

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

IN RE: John Strafach
ISDS Application No. 8936-187

DECISION AND ORDER

After carefully reviewing the testimonial and documentary evidence and assessing the credibility of each witness, Hearing Officer Patricia Byrnes using independent judgement makes the following specific findings of fact and conclusions of law:

Findings of Fact

1. This matter came before the Administrative Adjudication Division on February 28, 1991, and March 13, 1991 at One Capitol Hill, Providence, Rhode Island as an appeal from the Department of Environmental Management (DEM) denial of a variance to construct an individual sewage disposal system (ISDS) on Atlantic Avenue, Lots 279, 280, 291, Plat 165, Westerly, Rhode Island.

2. This hearing was conducted in accordance with the R.I.G.L. § 42-17.1-2 (l), (m) and (s), 42-17.7-1 et seq. as amended; R.I.G.L. § 23-19-5-4, the Administrative Procedures Act 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 promulgated on December 13, 1989 and the Administrative Adjudication Division for Environmental Matters Rules of Practice and Procedure effective July 10, 1990.

3. Joseph T. Turo, Esq. represented the Applicant and Stephen H. Burke,

Esq. appeared on behalf of the Division of Groundwater and Freshwater Wetlands.

4. All stenographic notes were received on April 18, 1991.
5. Post-hearing memoranda submissions were completed on May 10, 1991.
6. A Prehearing Conference was held on February 22, 1991, at One Capitol Hill, Providence, Rhode Island. At that time the parties agreed to enter the following joint exhibits and stipulations of fact:

Joint Exhibits

- a. Application No. 8936-187 dated October 30, 1989.
 - (i) Application for Approval
 - (ii) Application for Variance
 - (iii) List of Abutters
 - (iv) Comparison of Flow Rates
 - (v) Chamber allocation
 - (vi) Test Hole Data
 - (vii) Mounding Analysis
- b. ISDS Site Plan dated October 1989 entitled Atlantic Beach Club, Westerly, Rhode Island, for John and Loretta Strafach and Udo and Jane Schwarz, Siegmund & Associates, Inc., consulting Engineers, Scale 1 inch equals 20 feet. (Three sheets).
- c. Denial Letter dated April 16, 1990.
- d. Request for Hearing dated May 15, 1990.
- e. Site Plan of Existing Condition Consisting of Two Pages.
- f. Plan showing traverse (transverse) sections for groundwater model and location of groundwater divide prepared by Environmental Resource Associates, Inc.
- g. Coastal Resources Management Council Map.
- h. Resume of James W. Fester.
- i. Resume of Robert F. Angilly.

- j. Resume of Richard Chiodini.
- k. Division of Water Resources, Modified Order of Approval No. 703.
- l. Sewage Application, review sheet.
- m. Site plan dated June 2, 1990.
- n. Proposed leaching fields.

Stipulations

- a. This administrative appeal is properly before the DEM Division of Administrative Adjudication, which has subject matter jurisdiction over this application.
- b. The Applicant, John Strafach, is the owner of certain real property located southerly of Atlantic Avenue in the Town of Westerly, Tax Map 165, Lots 279, 280 and 281.
- c. Applicant submitted ISDS Application No. 8936-187 on October 30, 1989.
- d. Applicant requires variances from the provisions of standards 3.05 (7) (e), 3.05 (5), (9) and 3.05 (e) of SD Rules and Regulations Establishing Minimum Standards Relating to the Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems (1980, as amended).
- e. Applicant's request for variances was denied on or about March 27, 1990, as a result of the variance board's concern over the effect of the proposed system as a cause of any public nuisance and the system's effect on the public health. In addition, the Board was concerned over the effect of the proposed system on

the Atlantic Ocean and on public use and enjoyment of a recreational resource.

- f. Applicant's property is presently used as a commercial recreational facility and contains several buildings including a restaurant.
- g. The proposed ISDS system is located approximately five (5) feet from the proposed swimming pool, and one hundred and fifteen (115) feet from spring moon tide at a location designated as an erosion prone area by the R.I. Coastal Resources Management Council.

7. During the hearing aerial maps of the site dated 1965 and 1988 were submitted by applicant admitted as full over DEM objection and marked joint exhibit 15 A & B (transc. 1, p.118).

8. The Department submitted 5 exhibits at the hearing labelled DEM A, B, C, D & F. Exhibit A, a letter from Mr. Kim of Air Survey Corp. to Mr. Tim Behm Sigmund & Assoc. was admitted as full. Documents B-D were marked for ID only. Exhibit F, the resume of Margaret Dein Bradley was admitted as Full (transc. 2, p.61).

9. The Applicant presented three (3) witnesses. Richard Chiodini, a registered professional engineer employed by Siegmund Associates, Robert Angilly, a registered civil engineer working at Environmental Resource Associates and John Strafach, owner and developer of the property.

10. Both engineers were stipulated as experts in engineering.

11. The Department called two (2) witnesses. James Fester, DEM Assistant Director for Regulation and a licensed engineer. Mr. Fester was stipulated by the parties as an expert in engineering and during the hearing

he was qualified as an expert in public health. The department next called Margaret Dein Bradley. During the hearing she was qualified as an expert in hydrology and geology.

12. Ms. Bradley was presented as a witnesses over applicant's objection. This witness was not listed on the states pre-hearing list but was disclosed to the applicant at the conclusion of his case-in-chief (transc. 2, p.61).

13. After questioning both attorneys the Hearing Officer found no deliberate attempt by the state to mislead or delay the discovery process.

14. The state informed the applicant of the absence of Ms. Bradley's testimony and provided her resume.

15. To cure any prejudice to the applicant, the Hearing Officer limited Ms. Bradley's testimony to the issues raised in Mr. Angilly's testimony and granted Mr. Turo leave if he deemed it necessary, to prepare his cross examination (transc.2, p.63).

16. At the request of the parties in accordance with Rhode Island Rules of Evidence, Rule 201 and the Administrative Procedures Act R.I.G.L. § 42-35-10 (d), the Hearing Officer takes official notice of the "Coastal Resource Management Program", as amended.

17. At the close of applicant's case the Department's counsel moved to dismiss the appeal alleging the applicant had not proven a prima facie case (transc. 2, p.46-53).

18. The Hearing Officer denied the request citing Superior Court Rule 41 (b) (2) and the applicable case law Judd Realty Inc v. Tedesco 400 A2d 952 (1979), JK Social Club v. JK Realty, Corp. 448 A2d 130 (1982), Abbey Medical/

Abbey Rental, Inc. v. Mignacca 471 A2d 189 (1984) which allows the trier of fact to reserve decision on the issues raised until after the completion of all the evidence. Not to give both parties an opportunity to present all pertinent information would be an injustice to the fact-finding process (transc. 2, p.46-58).

19. The burden of proof and persuasion as set forth in ISDS Regulations 21.01 (B) & (d) falls upon the Applicant to show by a clear and convincing evidence that the literal enforcement of the regulations will result in unnecessary hardship to the applicant and that such a permit or variance would not be contrary to the public interest and public health. In addition the Applicant must show through clear and convincing evidence that:

1. 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;
2. The waste from such system will not pollute any body of water;
3. The waste from such system will not interfere with the public use and enjoyment of any recreational resource;
4. The waste from such system will not create a public or private nuisance; and
5. The waste from such system will not be a danger to the public health.

20. On October 30, 1989, John and Loretta Strafach submitted an Application to the Division of Groundwater and Freshwater Wetlands requesting a variance to construct an individual sewage disposal system in connection with the expansion of their hotel and restaurant.

21. Applicants property is located on the north and south side of Atlantic Avenue in the city of Westerly, Rhode Island.

22. The north parcel is adjacent to Winnepaug Pond and at the time of the application consisted of a 12 (twelve) 1 (one) and 2 (two) bedroom motel units.

23. On the south side parcel which fronts the Atlantic Ocean, the Strafachs operate a 120 seat restaurant, a 35 seat restaurant, a bar and parking lot.

24. Applicant intends to replace the existing uses of the property with a 200 unit beach and cabana club, a small restaurant and four (4) year round dwellings on the ocean side.

25. Mr. Strafach does not intend to develop any land near Winnepaug pond.

26. On March 27, 1990, Applicant requested the Department's variance board to grant a 35 foot variance which allows him to place the sewer system 115 ft from moon high tide. In addition, he requested permission to cover the system with open face decking and construct a pool (5) feet from the proposed system.

27. The board denied applicant's request expressing concern that the system would adversely affect public interest and public health (JT3-).

28. On May 15, 1990 applicant made a timely appeal to the Administrative Adjudication Division requesting a review of the board's decision.

29. The proposed ISDS system has a modern up-to-date design.

30. The new system will not impact Winnepaug Pond.

31. Less sewage effluent will flow from the new system (transc. 2, p.116).

32. DEM agrees this system as designed will adequately treat sewage effluent (transc. 2, p.116).

33. The Town of Westerly has denied applicant permission to hook up to the town sewer system (transc. 1, p.19).

34. The Misquamicut Beach area is serviced by municipal water from the town of Bradford, 6.3 miles from the proposed facility (JT.4).

35. Installation of the proposed ISDS system will be 25 ft from the water supply lines as required by SD 3.05 and will not contaminate any drinking water supply or tributary.

36. Placement of the system 115 ft from moon high tide is of serious concern to the department.

37. The old system is not a concern to the agency. That system is 10-30 years old and has not been known to have a sewage discharge problem.

38. The new system is closer to moon high tide than the current system.

39. An alternative area to place the ISDS system is available (transc.1, p.129) (JT.13).

40. Site of proposed system is within an area designated by the Rhode Island Coastal Resource Management Council (CRMC) as an "erosion-prone area".

41. The adjacent property to the west has not been designated erosion-prone.

42. When an area has been labelled "erosion-prone" the Department's ISDS regulations require no less than a 150 foot set back from moon high tide to the edge of the system (SD 3.05 (e)).

43. Coastal Resource Management plan estimates this beach area is eroding between 2 and 2 ½ ft per year (transc. 1, p.130).

44. In 25 years the ocean will be 65 feet closer to the ISDS system.

45. There is a "scarp" in this area. A scarp is a dug out in the sand caused by wave action during a winter storm.
46. The scarp exists between the applicant's property and moon tide high during the winter months.
47. The shortest distance between the proposed ISDS system and the scarp is 45 ft (transc. 2, p.19).
48. Waves hit the beach 65 feet closer to the proposed ISDS system in the winter time.
49. The scarp is located 60-65 ft from the proposed system at moon high tide (transc. 2, p.109).
50. The scarp is subject to erosion.
51. If the system is washed out or damaged by erosion it would allow sewage to pond on the surface. (transc. 2, p.137).
52. If erosion occurs to the beach, sewage from the proposed system may discharge into the ground and erode the leaching field.
53. This sewage would pollute the ocean, interfere with public use and enjoyment, create a public nuisance and would be a danger to public health.
54. Applicant did not show by clear convincing evidence that the 35 ft variance from moon high tide would not be contrary to public interest or public health.
55. Applicant's proposal to place a deck directly over the ISDS system supported by woodpilings could lead to sewage discharge on to the surface.
56. Woodpilings can shift in the sand causing voids which weakens the integrity of the system and can lead to raw sewage impounding the ground

surface (JT1) (transc.2, p.142).

57. Sewage seepage is a potential health risk and public nuisance.

58. ISDS regulations do not specifically prohibit woodpiling but do prohibit discharge of sewage onto the surface (transc. 2, p.139) (SD 2.08).

59. During testimony applicant's engineer proposed concrete pads to be placed under the woodpiles.

60. These pads are not in the original plan subject to this application and would not control swaying of the woodpiles in the sand which could cause spaces where sewage can be leaked.

61. Applicant's proposal (p.1 JT2) includes a pool located 5 feet from the proposed ISDS system.

62. Pools are not specifically addressed in the ISDS regulations.

63. All parties agreed the pool qualifications equal the regulations governing sub-basements which require a minimum of 15 ft from the system (SD 3.05) (transc.1, p.39) (transc.2, p.144).

64. Applicant has agreed to relocate the pool 15 ft from the system.

65. The Hearing Officer is required to review the plans as proposed in the application.

66. Placing a pool 5 ft from an ISDS system could interfere with proper disposal and treatment of wastewater and contaminate the pool water.

67. Contamination of pool water and improper disposal of wastewater would result in pollution of a body of water, interference with public use and enjoyment of a recreational resource, cause a public and private nuisance and would be a danger to public health.

68. Applicant was unable to show by clear and convincing evidence that the granting of the variance or permit for a wooden deck or pool located 5ft from the ISDS system would not be contrary to the public interest or public health.

69. Applicant questioned the meaning of undue hardship which is undefined in the regulations.

70. ISDS regulations require that an applicant demonstrate that literal enforcement of the regulations would result in undue hardship.

71. Applicant did not put on any evidence of his interpretation of undue hardship.

72. Having found applicant has not met his burden of proof with respect to public health and public interest is not necessary for the Hearing Officer to reach a decision on the issue of undue hardship.

CONCLUSIONS OF LAW

1. This administrative appeal is properly before the Administrative Adjudication Division.

2. Applicant made a timely notice of appeal and paid all necessary fees.

3. The Hearing was conducted in accordance with R.I.G.L. § 42-17.1-2, 23-19-5-4 and 42-35.1, the Rules and Regulations establishing Minimum Standings Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems promulgated December 13, 1989 and the Administrative Adjudication Division for Environmental Matters Rules of Practice and Procedure effective July 10, 1990.

4. The ISDS regulations are minimum standards which are reasonably necessary to protect public health and safety.

5. The Applicant was unable to sustain the burden of proof and persuasion set forth in ISDS regulation 21.01 (b) & (d) that such a permit or variance would not be contrary to the public interest or public health.

6. Applicant was unable to demonstrate by clear and convincing evidence that:

- a. The waste from such a system will not pollute any body of water;
- b. The waste from such a system will not interfere with public use and enjoyment of any recreational facility;
- c. The waste from such a system will not create a public or private nuisance;
- d. The waste from such system will not be a danger to the public health.

7. A finding that applicant has not met his burden with respect to the issue of public health and public interest is dispositive therefore, it is not necessary for the Hearing Officer to reach a decision if the regulation will result in unnecessary hardship to the applicant.

Wherefore it is hereby

ORDERED

that Application No. 8936-187 be DENIED.

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

9/5/91, 1991
date

Patricia Byrnes
Patricia Byrnes
Hearing Officer

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John Strafach

The within Decision and Order is hereby adopted as a final agency Decision and Order.

September 9, 1991
Date

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 pre-paid to John & Loretta Strafach, P.O. Box 1278, Westerly, Rhode Island 02891; Udo & Jane Schwarz, P.O. Box 1278, Westerly, Rhode Island 02891; Richard A. Chiodini, Siegmund Assoc., Inc., 49 Pavillion Avenue, Providence, Rhode Island 02905 and via inter-office mail to Sandra Calvert, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 9th day of September, 1991.

Jacqueline Ballard