

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

IN RE: Joseph Caito
(ISDS Application No. 9033-100)

AAD No. 91-001/ISA

DECISION AND ORDER

The above-entitled matter came on for hearing before Joseph F. Baffoni, Esquire, the designated Hearing Officer on the request for an adjudicatory hearing by the Department of Environmental Management of the State of Rhode Island (DEM) on the appeal from the denial of an application and request for variances for installation of an individual sewage system "ISDS" on the property owned by Joseph and Jeanne Caito "applicants" located at Driftwood Drive, Tiverton, Rhode Island, identified as Tiverton Tax Assessor's Block 203, Card 13 (site).

The applicants requested variances from the DEM SD Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems ("Rules"):

SD 3.05 (1) Distance from private well to Disposal Trench;

SD 3.04 (4) Distance from property line to any component of Disposal System;

SD 2.14 Construction in area served by private wells.

The application and request variances were denied by the DEM Variance Board.

Thomas A. Henley, Esquire represented the applicants, Stephen Burke, Esquire and Sandra J. Calvert, Esquire, represented the Division of Groundwater and Freshwater Wetlands (Division) and Paul A. Ward, Jr., Esquire

represented an abutter, Eleanor Miner (who also attended the hearing).

A timely appeal and request for Hearing, the requisite list of abutters within 200 feet, and attendant radius map, were filed by applicants.

A Prehearing Conference was held at One Capitol Hill, Providence, Rhode Island on May 2, 1991 and May 23, 1991, and the Prehearing Conference record was prepared by this Hearing Officer.

There were no motions to Intervene and no other members of the public attended either the Prehearing Conference or the Hearings.

The hearing was held before the Hearing Officer on May 30, 1991.

It was stipulated in the Pre-hearing Conference record that the issues to be considered at the hearing are the following:

1. Whether a literal enforcement of the ISDS regulations will result in an unnecessary hardship to the applicants.
2. Whether granting of the variances will not be contrary to or adversely affect the public interest and/or the public health.
3. Whether the proposed system will contaminate or adversely affect any drinking water supply or tributary thereto.
4. Whether granting of the permit or variances will be contrary to the public interest and/or public health.

The burden of proof is on the applicants to satisfactorily address the issues listed and to introduce clear and convincing evidence that the granting of the ISDS permit or variance will not be contrary to the public interest and public health.

The following documents were admitted into evidence as full exhibits:

<u>Applicants' Exhibit Nos.</u>	<u>Description</u>
Applic. 1.	Resume - Alfred P. Ferreira
Applic. 2.	Application No. 9033-100
Applic. 3.	Neighbors ISDS
Applic. 4.	Engineering Plan for ISDS - Submitted by Adamsville Engineering Inc.
Applic. 5.	Deed
Applic. 6.	Restrictive Covenant to Deed
Applic. 7.	Denial by ISDS Section
Applic. 8.	Letter of Appeal
	a. Plan
	b. Copy of Check for Fee
	c. List of Abutters
Applic. 9.	Copies of Health Department's inspection of Well of the applicants.
Applic. 10.	Approval of Septic System No. 8933-44 (to be submitted at the Hearing).

<u>Division's Exhibit Nos.</u>	<u>Description</u>
Div. 1.	Resume of James W. Fester.
Div. 2.	Surveyor's Plan showing proximity of new construction to existing well.
Div. 3.	Notice of Suspension of ISDS permit.

After the opening statements by the attorneys for the applicants and the Division, the abutter Eleanor Miner and her attorney stated under public comment that their position was to see that the letter of law was followed.

Applicant, Joseph Caito, testified first for the applicants. He stated that the construction of their house on the subject premises had already commenced before he was aware of any problem that existed with their septic system plans. The house is already framed in and the rough plumbing completed at a total cost in excess of \$100,000.00. He had proceeded under the assumption that there were approved plans until it was noticed that the hole which was dug (for the ISDS) was closer than it should have been. The survey taken by the abutter, Mrs. Miner, confirmed that the system was closer to her well than allowed by the ISDS regulations (100 feet) and construction of the house has stopped.

The applicants attempted to utilize their property located across the street from the subject property, but the water table was too high there. Mr. Caito testified that they explored all other available options with no success and denial herein would deprive them of all beneficial use of this property.

Cross examination of Mr. Caito elicited that he did not know that the application for the ISDS which had been approved for his subject premises contained a surveying error (that the ISDS was closer to Mrs. Miner's property than as shown on their application). He became aware of the problem when he received a call from the Division. At this time Mr. Caito thought that the hole had been dug and the house had progressed "pretty much" to its

present condition.

It was also brought out in redirect examination of Mr. Caito that several years ago he received a Cease and Desist Order and Notice of Suspension of the Permit by the Division pertaining to a wider system that was then reduced to a different size.

At this time an agreed Stipulation of the parties was read into the record that:

1. ISDS Application No. 8833-59 granted some time prior to November, 1988; - that approval was suspended November 17, 1988. They agreed to Admission of Document as a full Exhibit. Div 3 - copy of Notice of Suspension.
2. On April 11, 1989 applicant submitted application 8933-44 pertaining to same lot - presently marked as exhibit as Applic.'s 10 and that application was approved.
3. Thereafter, applicant submitted application no. 9033-100 on July 2, 1990 and that application is the subject of this hearing.

In relation to said stipulations, it was agreed that applicants were not going forward with the application that was approved (No. 8933-44) since after notification that the ISDS in that application was within 100 feet, applicants filed a new application (No. 9033-100) which is the subject of this hearing.

Alfred P. Ferreira, P.E. appeared next as applicants' expert witness. He stated that he had prepared Application No. 8933-44 for Mr. and Mrs. Caito which was approved by the Division. He described the "steps" that he took,

such as evaluation of the soil, survey of the property, house size and location of the ISDS. He then received a call from the Division informing him that they had a survey showing a well closer than as shown on his plan. He acceded to the Division's request and performed a resurvey which confirmed that the well was closer than he had shown. After he became aware of this discrepancy, he explored use of the applicants' lot across the street from the subject premises, however this proved to be "insufficient".

Mr. Ferreira testified that the groundwater flows east to west which would be AWAY from the Miner property (the adjacent Miner property is south of the subject premises); therefore, if any contamination could possibly occur, the seepage would flow in a westerly direction and away from the neighbor's property.

It was Mr. Ferreira's expert opinion that:

1. The system as designed would not cause any effect on drinking water.
2. The variance for 11 feet requested (89 feet instead of 100 feet) would not have a major impact on groundwater flow nor cause any possible contamination.

3. The system as redesigned (in the current application) would be safe for any water supply.

It was brought out in cross-examination of Mr. Ferreira what various types of soil were encountered while performing the necessary tests for the proposed septic system on applicants' property (the description of the soil texture by strata at various depths is listed on the application). This witness stated that no groundwater was encountered while digging for the

required tests, and that the direction of groundwater can not be determined from the perc tests.

Mr. Ferreira explained that the soil is uniform throughout the area and tests conducted in the area revealed no contamination of any wells (two wells being within 50 feet of an ISDS). He stated also that there was no evidence of failure of any systems in the area and the Miner well is a sealed well with a steel casing which draws water from ledge. It was this expert's opinion that there should be no contamination whatsoever from the proposed system.

Cross-examination of Mr. Ferreira established that he had been on applicants' property prior to the time he had any problem with distance and that he had relied on the grant markers as established by the subdivision plan. He stated he did not know that the Miner well was within 100 feet until he received a call from the Division. At this time he went to the site and observed the hole was dug and the foundation, framing and sheeting of applicants' house had already been constructed. After contacting the installer, the applicants and Mrs. Miner's attorney, he was able to locate the lot lines and submit a new plan with corrected distances.

James W. Fester, Assistant Director for Regulation for DEM, testified on behalf of the Division. This witness is eminently qualified and has extensive training and vast experience with DEM. He explained the formulation of the Rules and Regulations, their applicability to the subject matter and the factors that should be considered when determining the possible effects of a septic system on neighboring wells. These factors included the distance

involved, the permeability of the soil and the direction of groundwater flow.

Mr. Fester stated that he visited the area and viewed what appeared to be the location for the ISDS at the site. He explained that the U.S. Department of Agriculture Soil Conservation Survey for the State of Rhode Island (Applic.'s Exhibit 11) was a good document for soil types, but not for permeability. He stated he would not characterize the soil at the site as having uniform permeability.

It was Mr. Fester's candid opinion that it was not possible for him to formulate an expert opinion as to the possible effects of the proposed septic system on Mrs. Miner's (abutter) well as the information needed to make that determination was not present.

Eleanor Miner, the abutting property owner, also testified for the Division. Her testimony indicated that some construction on applicants' house may have continued after notification of the distance problem by the Division. However, no work has been performed to complete construction for a considerable length of time.

The only positive probative testimony concerning probable failure and possible contamination by the proposed ISDS was provided by applicants' expert. Their expert testified that the character of the soils and the water table at the site were more than adequate to conduct effluent flow without danger from contamination or pollution. This evidence that the installation of the ISDS as requested would not have an adverse effect drinking water, nor cause any possible contamination and that the system as redesigned would be safe for any water supply was not discredited either by other positive

testimony or by circumstantial evidence, extrinsic or intrinsic. This evidence should not be rejected as it did not contain inherent improbabilities or contradictions nor was it otherwise unworthy of belief. State vs A. Capuano 384 A.2nd 610 (1978).

The applicants had completed a substantial portion of their three (3) bedroom single family dwelling with associated ISDS (pursuant to a prior application approved by DEM based upon discrepancies regarding separation distances) prior to discovery of the distance discrepancies.

Applicants ceased further construction upon receipt of a Notice of Suspension by DEM. Following notification of said discrepancy and suspension of activities, applicants filed the subject application and requested variances. Substantial sums of money were expended by applicants prior to discovery of said discrepancy and in reliance on the approval of various authorities and applicants have exhausted all alternatives.

The evidence clearly establishes that the applicants acted in good faith at all times and that the predicament confronting applicants is an unnecessary hardship not intentionally imposed by any prior action of the applicants, nor anyone in their employ. The element of good faith on the part of the applicants has a bearing on the issue. If their action was with full knowledge of what they were doing, we would have an entirely different picture.

The mistake made by applicants in reliance on the results of a survey containing erroneous distances was not a conscious mistake but one which in the circumstances was understandable, and a denial under the circumstances

would constitute to the owner an unnecessary hardship. De Felice vs Zoning Board of North Providence 96 R.I. 99 (1963).

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

FINDINGS OF FACT

1. Applicants Joseph and Jeanne Caito are the owners of real property located at Driftwood Drive, Tiverton, Rhode Island, identified as Tiverton Tax Assessors Block 203, Card 13, which property is the subject of this application.

2. Applicants, on or about July 2, 1990, filed an application for a variance from the following regulations of the Division relating to construction and operation of ISDS systems:

SD 3.05 (1) Distance from private well to Disposal Trench;

SD 3.04 (4) Distance from property line to any component of Disposal System;

SD 2.14 Construction in area served by private wells.

3. On or about January 11, 1991 the Division notified applicants that their application for variances has been denied.

4. Applicants have taken all actions, paid all fees, and filed all documents required to confer jurisdiction over this matter upon the Administrative Adjudication Division of the Department of Environmental Management.

5. The Prehearing Conference was held on May 2, 1991 and May 23, 1991

and the record thereof was prepared and submitted by this Hearing Officer. There were no requests to intervene.

6. The hearing was held on May 30, 1991.

7. There are no public sewers into which the applicants can connect to dispose of waste from the proposed house, and therefore they must construct an individual sewage disposal system.

8. On April 11, 1989 the applicants received an approval of a prior application (No. 89-3334) to permit installations of an individual sewage disposal system at the subject property; but because of an error in distances as submitted therein, they are not proceeding with said prior application.

9. Applicants completed a substantial portion of the construction of their house on the subject premises (pursuant to the prior approved application) before they discovered that part of the proposed individual sewage disposal system being installed was within 100 feet of an abutting owner's well (because of an error of the plat plan for the area in question).

10. Thereafter, applicants submitted the instant application (No. 9033-100) and request for variances, and on January 11, 1991 such was denied.

11. Applicants halted construction of their house when they became aware of the problem with the plans and that because of an error in the plat plans, their septic system was closer to their neighbor's (Mrs. Miner)'s well than as shown on the prior (approved in error) application.

12. Applicants have explored all other reasonable options to complete construction of their house and septic system within the Rules and

Regulations, and the only viable avenue for relief is via the request for variances.

13. Applicants will be denied all beneficial use of their subject property if the denial is sustained.

14. The soils within the area of the proposed ISDS consist of loam to a depth of 1 foot, a silt layer with some clay to a depth of 4 feet, and then silts, clays and fractured rock (or shale) after 4 feet. The water table is dry at 10 feet. The soils are sufficient for the maintenance of an ISDS.

15. There is only one private well in use within 100 feet of the proposed septic system on the site (The Miner well being 89 feet away). This neighboring well is a sealed well (steel casing) which draws water from bedrock and the groundwater flows away from this neighbor's property.

16. There has been no record of septic system failures contaminating any private wells in the area.

17. There is no reasonable probability of the proposed system contaminating or adversely affecting any drinking water supply or tributary thereto or that the public health or public interest will be jeopardized or compromised.

18. A literal enforcement of the requirements of the ISDS Rules and Regulations would deprive applicants of all beneficial use of their property and result in an unnecessary hardship to them.

19. The permit issued shall be subject to the restrictions as set forth in the Restrictive Covenant executed by applicants on November 15, 1990 and recorded in the land evidence records of the Town of Tiverton on November 15,

1990 at 12:56 p.m., viz:

1. Water saver shower heads shall be installed in any dwelling erected on said premises.

CONCLUSIONS OF LAW

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

1. Reasonable notice of the hearings was provided as required by the Administrative Procedures Act, Rhode Island General Laws section 42-35-1 et seq. and Administrative Rule 13.00 (d). The notice also conformed with ISDS Regulation SD 20.03.

2. ISDS Regulation SD 2.01 (a) requires applicants to obtain a permit to construct an ISDS.

3. Application No. 9033-100, which includes the Engineering Plan for ISDS - submitted by Adamsville Engineering, Inc. (applicant's Exhibit no. 4), conforms to the requirements of the Water Pollution Act, Rhode Island General Laws section 46-12-1 et seq. as amended, and ISDS Regulations SD 2.02 and 2.09.

4. The variances from Regulations SD 3.05 (1), SD 3.04 (4) and SD 2.14 that the applicants seek will not be contrary to the purposes and policies set forth in the water Pollution Act, supra, and the Administrative Findings and Policy of the ISDS Regulations and complies with ISDS Regulations SD 10.01 through 10.04.

5. The applicants' appeal of the denial of the variances complies with Regulation SD 20.01, particularly Section (d) of said Regulation in that the applicants have met the burden of proof by clear and convincing evidence that

granting of such variances or permit will not be contrary to the public interest and public health in that the disposal system to be installed will be located, operated and maintained so as to prevent the contamination of a drinking water supply or tributary thereto; that the waste from such system will not pollute any body of water or tributary thereto, will not interfere with the public use and enjoyment of any recreational resource, will not create a public or private nuisance; and will not be a danger to the public interest or public health. Said appeal also complies with ISDS Regulation SD 20.02.

6. The ISDS as otherwise designed complies with all other applicable rules and regulations for such systems by the DEM.

7. Denial of the variances will substantially deprive the applicants of the reasonable use of their property and a literal enforcement of the provisions involved will result in an unnecessary hardship to the applicants.

Therefore, it is hereby

ADJUDGED AND ORDERED

1. That applicants' appeal is sustained and the decision of the Variance Board is hereby reversed.

2. That the Application No. 9033-100 with the request for variances which the applicants Joseph and Jeanne Caito requested, as submitted in the Engineering Plan for ISDS submitted by Adamsville Engineering, Inc.

(applicants' Exhibit no. 4) be granted subject to the following conditions and restrictions:

- a. Water saver shower heads shall be installed in any dwelling erected on said premises.

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

9-30-91

Date

Joseph F. Baffoni

Joseph F. Baffoni
Hearing Officer

Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

Entered as a Final Agency Order this 19th day of October, 1991.

October 19, 1991

Date

Louise Durfee

Louise Durfee, 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 to be forwarded regular mail, postage pre-paid to Thomas A. Hanley, Esq., Rahill, Rahill & Hanley, 174 Armistice Blvd, Pawtucket, Rhode Island 02860; Stephen Burke, Esq., Temkin & Miller, Ltd., 1400 Turks Head Place, Providence, Rhode Island 02903; Paul A. Ward, Jr., Esq., 608 Hospital Trust Bldg, 15 Westminster Street, Providence, Rhode Island 02903; and via inter-office mail to Kendra Beaver, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 and Sandra J. Calvert, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 23rd day of October, 1991.