

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

IN RE: David and Judy Kaloyanides AAD No. 91-008/IE
Notice of Violation No. IS91-44

DECISION ON MOTIONS PRESENTED BY
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Authority

This motion is properly before Hearing Officer Patricia Byrnes pursuant to R.I.G.L. 42-17.1-2, et seq. as amended, 42-17.7-1 et seq. as amended, the Administrative Procedures Act (APA) R.I.G.L. 42-35.1 et seq. as amended, the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems and the Administrative Rules of Practice and Procedure of the Administrative Adjudication Division for Environmental Matters.

Background

David and Judy Kaloyanides received a notice of violation (NOV) on April 29, 1991 alleging their septic system had discharged sanitary sewage onto the ground surface and ordering the Respondents to take immediate temporary action to alleviate the sewage overflow as well as submit an application and plan to permanently rectify the problem. The Respondents requested a hearing on this violation. The Hearing Officer held a status conference on July 12, 1991. As a result of this conference, a control date was set for August 23, 1991. This date was

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extended to September 27, 1991 at the request of the State. Settlement was not reached and AAD scheduled a prehearing conference on November 8, 1991. At the prehearing conference, Mrs. Kaloyanides was represented by Richard Galli, Esq., and Mr. Kaloyanides appeared pro se. (The Kaloyanides are currently involved in divorce proceedings.)

On December 18, 1991, Mr. Galli notified AAD that he had withdrawn his appearance. Neither party is now represented by counsel.

On December 12, 1991, DEM filed a "Request for Admissions" and on January 6, 1992 submitted a "Motion for Summary Judgment." The Kaloyanides' did not respond to the Request for Admissions, but a timely objection to the Summary Judgment Motion was filed on January 14, 1992.

After reviewing the file, the Hearing Officer determined an informal meeting would be useful to help resolve the pending violation. David Kaloyanides did not respond to the Hearing Officer's request. Judy Kaloyanides appeared for both informal meetings held January 31 and February 14, 1992 and was receptive to resolving this matter. Unfortunately, no resolution could be reached leaving the Hearing Officer to issue decisions on the State's pending motions. The Hearing Officer will address each issue separately.

I. The Department of Environmental Management's Request for Admissions

Under Superior Court Rules of Civil Procedure, Rule 36 (a) entitled, "Requests for Admissions" the non-moving party is required to answer each statement set forth within ten (10) days of service, or it shall be deemed admitted as true and accurate. The State filed nine (9) requests for admissions on December 12, 1991 and served the request to Richard Galli, attorney for Judy Kaloyanides, and David Kaloyanides at his home address. No response has ever been made to these requests.

Therefore, in accordance with Rule 36 (a) and the Supreme Court's ruling in Industrial National Bank v. Patriarca, 502 A2d 336, 338 (1985) in which the Supreme Court determined "by failing to respond to request for admissions, the defendant was deemed to have conceded that the facts described in the request did occur" the following nine (9) statements are entered as true and accurate admissions:

1. The Respondents are the owners of a parcel of real estate located at 12 Sandstone Circle, Cranston, Rhode Island, otherwise known as Cranston Assessor's Plat 22, Lot 145 (the "Property").
2. During the period between January 3, 1991 and April 29, 1991, the individual sewage disposal system ("ISDS" or "ISDS System") located on the Property failed to function adequately, which resulted in sanitary sewage being discharged to the surface of the ground.

3. Evidence that sanitary sewage had been or was being discharged to the surface of the ground was observable at the Property on or about March 28, 1991.
4. A Notice of Violation ("NOV"), numbered IS91-44, was issued to and served upon Respondents in accordance with R.I.G.L. § 42-17.1-2 (u) on or about April 29, 1991. (A copy of said NOV is attached hereto as "Exhibit A.")
5. The NOV was received by the Respondents and, on or about May 6, 1991, a hearing was requested by Respondent Judy Kaloyanides.
6. The hearing request submitted by Judy Kaloyanides was received by the Department of Environmental Management Administrative Adjudication Division on May 7, 1991; within the required ten-day time period.
7. Since the Respondents' receipt of the NOV, the Respondents have complied with Paragraph 1 of the NOV by taking steps to temporarily alleviate the sewage discharge referred to in the NOV and in Paragraphs 2 and 3, above.
8. Since their receipt of the NOV, the Respondents have not submitted to the Director of the Department of Environmental Management, or her designees, any applications, plans or other documentation relating to the permanent remediation of the violations noted in the NOV in accordance with the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems ("SD" or the "Regulations").
9. Since their receipt of the NOV, the Respondents have not performed any work on the Property relating to the permanent repair of the ISDS System in regard to the violations noted in the NOV.

II. The Department of Environmental Management Request for Summary Judgment

The Department asserts the admissions listed in the State's Request for Admissions and entered as true and accurate statements by virtue of the Respondents' failure to respond leaves no genuine issue of material fact to be decided by the Hearing Officer. In support of the Motion for Summary Judgment, DEM legal counsel provided to the Hearing Officer (and certified to the Respondents) a memorandum in support of the Motion for Summary Judgment and an affidavit by Attorney Brian Wagner.

Once a Motion for Summary Judgment has been filed, the non-moving party has an affirmative duty to set forth specific facts that show there is a genuine issue of material fact to be resolved at trial Quimette v. Moran 541 A2d 855 (1988). Trend Precious Metals Co., Inc. v. Sammartino, Inc. 577 A2d 986 (1990).

The Kaloyanides filed a response to the state's motion in the form of an 11-page, handwritten answer which included copies of two (2) documents. It is not an absolute requirement of the Summary Judgment Rule that the non-moving party file an affidavit in support of his motion Steinberg v. State 427 A2d 338 (1981), Nicola v. John Hancock Mutual Life Insurance Co. 471 A2d 945 (1984). Despite failure of the non-moving party to file

supporting affidavits, if the affidavit from the moving party does not establish the absence of a material fact, the request for summary judgment should be denied, Steinberg, Supra.

In light of the State's motion and Respondents' answer, the Hearing Officer must now determine by examining the pleadings, admissions, affidavits, regulations and other applicable documents submitted by the parties in the light most favorable to the non-moving party Commercial Union Companies v. Graham 495 A2d 243 (1985), Marandola v. Hillcrest Buildings, Inc. 102 RI 46, 227 A2d 785 (1987) without passing on the creditability of the evidence Doyle v. State of Rhode Island 411 A2d 907, 909 (1980), if an issue of material fact remains to be resolved by a hearing Desnoyers v. Rhode Island Elevator Co. 571 A2d 568 (1990) or whether the moving party is entitled to judgment as a matter of law Cardi Corp. v. State of Rhode Island 524 A2d 1092 (1987).

In essence, Respondents' argument opposing summary judgment is that they are not responsible for causing or permitting any sewage overflow on their property and that any difficulties with the septic system are a direct result of faulty installation and inspection.

The Department's basic argument to establish a lack of material fact or issue relies on the nine (9) factual admissions admitted by the Hearing Officer.

It is well established that a party may obtain summary judgment in reliance on Rule 36 Cardi Corp. v. State of Rhode Island 524 A2d 1092, 1097 (1987) when the admissions establish that no remaining issue of material fact exists.

In the instant case there is no dispute to any of the material facts listed in the State's Request for Admissions, but the Hearing Officer finds after reviewing ISDS Regulation SD 2.08 which states in pertinent part:

No person shall discharge or permit the overflow or spillage of any treated or untreated sanitary sewage or on the surface of the ground unless permitted by the Director . . .

as well as the Respondents answer to summary judgment and all other evidence submitted in the light most favorable to Respondent that although presented in an unorthodox form the Respondents' answer does raise issues of culpability unresolved by the admissions or other evidence presented by the State.

The purpose of Summary Judgment is issue finding not issue determination Industrial National Bank v. Peloso 397 A2d 1312 (1979). At this juncture, the Hearing Officer is making no determination as to the validity of the remaining issues to be resolved.

The Supreme Court has cautioned that summary judgment is a drastic remedy and should be awarded only in the event that the moving party is entitled to judgment as a matter of law and when there is no question of material fact outstanding between the parties. Mulholland Construction Co. v. Lee Pare Associates, Inc. 576/1236 (1990) O'Hara v. John Hancock Mutual Life Insurance Co. 574 A2d 135 (1990).

Having ascertained the existence of a factual dispute, DEM as a matter of law is not entitled to summary judgment. Alfonso v. Landers 585 A2d 651 (1991) Tangleridge Development Corp. v. Joslin 570 A2d 1109 (1990).

ORDER

1. The Department of Environmental Management's Request for Admissions is hereby granted.
2. The Department of Environmental Management's Request for Summary Judgment is hereby denied.

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3. Based upon this decision, the Hearing Officer will enter a separate order scheduling this matter for hearing and establishing a new date for the close of discovery.

Entered as an Administrative Order this 16th day of March, 1992.



Patricia Byrnes
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision to be forwarded via regular mail, postage prepaid to Judith Kaloyanides, 12 Sandstone Circle, Cranston, RI 02921; David Kaloyanides, 204 Wentworth Avenue, Cranston, RI 02905 and via interoffice mail to Brian Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 16th day of March, 1992.

