STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 7, 2014)

BRUCE GARDNER, CHARLES SWEET, and JOSEPH FRISELLA, Appellants	:	
v.	:	**C.A. No. PC 2010-3979**
W. MICHAEL SULLIVAN, in his capacity as Director of the RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT Appellees.	:	

DECISION

MATOS, J. This matter arises before the Court on appeal from a decision of the Director of the Rhode Island Department of Environmental Management (DEM) denying the application for a variance of Bruce Gardner, Charles Sweet, and Joseph Frisella (collectively, Appellants). In that decision, the Director rejected the Recommended Decision of the Hearing Officer and concluded that Appellants had failed to establish by clear and convincing evidence that granting the requested variances would not have an adverse impact on the public health, interest, or environment. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

A

Initial Application and Notice of Denial

Appellants own a parcel of land identified as Plat 9, Lot 387 (the Property or the Lot), located on Sea Lea Avenue in Charlestown, Rhode Island. (Ex. B, In re Gardner, Recommended Decision, AAD No. 08-007/ISA at 3, Apr. 13, 2010.) Appellants seek to construct a single-family residence on the Property. Id. at 20. Although Appellants wish to construct a residence with an Individual Sewage Disposal System (ISDS) and a well, the Lot is too small to construct an ISDS without obtaining variances from the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems, dated January 2002 (ISDS Regulations). Id. at 28.

Those regulations, which are promulgated by the DEM, Office of Water Resources (OWR), provide minimum standards for the location, design, construction, and maintenance of ISDS. ISDS Regulations, State of Rhode Island and Providence Plantations Department of Environmental Management Division of Groundwater and ISDS at 2.) Among those minimum standards; SD 3.05(4) requires that an ISDS be set back at least ten feet from the property line; SD 3.05(1) requires that an ISDS be set back at least one hundred feet from all private wells; SD 2.14 requires that an alternate leach field be available on the property; and SD 19.02.4 requires that an ISDS be set back at least one hundred and fifty feet from Green Hill Pond. Id. at 20, 24, 52.

Because of the size and configuration of the Lot at issue, Appellants are unable to comply with those four requirements and, in their application to DEM, sought variances from each. (Ex. B, In re Gardner, Recommended Decision at 28.) Appellants requested that they be granted a variance from SD 3.05(4), which requires an ISDS to have a ten foot setback from the property line, to permit the setback distance to be reduced to two feet. Additionally, Appellants requested that they be granted a variance from SD 3.05(1), which requires an ISDS to have a one hundred foot setback from all private wells, to permit the setback distance to be reduced to seventy-one feet. Appellants also requested that they be granted a variance from SD 2.14, which requires that an alternate leach field be available on the property, to permit them to construct an ISDS without designating an alternate leach field. Finally, Appellants requested a variance from SD 19.02.4, which requires an ISDS to have a one hundred and fifty foot setback from Green Hill Pond, to permit them to construct an ISDS within fifty feet of Green Hill Pond.

On March 7, 2008, DEM denied Appellants' application for installation of the proposed ISDS. (Ex. C, In re Gardner, Rhode Island Department of Environmental Management Notice of Denial (hereinafter Notice of Denial), Application No. 9905-3244 at 1, Apr. 13, 2010.) In the Notice of Denial, DEM concluded that "the applicant did not provide convincing evidence to demonstrate that the degree of environmental protection provided under the Rules can be achieved without strict application of the particular provisions from which the variance was requested." Id. at 2. In particular, DEM determined that the project was not in the best public interest because it could potentially cause a public or private nuisance and because it could potentially affect drinking water

supplies, public health, bodies of water, and the public use and enjoyment of a recreational resource. Id.

B

Appellants' Evidence Before the DEM Administrative Adjudication Division

On April 14, 2008, Appellants appealed, seeking review of the Notice of Denial. (Ex. B, In re Gardner, Recommended Decision at 1.) An administrative hearing was held on August 24, August 25, and September 14, 2009. Id. At that hearing, Appellants presented the expert testimonies of Dr. Daniel Urish (Urish) and Joseph W. Frisella (Frisella). Id. at 4, 7. Appellants also introduced into evidence two reports, each of which was produced by DEM: one report titled "Total Maximum Daily Load Analysis for Green Hill Pond, Ninigret Pond, Factory Pond Stream and Teal Pond Stream, South Kingstown and Charlestown, Rhode Island" (Load Analysis Report) and dated February 9, 2006, and another report titled "Identification of Bacteria Sources in Green Hill Pond Using Polymerase Chain Reaction" (Bacteria Source Report) and dated July 8, 2003. Id. at 4. In response, DEM introduced the expert testimony of Mohamed Freij. Id. at 14.

Urish, who was admitted without objection as an expert in hydrogeology, testified that it was his opinion that the proposed ISDS would neither pollute Green Hill Pond nor endanger public health and would therefore not cause a public or private nuisance. (Ex. E, In re Gardner, AAD No. 08-007/ISA, Hearing Before the Rhode Island Department of Environmental Management Administrative Adjudication Division, (hereinafter, August 24 Hearing) at 71:8-74:20, Aug. 24, 2009.) He based those conclusions on studies and evaluations performed on the Lot and the immediately surrounding area. Id. at 17:17-

20:21. Those studies and evaluations were based on regional flow pattern maps;[1] data obtained from monitor wells;[2] and water samples obtained from wells on neighboring lots. Id. at 18:24-19:12, 24:15-21, 26:14-27:18.

From the flow pattern maps and data obtained from the monitor wells, Urish calculated the groundwater flow directions. Id. at 30:10-31:9, 32:19-33:10. He concluded that the groundwater flowed consistently to the north-northwest even as conditions changed in the area throughout the year. Id. at 63:20-64:6. According to him, the fact that the groundwater flowed consistently in that direction was significant, in that it reduced—and, in his opinion, eliminated—the possibility of contamination of nearby wells. Id. at 64:7-17, 65:7-16. That is, because the groundwater flowed in a northerly direction and because the existing wells and proposed well would be south of the proposed ISDS, effluent from the proposed system would flow away from those wells. Id. at 64:18-65:15. Urish further opined that there would not be a reversal of flow from the ISDS systems to the wells, but that the flow would continue to flow to the north-northwest. Id. at 64:1-6. He recognized on cross-examination, however, that the flow of the underground water could change direction in the event of a 1938-type hurricane. Id. at 94:10-14.

Additionally, from the water samples taken from adjacent lots, Urish concluded that the well water from neighboring parcels was of a good quality and well within the public health limits set by the Environmental Protection Agency (EPA). Id. at 24:15-

[1] Regional flow pattern maps are maps which demarcate the direction and speed of underground water. These maps are created by recording observations of existing environmental conditions and by hypothesizing effects of the proposed conditions.

[2] Urish defined "monitor wells" as "points that go about two feet into the water table and [that are] perhaps about an inch and a quarter in diameter . . . suitable for measuring and extracting some sampling."

25:9. Specifically, Urish determined that one lot had water that contained between 1.8 and 2.2 milligrams of nitrate per liter, and that the other lot had water that contained approximately 3 milligrams of nitrate per liter. Id. at 24:22-25:2. He noted that, under EPA standards, which establish public health limits at 10 milligrams of nitrate per liter of water, the water quality was very good. Id. at 25:1-9. Therefore, according to Urish, as a result of the direction of the groundwater flow, the minimal amount of nitrate that would be released by the proposed ISDS, and the good quality of the water on adjacent lots, the proposed ISDS would not endanger public health or contaminate any drinking water supply. Id. at 71:8-73:17.

Urish also testified that it was his opinion, based on a reasonable degree of engineering certainty, that if the ISDS was installed, located, operated, and maintained properly, the waste from the system would not pollute any body of water or wetland, namely, Green Hill Pond. Id. at 73:6-74:20. Although he recognized that installing the system would contribute nitrates to the pond, he concluded that the amount contributed from the proposed ISDS would be so small that it would cause no recognizable or significant effect. Id. at 73:18-74:20. Urish testified that the system would contribute approximately four parts nitrate per million parts water. Id. at 74:2-11. He further testified that effluent from a traditional septic system would contribute nitrates at approximately ten to eleven times that rate. Id. at 72:2-21.

In addition to Urish's testimony, Appellants also introduced the testimony of Frisella,[3] who was admitted without objection as an expert in soil evaluation and in the

[3] Although Frisella testified as an expert at the hearing, it is relevant to note that, at the time of the hearing, Frisella was also an owner of the Lot at issue. (Ex. B, In re Gardner, Recommended Decision at 11.) Frisella first became involved with the Property as a

professional engineering, design, and installation of ISDS. Id. at 109:1-111:18. Frisella offered testimony to support his conclusion that waste from the proposed system would not interfere with the public use or enjoyment of a public resource. Id. at 168:16-169:1. First, he described the structure of the proposed ISDS. Id. at 135:6-136:14. He then explained the process through which the effluent is treated. Id. Frisella testified that once the grey water[4] effluent drained to the septic tank, it would be raised into a nutrifier—the AdvanTex system. Id. at 135:6-12. Frisella testified that the AdvanTex system cleans the effluent, removing ninety-nine percent of suspended solids and ninety-nine percent of the biological oxygen demand. Id. It does so by exposing the effluent to anaerobic conditions, causing nitrates in the effluent to bind with carbon in the anaerobic environment. Id. at 135:16-136:3. Once the effluent has gone through this process five times, it is treated with ultraviolet light, which, according to Frisella, removes ninety-nine to one hundred percent of the bacteria in the effluent. Id. 136:4-14. Having been clarified in the pump chamber, the effluent is then released into the leach field, at which point the water goes through two inches of processed stone and two feet of sand (the Bottomless Sand Filter). Id. at 138:12-20. Only after the effluent has passed through the Bottomless Sand Filter is it released into the ground. Id. at 139:21. Frisella further testified that once the clarified effluent is released into the ground, it would travel north-

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consultant and bought the Property in October 2005 with Charles Sweet and Bruce Gardner as partners. Id. He testified that when he purchased the Property he was aware of the necessity of obtaining variances before development, as Frisella had been a consultant through two previous variance denials. Id.

[4] "Grey water" is wastewater that is generated from activities such as dishwashing, laundry, and bathing. This wastewater differs from water containing human waste, which is known as "black water." In this matter, the proposed ISDS would treat only grey water, as any black water produced on the Property would be treated through composting or incineration

northwest with the groundwater flow, eventually combining with Green Hill Pond. Id. at 139:5-13. According to Frisella, if the effluent traveled at the average rate of the groundwater flow as determined by Urish's study, then it would combine with Green Hill Pond after approximately thirty days. Id. He opined that any pathogens remaining in the effluent after the clarification process would be removed during this time. Id.

Frisella testified that it was his opinion, within a reasonable degree of engineering certainty, that the waste would not be a danger to public health and that it would neither contaminate drinking water in the area nor have a detrimental effect on the public use and enjoyment of Green Hill Pond. Id. at 164:3-16, 168:2-22. According to Frisella, there would be no detrimental effect because the proposed ISDS would only be treating grey water; black water would not be introduced to the ISDS because that wastewater would be treated through a composting toilet under the proposed plan. Id. at 163:4-164:16.

Once treated with the AdvanTex unit, the ultraviolet light, and the Bottomless Sand Filter, the grey water comes out—in Frisella's words—"really pure." Id. at 168:9-15. Accordingly, the minute quantity of nutrients and pathogens entering the system would be clarified and cleansed, making any nutrient contribution negligible. Id. at 165:17-168:15. Furthermore, Frisella opined, routine maintenance would ensure the continued functioning of the system. Id. at 165:3-16. He also described the proposed unit's telemetry system, which monitors the ISDS's regular functioning and alerts the homeowners or the maintenance company of problems with the system. Id. at 166:11-167:1. He noted that, as an additional safeguard, the maintenance company for the AdvanTex system cleans and inspects the system once a year to ensure its proper functioning. Id. at 167:15-168:1.

To support his opinion that the proposed ISDS would not contaminate drinking water in the area or have a detrimental effect on Green Hill Pond, Frisella also testified regarding two reports issued by the DEM—the Load Analysis Report and the Bacteria Source Report. Id. at 149:11-23, 153:9-22. The Load Analysis Report evaluated pollutants, primarily nitrates, present in Green Hill Pond and, through evaluation of DNA, determined the origin of those pollutants. Id. at 150:9-24. Frisella testified that the Load Analysis Report concluded that 30.7% of bacteria in Green Hill Pond originated from birds and that only 11.2% of the bacteria originated from humans. Id. at 154:2-21. According to Frisella, the Load Analysis Report was significant in that it demonstrated that septic systems were not the primary cause of pollutants in Green Hill Pond. Id. at 154:22-156:1.

In further support of these conclusions, Appellants admitted into evidence, without objection, the manufacturing specifications and promotional information for the ultraviolet light system, the Sal-Cor 3G Wastewater Ultraviolet Disinfection Unit. Appellants also admitted into evidence, without objection, a document titled "Fecal Coliform Reduction with AdvanTex AX20," which is the executive summary of testing done on that unit. Id. at 169:6-16, 170:2-11.

C

DEM's Evidence Before the Administrative Adjudication Division

At the hearing, DEM presented the testimony of Mohamed Freij, who was qualified, without objection, for his expertise as a professional engineer and professional land surveyor. (Ex. G, In re Gardner, AAD No. 08-007/ISA, Hearing Before the Rhode Island Department of Environmental Management Administrative Adjudication Division,

(hereinafter, September 14 Hearing) at 12:4-18, Sept. 14, 2009.) Freij testified that he had reviewed the application submitted by Appellants, and he delineated the reasons for which the application was denied. Id. at 13:8-16:6. Freij noted that the Appellants had requested significant variances from the required distances to place the proposed ISDS. Id. at 23:11-30:15.

According to Freij, the primary reason DEM denied the application was that it proposed that the ISDS be installed significantly closer to existing wells than the minimum distance required under the regulations. Id. at 36:13-20. The regulations require that ISDS be set back one hundred feet from private wells. Id. at 11-18. Appellants had requested a variance, however, to permit the proposed ISDS to be built within seventy-one feet of two wells. Id. at 22:8-19. Freij testified that the DEM, in evaluating whether it will grant a variance from the regulations, will weigh a number of factors including whether the proposed ISDS is up-gradient or down-gradient from the wells; the type of soil in the area; the groundwater table depth; the current water quality in the existing wells; and the neighborhood density. Id. at 14:8-20. Here, one concern leading to the DEM's rejection of the application was the water quality in the existing wells. Id. at 21:21-22:5. According to Freij, a test of existing wells in the area revealed nitrate levels and, in one well, fecal coliform. Id. He explained that adding another septic system approximately seventy feet from those wells was not protective. Id. at 22:8-19.

In addition to the concerns over the current water quality, Freij expressed concerns over the existing wells' sensitivity to future pollution and contamination. Id. at 36:9-20. As a result of the characteristics of the Lot at issue and neighboring parcels—

namely, that they are coastal properties in close proximity to a salt-water coast—the existing wells and proposed wells are dug wells. (Ex. E, In re Gardner, August 24 Hearing at 44:9-20.) Dug wells are shallower than drilled wells—they are dug deep enough that they extend into the water table but not so deep that they intrude into the salt-water lens beneath. Id. at 44:9-47:7. These shallow wells are more susceptible to surface pollution and bacterial problems than drilled wells. Id. at 44:21-45:21. Thus, according to Freij, the characteristics of the existing and proposed wells militated against granting the application, not only because the existing wells in the area were compromised, but also because the existing wells and proposed well were all shallow wells and thus more susceptible to pollution and contamination. (Ex. G, In re Gardner, September 14 Hearing at 21:19-23:10.)

Freij further testified that the proposed design called for the ISDS to be installed forty feet from Green Hill Pond.[5] Id. at 28:5-29:19. According to Freij, that proposal was unacceptable because it represented a large departure from the regulations, which require a horizontal separation of at least one hundred and fifty feet from a coastal feature. Id. Accordingly, installing the proposed system would not be protective of Green Hill Pond.[6] See id. He testified that the closer to a coastal feature that an ISDS is installed, the greater the risk to that coastal feature. Id. at 29:12-19. In this application,

[5] Appellants contend that the distance between the proposed ISDS and the coastal feature is fifty feet, rather than forty feet. The parties disagree whether the setback from a "coastal feature" required by the regulations should be measured from the top of the bank of Green Hill Pond or the mean high-water mark. (Ex. G, In re Gardner, September 14 Hearing at 26:10-28:18.) Freij testified, however, that the application would not have been acceptable even if the distance between the ISDS and Green Hill Pond had been fifty feet. Id.

[6] DEM did not dispute that the proposed system is the most advanced available. In fact, DEM's witness, Freij, acknowledged that the system proposed, although not officially approved by DEM, was beneficial with proper maintenance.

the fact that Green Hill Pond was already affected by nitrates also weighed into the decision. Id. at 30:2-15.

In addition, Freij expressed concerns regarding the requested variance from the property line setback requirement. Id. at 37:17-38:5. He noted that although the regulations provide that the minimum distance between the ISDS system and the property line is ten feet, the Appellants requested a variance to permit the system to be placed two feet from the property line. Id. According to Freij, adherence to the property line setback requirement ensures that a property owner can maintain an ISDS without encroaching on neighboring lots. Id. at 38:20-39:6. Such a large variance was problematic, therefore, because Appellants would not be able to maintain the system without encroaching on the neighboring property and because actions by the adjoining property owners could create problems or interfere with the functioning of the ISDS. Id. at 38:6-39:6.

On cross-examination, Freij agreed that the DEM does regularly approve the installation of similar systems at distances less than seventy feet from existing wells. Id. at 87:20-88:23. He noted, however, that such variances have been granted for existing homes, rather than for new developments. He testified that variances for existing properties are often granted to encourage the installation of advanced systems that will improve effects or diminish risks on wells or coastal features. Id. at 88:3-23, 90:7-91:8. According to Freij, the DEM has "to be very careful," however, when approving variances that add new systems or increase the environmental impact of existing systems. Id. at 90:14-91:8. Therefore, although the DEM will grant a variance to update an existing system when doing so will improve current conditions by lessening the impact or risk of impact of a system on a water resource, it will be less willing to grant a variance

when doing so will increase the impact or risk of impact on a water resource. Further, earlier in the hearing, on cross-examination of Appellants' expert witness, Frisella admitted that of the "five thousand or so" applications that he had designed and submitted, he could not recall a single instance in which a variance was granted for new construction on Green Hill Pond. (Ex. F, In re Gardner, AAD No. 08-007/ISA, Hearing Before the Rhode Island Department of Environmental Management Administrative Adjudication Division, (hereinafter, September 25 Hearing) at 35:23-36:15, Aug. 25, 2009.)

D

Recommended Decision

At the conclusion of the three-day hearing, Chief Hearing Officer Kerins (Hearing Officer) issued a thirty-four page decision recommending that DEM grant Appellants' request to install an ISDS on the Property. (Ex. B, In re Gardner, Recommended Decision.) The Hearing Officer extensively summarized the testimony and evidence available and made in-depth factual findings. Id. at 27-30. As part of those findings, the Hearing Officer concluded that the AdvanTex system proposed by Appellants removes approximately 98% of suspended solids from effluent before discharging that effluent through the bottomless sand filter. Id. at 29 ¶ 19. He also found that the system removes 70% of nitrates in effluent, 99-100% of any bacteria or pathogens in the effluent and that when that cleansed effluent is released from the bottomless sand filter, the level of nitrates in the cleansed effluent falls within acceptable levels. Id. at 29 ¶¶ 20-21, 23. Furthermore, the Hearing Officer found that permitting the proposed system would not be contrary to the public interest, public health, or the environment, and that the disposal

system could be operated and maintained so as to prevent the contamination of any drinking water supply or tributary. Id. at 29 ¶¶ 29-31.

Based in part on these factual findings, the Hearing Officer concluded that the Appellants met their burden of proof by clear and convincing evidence that the proposed plan would not constitute a threat to public or private health, safety, or welfare. Id. at 27. He stated that OWR had failed to rebut Appellants' evidence regarding the effectiveness of the AdvanTex system, which he concluded would extensively treat the effluent. Id. He gave great weight to the testimony of Urish, whose testimony established that the groundwater flow was away from the proposed and existing wells, and noted that the only manner in which OWR undermined this testimony was through testimony that the groundwater flow could change direction as a result of an episodic, 1938-type hurricane. Id. Accordingly, the Hearing Officer found that OWR improperly denied the application and recommended that the application be granted. Id.

E

Director's Decision

Under § 42-17.7-6, the DEM Director (Director) had the authority to adopt, modify, or reject the Hearing Officer's recommendation. That section provides that although the Director has discretion to adopt, modify, or reject the Recommended Decision, modification of that recommendation must be in writing and must adequately state the rationale. In this matter, after reviewing the Recommended Decision, the Director concluded that the Appellant failed to establish by clear and convincing evidence that there would be no adverse impact to the public health, interest, and environmental quality in failing to adhere to the minimum setback requirements in the

regulations. (Ex. A, In re Gardner, AAD No. 08-007/ISA, Rhode Island Department of Environmental Management Director Decision, (hereinafter, Director Decision), at 1.) Nonetheless, the Director's short, three-page, Decision rejected the Recommended Decision without providing an extensive rationale for that rejection and without addressing and discounting the many factual findings contained in that recommendation.

Among the conclusions unsupported by a written rationale, the Director stated that he "take[s] issue factually with Dr. Dan Urish's testimony that health concerns presented by Mr. Friej [sic] can be eliminated by use of ultraviolet light protocols which Dr. Urish purports to eliminate all concerns relative to bacterial contamination of groundwater and nearby Green Hill Pond." Id. The Director does not further explain his rationale for dismissing Urish's testimony. See id. Similarly, although the Hearing Officer in the Recommended Decision found that "the system will function as proposed," and that the system "will be located, operated and maintained so as to prevent contamination[,]"—and supported those factual findings with an extensive record—the Director stated in his decision that the Appellants had failed to provide evidence that the system will function as proposed in the application. Id. at 2; Ex. B, In re Gardner, Recommended Decision at 29 ¶¶ 28, 31. The Director further stated that "[t]here was no evidence presented as to how the operation and maintenance required by the proposed systems could reasonably be sustained at all times so as to prevent nutrient and microbial contributions to Green Hill Pond and thus avoid further degradation of this fragile water body." (Ex. A, In re Gardner, Director Decision at 2.). In the Recommended Decision, however, the Hearing Officer had concluded that a deed restriction could be included to

ensure the system's maintenance and summarized testimony regarding the continued maintenance of the system and deed restrictions. Id. at 10-11, 30 at ¶ 35.

F

Appeal in the Superior Court

After the Director's denial of the variance application, Appellants appealed to the Superior Court. In this appeal, Appellants ask this Court to reverse the Director's Decision and to reinstate the Hearing Officer's Recommended Decision. Appellants argue that they are entitled to such relief because the DEM did not give deference to the Hearing Officer's determinations and did not demonstrate that the findings of fact and conclusions of law contained in that recommendation were clearly wrong. Additionally, Appellants contend, the DEM applied the clear and convincing standard of review without statutory or constitutional authority. They further argue that DEM's actions constitute the taking of private property for a public use without just compensation in violation of the United States and Rhode Island Constitutions.

II

Standard of Review

Under § 42-35-15, "[a]ny person, . . . who has exhausted all administrative remedies available to him or her within [an] agency, and who is aggrieved by a final order in a contested case is entitled to judicial review" by the Superior Court. Under this scheme, the Court:

> may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error or law;
(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
Sec. 42-35-15(g)

The scope of Superior Court's review of an agency decision has been characterized as "an extension of the administrative process." R.I. Pub. Telecomms. Auth. v. RISLRB, 650 A.2d 479, 484 (R.I. 1994). As such, "judicial review is restricted to questions that the agency itself might properly entertain." Id. (citing Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting R.I. Pub. Telecomms. Auth., 650 A.2d at 485). Accordingly, this Court defers to the administrative agency's factual determinations provided that those determinations are supported by legally competent evidence. Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). Legally competent evidence is "some or any evidence supporting the agency's findings." Auto Body Ass'n of R.I., 996 A.2d at 95 (quoting Envtl. Scientific Corp., 621 A.2d at 208).

DEM utilizes a two-tier review process. Under that process, grievances are heard first by a hearing officer, who issues a recommended decision to the Director of the DEM. Then, the Director considers the decision, along with any further briefs or arguments, and renders his or her own decision. This two-step procedure has been likened to a funnel. Envtl. Scientific Corp., 621 A.2d at 207-08. The hearing officer, at the first level of review, "sits as if at the mouth of the funnel" and analyzes all of the

evidence, opinions, and issues. Id. The Director, stationed at the "discharge end" of the funnel, the second level of review, does not receive the information considered by the hearing officer first hand. Id.

Our Supreme Court has held, therefore, that the "further away from the mouth of the funnel that an administrative official is . . . the more deference should be owed to the factfinder." Id. A hearing officer's credibility determinations, for example, should not be disturbed unless they are "clearly wrong." Id. at 206. Thus, this Court will '"reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record."' Baker v. Dep't of Emp't and Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1994) (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)).

Nonetheless, when the findings of the Director do not adequately explain the rationale for the administrative agency's decision, the Court may remand the matter to the agency so that it can make additional findings. See § 42-17.7-6; Envtl. Scientific Corp., 621 A.2d at 200. "Section 42-17.7-6 also requires the DEM to ground its rejection of the hearing officer's findings upon an adequate rationale." Envtl. Scientific Corp., 621 A.2d at 208. If the Director fails to support that rejection with competent legal evidence, then this Court may remand the matter to the Director to make specific findings in support of that rejection. See id.

III

Analysis

A

Review of the DEM Decision

Appellants state various grounds for which the Director's Decision should be reversed. Appellants contend that the Director failed to give "great deference" to the Hearing Officer's findings, which were not "clearly wrong." Accordingly, Appellants argue that the Director's rejection of the Hearing Officer's findings was "a mere philosophical difference insufficient to overturn the Hearing Officer's recommendation." (Pls.-Appellants' Mem. Law Supp. Appeal at 12.) Further, Appellants contend that the Decision is not based on substantial evidence on the record. Appellants additionally argue that the Director's determinations were clearly erroneous.[7] Specifically, they take issue with his findings that there was no evidence to support how the operation and maintenance could be sustained at all times; that the variation for a two-foot setback from the property line presented a serious health risk; and that the Appellants would not suffer

[7] Although Appellants also seek to argue that the DEM lacks statutory or constitutional authority to require Appellants to prove their case by clear and convincing evidence, that contention is not supported. Section 42-17.1-2(12) of the Rhode Island General Laws provides that DEM is to develop minimum standards to regulate the location, design, construction, and maintenance of ISDS. Further, that statute delegates to DEM the authority to regulate the enforcement and applicability of those standards. The clear and convincing standard is explicitly set out in the ISDS Regulations. Additionally, our Supreme Court, in Strafach v. Durfee, cited with approval the application of the clear and convincing evidence standard to an applicant's request for a variance from the minimum standards laid out in the ISDS regulations. 635 A.2d 277, 281 (R.I. 1993). Appellants have also failed to provide any citation or support to bolster the contention that such a burden is unconstitutional. The failure to support a legal contention or to provide case law or statutory law in support of a proposed contention is effective in waiving that argument. See, e.g., State v. Arruda, 113 R.I. 59, 64, 317 A.2d 437, 440 (1974); State v. Ragonesi, 112 R.I. 340, 346, 309 A.2d 851, 855 (1973); State v. Carufel, 106 R.I. 739, 263 A.2d 686 (1970).

undue hardship if they did not receive the requested variances. DEM contends, however, that the Director's Decision to reject the Recommended Decision was correct because the Recommended Decision was clearly wrong. Therefore, DEM argues that the Director's Decision should be affirmed.

The parties do not dispute that the Director complied with the statute's requirement that the final agency Decision be in writing, as the three-page Decision was set out in written form. See § 42-35-15; Envtl. Scientific Corp., 621 A.2d at 203. Nonetheless, this Court finds that the Director did not adhere to the second requirement, mandating that the Director adequately support his rationale based on evidence in the record when modifying or rejecting the Recommended Decision of the Hearing Officer. See id.

In this case, the Hearing Officer issued a thirty-four page Decision which extensively summarized the testimony and evidence available. The Hearing Officer made in-depth factual findings, including findings that the system proposed by Appellants would effectively remove 98% of suspended solids from effluent, remove 70% of nitrates in effluent, and 99-100% of any bacteria or pathogens in the effluent. The Hearing Officer also concluded that OWR had failed to rebut Appellants' evidence regarding the effectiveness of the AdvanTex system, that the disposal system could be operated and maintained so as to prevent the contamination of any drinking water supply or tributary, and that the proposed system would not be contrary to the public interest, public health, or the environment.

Notwithstanding the Recommended Decision or the factual findings contained in it, the Director, in his brief three-page Decision, rejected the Hearing Officer's credibility

determinations and his findings of fact. Although the Hearing Officer had relied heavily on Urish's testimony and had stated in the Recommended Decision that he found Urish's testimony to be credible, the Director took "issue factually with Dr. Dan Urish's testimony that health concerns presented by Mr. Friej [sic] can be eliminated by use of ultraviolet light protocols which Dr. Urish purports to eliminate all concerns relative to bacterial contamination of groundwater and nearby Green Hill Pond." It is well settled that "[o]bservations of live testimony necessarily enter into a determination of what the [fact finder] believes and disbelieves." Envtl. Scientific Corp., 621 A.2d at 206. Further, the Court "accords deference to 'the assessment of the credibility of witnesses made by a judicial officer who has had the opportunity to listen to live testimony and to observe demeanor.'" State v. Washington, 42 A.3d 1265, 1271 (R.I. 2012); State v. Horton, 971 A.2d 606, 610 (R.I. 2009). Here, however, the Director failed to further explain his rationale for dismissing Urish's testimony, other than by supplanting his opinion for that of the expert.

Additionally, the Hearing Officer in the Recommended Decision found that "the system will function as proposed" and that the system "will be located, operated and maintained so as to prevent contamination[,]" and supported those factual findings with an extensive record. Nonetheless, the Director stated in his Decision that the Appellants had failed to provide evidence that the system would function as proposed in the application. The Director further stated that "[t]here was no evidence presented as to how the operation and maintenance required by the proposed systems could reasonably be sustained at all times so as to prevent nutrient and microbial contributions to Green Hill Pond and thus avoid further degradation of this fragile water body." In the

Recommended Decision, however, the Hearing Officer had concluded that a deed restriction could be included to ensure the system's maintenance and included in his recommendation a summary of testimony regarding the continued maintenance of the system and deed restrictions.

This Court therefore concludes that the Director failed to state adequate rationale for the rejection of the Recommended Decision. See Envtl. Scientific Corp., 621 A.2d at 209-10 ("An adequate rationale is one that relies on a previously articulated standard and is supported by substantial evidence in the record."). Although it is within the Director's authority to reject the Hearing Officer's credibility determinations and factual findings, the Director may only do so if those determinations and findings are "clearly wrong." See Envtl. Scientific Corp., 621 A.2d at 206; see also Washington, 42 A.3d at 1271; Horton, 971 A.2d at 610. The Director, however, did not state what facts and evidence from the record support the conclusion that the Hearing Officer's findings were "clearly wrong."

Rather, the Director concluded, without additional support from the record, that the Hearing Officer's reliance on the promotional literature provided by Appellants was clearly wrong. The Director came to this conclusion notwithstanding the Hearing Officer's reliance on the promotional literature, the testimonies of Urish and Frisella, and the Hearing Officer's credibility determinations. See, e.g., Envtl. Scientific Corp., 621 A.2d at 206; Washington, 42 A.3d at 1271; Horton, 971 A.2d at 610. The Director also concluded that there was no evidence that the operation and maintenance of the ISDS could be sustained at all times. The Hearing Officer had found, however, that the promotional literature submitted by Appellants was credible evidence. The Hearing

Officer had further found credible the expert testimony of Frisella, who testified as to the process by which an ISDS can be maintained at all times.

Accordingly, this Court remands the matter to the Director to make specific findings of fact and conclusions of law. The Director's findings of fact must be adequate to support the determination that the Hearing Officer's factual findings and determinations were "clearly wrong."

B

Ex Parte Communications

Appellants further argue that DEM's Objection to the Recommended Decision, which it filed with the Director, was an unauthorized ex parte communication with an agency decision maker, thereby justifying a reversal of the Director's Decision. According to Appellants, such a result is appropriate under the Administrative Procedures Act (APA), which states that:

> members or employees of an agency assigned to render an order or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate; but any agency member[. . .] Sec. 42-35-13.

In response, DEM argues that its Objection to the Recommended Decision was neither ex parte, nor off the record. Specifically, DEM noted that it sent copies to opposing counsel, that opposing counsel was permitted the opportunity to file a response, and that there were no litigious facts in that Objection that were not already a part of the administrative record. Thus, according to Appellants, DEM's Objection should not affect this Court's analysis.

Although the APA prohibits ex parte communications with an agency decision maker, the Act does not define "ex parte." Its definition is nonetheless ascertainable from similar regulations of other agencies and from the common understanding of the term. For example, the Department of Health (DOH) prohibits ex parte communications with an agency decision maker in the context of Certificates of Need. In that context, the DOH defines "ex parte" as "an oral or written communication not on the public record, with respect to which reasonable prior notice to all parties is not given, not including requests for status reports on reviews being conducted." (CON Reg. 3.24.) Similarly, Black's Law Dictionary defines "ex parte" as that which is "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested[.]" Black's Law Dictionary 657 (9th ed. 2009).

In the context of agency decisions, our Supreme Court has noted that the prohibition against ex parte communications serves primarily to ensure that "no litigious facts . . . reach the decision maker off the record in an administrative hearing." Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427, 440 (R.I. 2010); Arnold v. Lebel, 941 A.2d 813, 821 (R.I. 2007). Litigious facts are those which "concern[] facts or opinions about the merits of an appeal[.]" Champlin's Realty Assocs., 989 A.2d at 441; Arnold, 941 A.2d at 821. That is, if an agency decision maker wishes to consider evidence in his or her determination, then "he or she must notify the parties so that they may 'contest any such evidence' and 'cross-examine any people consulted.'" Champlin's Realty Assocs., 989 A.2d at 441 (quoting Arnold, 941 A.2d at 821).

In this case, the record demonstrates, and Appellants do not dispute, that DEM sent copies of the Objection to the Recommended Decision to Appellants' attorneys.

Further, the record demonstrates, and the parties do not dispute, that DEM's Objection was a part of the record in this proceeding. See Champlin's Realty Assocs., 989 A.2d at 440-41 (quoting Arnold, 941 A.2d at 821). Accordingly, although the Objection did raise litigious facts—in that it addressed facts concerning the merits of the appeal—those facts were part of the administrative record, and Appellants could have permissibly filed a response to the Objection. See id. (quoting Arnold, 941 A.2d at 821). This Court, therefore, would be hard-pressed to, and does not, conclude that DEM's Objection constituted an "ex parte" communication. Further, although Appellants cite § 42-35-13 to support the conclusion that DEM acted outside its statutory authority in communicating with the Director, they do not support that contention with any case law. See State v. De Cesare, 64 R.I. 428, 12 A.2d 727 (1940); see, e.g., Arruda, 113 R.I. 59, 317 A.2d at 440; Ragonesi, 112 R.I. 340, 309 A.2d at 855; Carufel, 106 R.I. 739, 263 A.2d at 686.

C

Takings Clause

Additionally, Appellants argue that DEM has effectuated a taking of their land by denying them an ISDS permit. They assert that the Director's Decision constituted a regulatory taking in violation of the United States and Rhode Island Takings Clauses. Appellants state that the Decision deprived Appellants of all economically viable use of their property and that the Decision interfered with Appellants' reasonable, investment-backed expectations. In response, DEM argues that the Appellants have not been deprived of all beneficial use of the Property, as they have not explored all alternatives for the use of the Property under the zoning ordinance.

It is well-settled in this jurisdiction that "courts will not undertake to decide constitutional questions unless their determination is indispensably necessary to the proper disposition of the case." Berberian v. Jordan, 81 R.I. 34, 36, 98 A.2d 824, 825 (1953) (citing State v. Goldberg, 61 R.I. 461, 1 A.2d 101 (1938); Blais v. Franklin, 30 R.I. 413, 75 A. 399 (1910)). Here, a ruling on whether the DEM's Decision was an unconstitutional taking is premature, in that it is not yet established whether the ISDS permit will be denied. As this case is remanded to the Director at this juncture for further proceedings, this Court need not address the constitutionality of the Director's Decision.

IV

Conclusion

After review of the entire record, the Court finds that the Director's Decision did not adequately state his rationale for rejecting the Recommended Decision of the Hearing Officer. The Director's Decision, therefore, was in violation of constitutional and statutory provisions and otherwise affected by error of law. Substantial rights of Appellants have been prejudiced. Accordingly, this matter is remanded to the Director to make findings of fact adequate to support conclusions of law on whether Appellants met their burden of proof by clear and convincing evidence that the proposed plan would not constitute a threat to public or private health, safety, or welfare. This Court further concludes that the Objection filed by DEM was not an ex parte communication because the litigious facts raised in the Objection were part of the administrative record and Appellants could have permissibly filed a response to the Objection. This Court need not address the Appellants' claim that the Director's Decision constituted an unconstitutional

taking, as such a determination is rendered premature by this remand. Counsel for the prevailing parties shall submit an order in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Gardner v. W. Michael Sullivan, in his capacity as Director of the Rhode Island Department of Environmental Management, et al.**
CASE NO:	**PC 2010-3979**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 7, 2014**
JUSTICE/MAGISTRATE:	**Matos, J.**
ATTORNEYS:	
For Plaintiff:	**Joseph DeAngelis, Esq.**
For Defendant:	**Susan B. Forcier, Esq.** **Peter F. Kilmartin, Attorney General**