September, 1994.