

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

RE: LOUIS G. AND JOAN R. ROY
AAD NO. 95-002/ISA (Appeal by Jeffrey & Bonnie Glazer)
ISDS APPLICATION NO. 9332-825

DECISION GRANTING DIVISION'S AND APPLICANTS' MOTIONS TO
DISMISS

This matter came before Hearing Officer Mary F. McMahon for consideration of motions to dismiss filed by the Division of Groundwater and ISDS on February 28, 1995 and by the applicants, Louis G. and Joan R. Roy, on March 6, 1995. This matter involves an appeal to the Administrative Adjudication Division ("AAD") by Jeffrey and Bonnie Glazer, neighboring landowners to the site which was the subject of the application of Louis G. and Joan R. Roy for a variance in the construction of an individual sewage disposal system on property located at Pole No. 8516, Charlestown Beach Road, South Kingstown, Rhode Island. The motions to dismiss present the argument that on applications, only the applicant has the right to a hearing before the AAD, that no such hearing has been requested, and that the Glazers are without standing in this matter. The Glazers have objected.

By way of telephone conference on March 14, 1995, the parties agreed that oral argument on the within motions to dismiss was unnecessary and that argument could properly be made through the filing of briefs. The Glazers Supplemental Memorandum of Law in Support of Objection to Motion to Dismiss was filed with the AAD on April 3, 1995. Response briefs were filed by applicants and the Division on April 7, 1995 and on

April 12, 1995, respectively.

DECISION AND ORDER

This matter initially came before the AAD pursuant to the Notice of Appeal filed by Jeffrey and Bonnie Glazer (the "Appellants") on February 23, 1995. In this request for hearing, the Appellants maintain that they are "parties in interest" because of their status as neighboring landowners, who are aggrieved by the DEM decision approving the Roys' application for a variance. They contend that approval of the variance violated DEM regulations and policies, was an arbitrary and capricious action by DEM, and was against the weight of the evidence presented. Simultaneous with the filing of this hearing request, the Glazers appealed the Division's decision to the Superior Court pursuant to the Administrative Procedures Act (R.I.G.L. Section 42-35-15).

The motions to dismiss filed by the applicants and the Division maintain that the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations") do not provide a right of appeal to persons other than the applicant. ISDS Regulation SD 21.00 clearly identifies who may appeal a determination by the Division:

Any person whose permit application is denied may appeal to the Director for review of the decision on which the denial is based by filing an appeal with the Administrative Adjudication Division.

As a result of the above provision, the motions contend,

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the AAD is without jurisdiction to consider the Glazers' request for hearing.

This issue was recently addressed in the matter of William R. Reagan (Appeal Filed by Urania, Ltd.), AAD No. 95-004/ISA, Decision and Order Granting Division's Motion to Dismiss, Final Agency Order entered April 28, 1995. In that Decision, the Chief Hearing Officer considered the abutter's argument that a hearing at the agency adjudication level would allow for a broader review of the Division's action than would an appeal of the agency action in Superior Court, but concluded that the AAD was without jurisdiction to entertain the abutter's request for hearing. Appellants in the within matter make the same argument: if Department regulations and the pertinent statutes are interpreted so as to deny them an adjudicatory hearing, their only recourse is appeal under the Administrative Procedures Act (the "APA"), which is a review limited to the record of the Division's action, with no opportunity to present evidence or to examine or cross-examine witnesses.

The Reagan/Urania decision reviewed the AAD's enabling legislation and other statutes which confer specific jurisdiction on the AAD. Section 42-17.7-2 specifically authorizes the AAD to hear, inter alia, all contested licensing proceedings. Chapter 35 of Title 42--the APA--governs the proceedings of the AAD and defines a contested

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case as a proceeding, including licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing. The Rhode Island Supreme Court has held that in order for a proceeding to constitute a contested case subject to the requirements of the APA, a hearing must be required by law. Property Advisory Group, Inc., et al. v. Ryland, 636 A.2d 317 (R.I. 1994).

The Appellants' desire for a fuller airing of the Division's decision on the application notwithstanding, a review of pertinent statutes and regulations reveals that there is no provision which would confer upon an abutter in ISDS matters an independent right to have a hearing before the AAD. Nothing in AAD's enabling legislation authorizes the AAD or Director to expand the rights of either the divisions within the Department or the rights of private persons. Moreover, the Rhode Island Supreme Court acknowledges that it has "...consistently prevented state administrative agencies from expanding their jurisdiction through strained interpretations of unambiguous statutes." Caithness Rica Ltd. v. Malachowski, 619 A.2d 833, 836 (R.I. 1993).

In addition to Appellants' above arguments in support of their position that they should have a right to seek redress before the AAD, the Appellants contend that denial of a hearing before the AAD would constitute an unconstitutional

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deprivation of the aggrieved neighbor's property rights without due process of law. They compare their circumstance to the situation of abutters in zoning cases, where some courts have held that the rights of the abutter are property which cannot be denied without due process of law. Supplemental Memorandum of Law in Support of Objection to Motion to Dismiss, p.6., citing Cugini v. Chiaradio, 189 A.2d 798 (R.I. 1963); Abbott v. Zoning Board of Review, 78 R.I. 84, 87 (1949); and Wolfe v. City of Providence, 74 A.2d 843 (R.I. 1950). Appellants' Supplemental Memorandum also maintains that failure to allow them access to the AAD hearing forum would infringe on their right to equal protection under the law, arguing that if the applicant had appealed an adverse decision, the abutters could have intervened and obtained party status.

Although the AAD is empowered to review, interpret and adjudicate matters concerning statutes and regulations under its jurisdiction, the U. S. District Court for the District of Rhode Island has determined that the expertise of state administrative agencies does not extend to issues of constitutional law. Bowen v. Hackett, 361 F. Supp. 854, 860 (D.R.I. 1973). In accordance with the Bowen decision, the AAD has repeatedly held that constitutional issues are not properly before this tribunal. See Henry Palazzo, AAD No. N/A, NOV. No. C90-0031; Richard and Anita Ally, AAD No. N/A,

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NOV No. C-1915, Administrative Order entered November 5, 1991;
and Bruce T. Cunard, AAD No. N/A, NOV No. N/A, Final Agency
Order entered June 17, 1991. I therefore will not address the
merits of Appellants' constitutional arguments nor determine
whether the assertions which serve as the basis for their
constitutional claims are factual or warranted.

In addition, any assertion that if the Roys had
appealed the Division's decision on their ISDS permit, the
Glazers could have obtained intervention and become a party is
totally speculative: In order for the Glazers to have become
a party on a Roy appeal, they would have had to comply with
AAD Rule 13.00 governing intervention. Party status would not
be achieved unless they met the two-pronged test that their
interests differed from and were not adequately represented by
existing parties to the action, and that they could
specifically demonstrate an injury in fact.

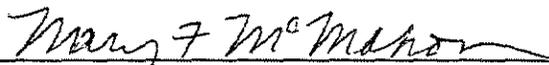
Based upon the foregoing, and having carefully reviewed
the arguments of counsel in toto, as well as the pertinent
statutes and regulations, I conclude that the AAD is without
jurisdiction to hear this matter.

WHEREFORE, it is hereby

ORDERED

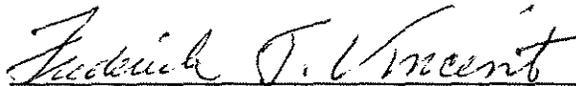
Applicants' Motion to Dismiss and the Division's Motion to Dismiss are herewith **GRANTED**.

Entered as an Administrative Order this 16th day of May, 1995 and herewith recommended to the Director for issuance as a Final Agency Order.



Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

Entered as a Final Agency Order this _____ day of May, 1995.



for Timothy R. E. Keeney
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to Michael P. Donegan, Esq, Michele A. Theroux, Esq., 321 South Main St., Providence, RI 02903; Thomas S. Hogan, Esq, Hogan & Hogan, 201 Waterman Ave., East Providence, RI 02914 and via interoffice mail to John A. Langlois, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 7th day of May, 1995.

