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CHAPTER 9

Signage and Adult Uses

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CHAPTER 9

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Scope Note

This chapter provides an analysis of First Amendment protections as applied to two areas of zoning law: signage and adult uses. The chapter begins by discussing basic First Amendment principles and how the courts have applied them to the regulation of signage and adult uses. It then examines the various types of signage and how the First Amendment protects such displays. Finally, the chapter looks at the zoning of adult uses and how the courts have applied First Amendment principles to various forms of such uses.

§ 9.1 BASIC FIRST AMENDMENT PRINCIPLES

§ 9.1.1 Content-Neutral Regulations

When a court is presented with analyzing the legality of a particular regulation with respect to freedom of speech, the first question that must be answered is whether the regulation is "content neutral" or "content based." A content-neutral regulation is one that applies to the form of expression rather than to its content. The U.S. Supreme Court, in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)), held that

> even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and they leave open ample alternative channels for communication of the information."

In *Ward*, the Court upheld a New York City ordinance regulating concerts in Central Park because it found it to be a reasonable regulation of the place and manner of expression. *Ward v. Rock Against Racism*, 491 U.S. at 803.

The foregoing test set forth in *Ward* is commonly referred to as the "intermediate scrutiny" test because such a test can be satisfied by the government establishing a

significant governmental purpose for such content-neutral types of regulation. *Ward v. Rock Against Racism*, 491 U.S. at 803.

§ 9.1.2 Content-Based Regulations

In contrast to a content-neutral regulation, a content-based regulation is one that directly regulates the content of the expression. The U.S. Supreme Court, in *Boos v. Barry*, 485 U.S. 312, 321 (1988), held that "regulations that focus on the direct impact of speech on its audience present a different situation" and such regulations "must be subjected to the most exacting scrutiny." The Court in *Boos* required the government "to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Boos v. Barry*, 485 U.S. at 321 (quoting *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)). In *Boos*, the Court deemed a District of Columbia ordinance regulating the display of signage unconstitutional because it was a content-based regulation on political speech in a public forum, and it was not narrowly tailored to serve a compelling state interest. *Boos v. Barry*, 485 U.S. at 334.

In addition to the *Boos* case, the U.S. Supreme Court recently analyzed a content-based ordinance in *Reed v. Town of Gilbert*. There, the Court held that content-based regulations can "stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (quoting *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011)). In *Reed*, the Court held that a Gilbert, Arizona, ordinance regulating the display of outdoor signs was unconstitutional because it was content based and not justified by traditional safety concerns, nor was it narrowly tailored. *Reed v. Town of Gilbert*, 135 S. Ct. at 2231–32.

The foregoing test set forth in *Boos* and *Reed* is commonly referred to as the "strict scrutiny" test because it requires the government to show a compelling state interest rather than merely a significant governmental interest as in the intermediate scrutiny test.

§ 9.1.3 General Observations

Courts will categorize a challenged regulation as either content neutral or content based and apply the intermediate scrutiny test or the strict scrutiny test as applicable. The burden is on the government to satisfy the applicable test, and each test boils down to whether or not the government can show either a significant or a compelling state interest based on the factual situation in the case.

Thus, it will be easier for a municipality or a governmental entity to satisfy the intermediate scrutiny test when a content-neutral regulation is at issue because the court will presume that such a regulation merely attempts to regulate the time, place, and manner of a specific activity or speech rather than controlling the content or the specific subject matter of an activity or speech.

§ 9.2 SIGNAGE

§ 9.2.1 Commercial Speech

(a) *The* Central Hudson *Test*

Commercial speech is a form of common expression that typically comprises communications and expressions used in the conduct of business. The most familiar example of commercial speech is an advertisement. Historically, the U.S. Supreme Court was reluctant to recognize that commercial speech enjoyed First Amendment protection. However, the Court changed its tune in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).There, the Court held that the First Amendment protects a consumer's interest in the free flow of commercial information.

Most notably, the Court addressed the regulation of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). In particular, the Court established a four-part test for the validity of a government regulation on commercial speech:

(1) whether the commercial speech in question is misleading or unlawful;

(2) whether or not there is a substantial governmental interest at stake;

(3) whether or not the regulation directly advances the governmental interest asserted; and

(4) whether or not the regulation is more extensive than is necessary to serve that interest.

The first element is intended to establish whether or not the First Amendment applies to the challenged regulation. For the First Amendment to apply, the regulation must "at least concern lawful activity and not be misleading." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. at 566. The second element indicates that regulation on commercial speech is subject to the intermediate scrutiny test, and the burden is on the government to show a substantial governmental interest. If the first two elements of the test are shown to produce positive answers, then the third and fourth elements must also be satisfied. A regulation that is determined to directly advance the governmental interest and not be more extensive than is necessary to serve that interest would most likely be upheld by the court.

In *Central Hudson*, the Court held that a State of New York regulation banning the advertisement of services by electric utilities was unconstitutional because the regulation was in fact more extensive than was necessary to serve the state interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. at 572.

(b) *On-Premises Versus Off-Premises Commercial Speech*

An example of an "on premises" sign is a business's sign above its front door. An example of an "off premises" sign is a billboard on the side of the highway. As one might expect, governments frequently attempt to regulate these types of signs differently. Communities would rather see a ban on off-premises signage because such signage impacts the aesthetic attractiveness of the community. On-premises signs, on the other hand, are common, and essential, to almost every business.

A problem, however, arises when governments attempt to regulate on-premises and off-premises signs in different ways. The U.S. Supreme Court addressed these types of regulations in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981). In *Metromedia*, the Court applied the four-part test established by the *Central Hudson* case, as the underlying regulation still related to commercial speech. The four-part test does not differentiate between on-premises and off-premises signs. The Court, in *Metromedia*, found that a San Diego ordinance that regulated on-premises signs, while banning off-premises billboards, was unconstitutional because the regulation "reache[d] too far into the realm of protected speech" by distinguishing between permissible and impermissible signs based on the location and content of the signs. *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 520–21.

§ 9.2.2 Political Signage

During an election season, various forms of political signs, which come in all shapes and sizes, tend to flourish. When government attempts to regulate the location and/or content of political signs, however, there is a certain level of scrutiny that the regulations must meet. A court that is faced with addressing the validity of a regulation regarding political signage, as in the case of other types of signage, will seek to determine if the challenged regulation is content neutral or content based. As discussed above, either an intermediate scrutiny test or a strict scrutiny test will be applied.

Although one might think that a regulation of political signage would tend to be content based, that is not necessarily the case. The U.S. Supreme Court, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), held that "the text of the ordinance is neutral—indeed it is silent—concerning any speaker's point of view"; thus, it subjected the particular ordinance to the intermediate scrutiny test. There, the Court noted that the subject ordinance was not "designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. at 804. The Court in *Members* concluded that a Los Angeles ordinance that prohibited the posting of signs on public property did not rise to a level where the specific content of expression was limited, and it upheld the ordinance because it banned all signs from being posted on public property rather than just specifically banning political signs. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. at 816–17.

§ 9.2.3 Regulatory Purpose

The purpose of signage regulations in the City of Providence is to "establish a comprehensive system of controls governing the display, design, construction, installation, and maintenance of signs." *See* Providence, R.I., Zoning Ordinance, ch. 2014-39, No. 513 (Nov. 24, 2014). Regulations in the City of Warwick, as another example, "recognize the function of signs in the city, to provide for their inclusion under the zoning ordinance, and to regulate and control all matters relating to such signs, including location, size, materials and purpose." *See* Warwick, R.I., Code of Ordinances (Nov. 24, 1992).

A government's purpose for a particular regulation can be extremely important, as seen in the various cases cited throughout this chapter. If the government can establish a clear, permissible purpose for a particular regulation, it will be easier for a court to uphold it against a First Amendment challenge.

§ 9.2.4 Rhode Island Case Law

(a) *Regulation of Signage*

In *Knapp Video, Inc. v. Zoning Board of Review for Barrington*, 1996 R.I. Super. LEXIS 69, at *10, the Rhode Island Superior Court examined a Town of Barrington ordinance governing the illumination and size of signs. The court upheld the ordinance, reasoning that it was a proper content-neutral regulation that promoted a substantial governmental interest and that there were adequate alternative channels of communication available to the plaintiff, especially since the town would have permitted a slightly smaller version of the exact sign that the plaintiffs sought to display.

Similarly, in *Pawtucket CVS, Inc. v. Gannon*, 2006 R.I. Super. LEXIS 33, 39–40, the Superior Court found that a Pawtucket ordinance regulating signage was constitutional and did not violate the First Amendment because the ordinance in question was content neutral and advanced substantial governmental interests, namely, traffic safety and aesthetics.

(b) *Commercial Speech*

The Rhode Island Supreme Court addressed the issue of commercial speech in *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985), in which the court upheld an injunction that had issued in favor of the Rhode Island Liquor Stores Association against a pub, enjoining it from soliciting or publishing advertisements setting forth the price of alcoholic beverages. The court reasoned that the statute banning such solicitation advanced the state's interest in promoting temperance and controlling the traffic in alcoholic beverages. The court applied the *Central Hudson* test in analyzing whether or not a statute that prohibited the commercial speech in question violated the First Amendment. The court rested its decision in favor of the statute on the third element of the test: whether the law

directly advanced the governmental interest asserted. *Rhode Island Liquor Stores Ass'n v. Evening Call Publ'g Co.*, 497 A.2d at 335.

The Rhode Island Supreme Court addressed a similar issue in *S & S Liquor Mart v. Pastore*, 497 A.2d 729, 738 (R.I. 1985). There, the court upheld a Rhode Island statute that prohibited solicitations or advertisements containing the price of alcoholic beverages. As with the *Evening Call* case, the court in *S & S Liquor Mart* bottomed its decision to uphold the statute on the third element of the *Central Hudson* test, indicating that controlling the advertising of the price of liquor advanced the legislative goal of alcohol moderation or abstinence. *S & S Liquor Mart v. Pastore*, 497 A.2d at 735.

§ 9.3 ADULT USES

§ 9.3.1 Regulation of Adult Uses Through Zoning Ordinances

(a) *The* Young *and* Renton *Tests*

As a general proposition, governments have the ability to regulate adult land uses even though the First Amendment protects certain of these uses. The U.S. Supreme Court, in *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 70–71 (1976), opined that "even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." Based on the *Young* case, the Court permits the government to regulate adult uses under a separate set of rules and regulations from those that apply to other forms of speech that enjoy First Amendment protection. It is also clear that adult uses are classified as a "low value" speech and may be subject to specific rules and regulations that are likely to survive the test of establishing a legitimate governmental interest in regulating such expression. In *Young*, the Court upheld a Detroit ordinance regulating the licensing and location of adult movie theaters because the city's interest in the present and future character of its neighborhoods adequately supported its classification of motion pictures. *Young v. Am. Mini-Theaters, Inc.*, 427 U.S. at 70–71.

The U.S. Supreme Court also took up this issue in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50 (1986). Relying on the principles set forth in *Young*, the Court acknowledged that there is a substantial governmental interest in regulating adult uses. But the facts in the *Renton* case were such that the Court deemed the ordinance in question to be content neutral, unlike the *Young* case, where the Court found the ordinance in question to be content based. Despite this distinction, it is clear that the Court, in both cases, established that governments have a legitimate and significant interest in regulating adult uses and that such adult uses are not subject to the same rigorous scrutiny as other forms of expression protected by the First Amendment. In *Renton*, the Court upheld a municipal ordinance regulating the location of adult movie theaters because the city "sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of

life in the community at large by preventing those theaters from locating in other areas." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. at 54.

(b) *Regulation of Adult Uses in Rhode Island*

Definition of "Adult Use"

As an example, the City of Providence zoning ordinance defines "adult use" as follows:

> A business that sells or disseminates explicit sexual material, and at which access to the public display of explicit sexual material is restricted to persons 18 years of age or older. An adult bookstore, adult cabaret, or adult motion picture theater are considered adult uses and are defined as follows:
>
> 1. Adult Bookstore/Retail. A business which offers for sale or rent any of the following: publications, books, magazines, periodicals, photographs, films, motion pictures, video cassettes, DVD, or other video reproductions, or other visual representations that depict or describe specified sexual activities or specified anatomical areas, or instruments, devices, or paraphernalia that are designed for use in connection with specified sexual activities.
>
> 2. Adult Arcade. A business where, for any form of consideration, one or more still or motion picture projectors, slide projectors or similar machines are used to show films, motion pictures, video cassettes, DVD, slides, computer generated graphics, or other photographic reproductions which are characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas.
>
> 3. Adult Cabaret. A business that features dancers, go-go dancers, exotic dancers or similar entertainers, or live entertainment, in which persons regularly appear in a state of nudity, or where live performances are characterized by the exposure of specified anatomical areas or by specified sexual activities. Adult cabaret establishments specifically exclude minors, or minors are specifically prohibited by statute or ordinance, regardless of whether any such business is licensed to sell alcoholic beverages.
>
> 4. Adult Motion Picture Theater. A business used for presenting motion pictures that are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas for observation by patrons.

> 5. Adult Hotel/Motel. A hotel or motel or similar business establishment that rents, leases or lets any room for less than a six hour period, or rents, leases or lets any single room more than twice in a 24 hour period.
>
> 6. The following definitions describe the sexually-oriented activities contained within the general definitions for the above adult uses:
>
> a. Sexually Oriented Devices. Any artificial or simulated specified anatomical area or other device or paraphernalia that is designed in whole or part for specified sexual activities.
>
> b. Specified Anatomical Area. Less than completely and opaquely covered genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola, or human male genitals in a discernible turgid state, even if completely and opaquely covered.
>
> c. Specified Sexual Activities. Any activity that includes human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, or sodomy; or fondling or erotic touching of human genitals, pubic regions, buttocks, or female breasts, even if completely or opaquely covered.

See Providence, R.I., Zoning Ordinance, ch. 2014-39, No. 513 (Nov. 24, 2014).

As another example, the City of Warwick, R.I., zoning ordinance defines "adult entertainment" as follows:

> (A) Any commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of specified sexual activities or specified anatomical areas. This shall also include any commercial establishment which regularly features persons who appear in a state of nudity or seminude, or live performances which are characterized by the exposure of specified anatomical areas or by specified sexual activities.
>
> (B) Any bookstore, novelty store, video store, or any commercial establishment in which more than 25 percent of the in-store inventory contains, for sale or rental only, for any form of consideration, any one or more of the following:
>
> (1) Books, magazines, periodicals, or other printed material, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which are

> characterized by the depiction or description of specified sexual activities or specified anatomical areas; or
>
> (2) Instruments, devices, or paraphernalia which are designed for use in connection with specified sexual activities.
>
> (C) Specified anatomical areas:
>
> (1) The human male genitals in a discernibly turgid state, even if completely and opaquely covered; or
>
> (2) Less than completely and opaquely covered human genitals, pubic region, buttocks, or a female breast below a point immediately above the areola.
>
> (D) "Specified sexual activities" means any of the following:
>
> (1) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts; or
>
> (2) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, masturbation, or sodomy.
>
> An adult entertainment business may have other principal purposes that do not involve the activities or materials described above. However, such purposes shall not have the effect of exempting the commercial businesses from being categorized as adult entertainment so long as the depiction or description of specified sexual activities or specified anatomical areas remains one of the principal purposes.

See Warwick, R.I., Code of Ordinances (Nov. 24, 1992).

Both Providence and Warwick have crafted their respective definitions of "adult use" and "adult entertainment" to include essentially any and all activity that a layperson would consider to be "adult." If either of these ordinances were to be challenged in a court of law, the court would first determine if the ordinance in question is content neutral or content based. Regardless, the principles set forth in the *Young* and *Renton* cases provide leeway to governments to regulate adult uses in a different manner than other forms of expression protected under the First Amendment.

Where Are Adult Uses Permitted?

It is typical for a government to attempt to limit the location of adult uses within a city or town. The purpose of this limitation is to serve a governmental interest in protecting the lifestyle, marketability, and overall appeal of the city or town.

As an example, the Providence zoning ordinance limits adult uses to the M-1 (List Industrial District) and M-2 (General Industrial District) zoning districts. *See* Providence,

R.I., Zoning Ordinance, ch. 2014-39, No. 513 (Nov. 24, 2014). The M-1 district is "intended for light industrial and office park uses that accommodate a variety of manufacturing, assembly, storage of durable goods, and related activities provided that they do not pose toxic, explosive or environmental hazard in the City." Providence, R.I., Zoning Ordinance, ch. 2014-39, No. 513 (Nov. 24, 2014). Similarly, the M-2 district is "intended to provide areas for moderate and heavy intensity industrial uses, especially for those uses that are potentially hazardous, noxious, or incompatible with the uses in other districts." Providence, R.I., Zoning Ordinance, ch. 2014-39, No. 513 (Nov. 24, 2014).

Additionally, the Providence zoning ordinance further limits the location of adult uses as follows:

> (1) All adult uses shall be located a minimum of 500 feet from any residential use, place of worship, educational facility, park/playground, or cultural facility.
>
> (2) An adult use shall be located a minimum of 2,000 feet from any other adult use.
>
> (3) No adult use may be maintained or operated in any manner that causes, creates, or allows public viewing of any adult material, or any entertainment depicting, describing, or relating to specified sexual activities or specified anatomical areas, from any public or private right-of-way or any property.

See Providence, R.I., Zoning Ordinance, ch. 2014-39, No. 513 (Nov. 24, 2014).

As another example, the Warwick zoning ordinance limits adult entertainment to the GI (General Industrial District) zoning district. *See* Warwick, R.I., Code of Ordinances (Nov. 24, 1992). The GI district is

> for general industrial and manufacturing operations and enterprises, including assembly of durable goods, bulk storage, and general storage of trucks and construction equipment; provided however that such uses do not create serious problems of compatibility with other land uses and that they do not pose unwarranted toxic, explosive or environmental hazard in the general vicinity.

Warwick, R.I., Code of Ordinances (Nov. 24, 1992).

In the *Young* case, the government implemented a locational restriction for adult motion picture theaters. The Court held that "the City's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits." *Young v. Am. Mini-Theaters, Inc.*, 427 U.S. 50, 62–63 (1976). The Court further held that, "apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in

the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment." *Young v. Am. Mini-Theaters, Inc.*, 427 U.S. at 63.

Again, it is clear that the courts have permitted governments to specifically regulate adult uses in a manner different from other forms of expression protected by the First Amendment.

Are There Specific Regulations for Adult Use Signage?

One might think that, because governments typically have a specific set of regulations for adult uses, they would also have a specific set of regulations for adult use signage. After all, the signage for an adult use business is what the public views the most. Oddly enough, not all municipalities regulate adult use signage.

The City of Providence, for example, does not have a specific set of regulations for adult use signage. However, Providence does have a general regulation on adult use advertising as follows: "No adult use may be maintained or operated in any manner that causes, creates, or allows public viewing of any adult material, or any entertainment depicting, describing, or relating to specified sexual activities or specified anatomical areas, from any public or private right-of-way or any property." *See* Providence, R.I., Zoning Ordinance, ch. 2014-39, No. 513 (Nov. 24, 2014). Although this provision does not constitute an extensive regulation of adult use signage, it certainly would be applicable to adult use signage in the City of Providence.

The City of Cranston, R.I., has a regulation similar to that of Providence:

> No use shall be allowed to display for advertisement or other purposes any signs, placards or other like materials to the general public on the exterior of the building or on the interior where the same may be seen through glass or other like transparent material any explicit figures or words concerning specified anatomical areas or sexual activities as defined herein.

See Cranston, R.I., Zoning Ordinance § 17.80.010(A)(2)(c)(iv) (codified through Ordinance No. 2014-30, passed Nov. 24, 2014 (Supp. No. 10)). This regulation certainly applies to adult uses in the City of Cranston.

§ 9.3.2 Regulation of Nude Dancing

Although it is clear that nude dancing would be considered an adult use and would be subject to the principles discussed above, it is worth noting a U.S. Supreme Court case on this specific issue. *In Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991), the Court determined that nude dancing was entitled to a measure of First Amendment protection, but only marginally so. The Court further indicated that the ban on nude dancing, as prohibited by the challenged ordinance, had a clear purpose of "protecting societal order and morality." *Barnes v. Glen Theatre, Inc.*, 501 U.S. at 568. Such a justification, as approved by the Court in *Barnes*, is yet another example

of the Court upholding regulations on adult uses that may not otherwise survive the Court's scrutiny if such regulation were related to a different form of protected First Amendment expression. It is clear that the Court will uphold the governmental interest of protecting the community and its citizens from unregulated adult uses.

§ 9.3.3 Rhode Island Case Law

The Rhode Island Supreme Court addressed adult uses as they relate to nude dancing in *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1235 (R.I. 2000). There, the court reviewed an ordinance in the Town of Johnston that prohibited displays of nudity at the plaintiff's nightclub and at other liquor-serving establishments. Putting aside the Twenty-First Amendment issues presented in this case, the court addressed the First Amendment implications of the challenged ordinance. The court held that such an ordinance was content neutral because it "merely restricts the time, manner, and places in the town where displays of nudity could occur." As such, the intermediate scrutiny test was deemed applicable. *El Marocco Club, Inc. v. Richardson*, 746 A.2d at 1236. The court also cited the *Barnes* case from the U.S. Supreme Court, where nude dancing was also at issue. The *El Marocco* case turned on the Town of Johnston establishing an important or substantial governmental interest in enacting the ordinance. The court held that the town

> could rationally conclude that prohibiting nude dancing and other displays of nudity from occurring at the same commercial locations in the town that serve liquor would serve to increase the overall safety and welfare of the local community and its citizens, reduce crime in those areas, and thereby promote societal order and morality.

El Marocco Club, Inc. v. Richardson, 746 A.2d at 1238.

The Rhode Island Supreme Court also addressed adult uses in *DiRaimo v. City of Providence*, 714 A.2d 554, 557 (R.I. 1998), where it relied on the lower court's decision to uphold a Providence ordinance regulating the presentation of adult entertainment in the downtown Providence area. The lower court's decision cited *Renton* and *Barnes* in applying the principles of time, place, and manner regulations and their applicability to nude dancing. *DiRaimo v. City of Providence*, 714 A.2d at 563–64.

CHAPTER 10

Brownfields, Wetlands, and Municipal Regulations

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Scope Note

This chapter reviews a number of environmental programs affecting Rhode Island land use. It begins with a discussion of the brownfields program, established to address contaminated properties considered for redevelopment. It then discusses the state's uniform wetlands standards and local regulation of soil erosion, storm water, and groundwater. The chapter concludes by discussing the circumstances under which state law preempts municipal ordinances.

§ 10.1 BROWNFIELDS

§ 10.1.1 General Background

Rhode Island is home to a number of contaminated properties left behind by Rhode Island's industry and former manufacturing facilities, primarily in the state's urban areas. Where these sites are contemplated for redevelopment, they are referred to as "brownfields."

Rhode Island's brownfields program is an effort to address and redevelop these areas. The program is intended for sites that are targeted for economic investment or redevelopment but are impeded by environmental contamination. Eligible participants, defined below, may enter into settlement agreements with the state, acting through the Rhode Island Department of Environmental Management (RIDEM). These agreements convey significant liability protections and other benefits to the eligible participant party.

The brownfields program is intended to encourage the redevelopment of contaminated properties in a way that is protective of human health and the environment, while being as cost effective as possible. RIDEM estimates that there are over 10,000 brownfield sites across Rhode Island, with many occupying prime commercial and industrial locations. Department of Environmental Management, Rules and Regulations for the Brownfields Remediation and Economic Development Fund § 10.02 (2015) [hereinafter DEM Fund Rules].

The brownfields program was established in 1995 as one component of the Rhode Island Industrial Property Remediation and Reuse Act (Reuse Act). The regulations that govern the program are the Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases (Remediation Regulations), which are promulgated under the Reuse Act and administered through RIDEM's Office of Waste Management (OWM). The regulations establish an integrated program involving reporting, investigation, and remediation of contaminated sites.

§ 10.1.2 Brownfields Program Eligible Participants

(a) *Eligible Properties*

To be eligible for the program, a property must have actual or suspected contamination and must be targeted for redevelopment. Although previously excluded pursuant to statutory changes adopted in 1997, sites with petroleum contamination are now included among those sites governed by the Reuse Act and the provisions of the brownfields program. *See* R.I.G.L. § 23-19.14-6.1. The Reuse Act still states that petroleum is not a hazardous substance for purposes of the Act, but the phrase "remedial or response action" now includes action taken to rectify the effects of a release of hazardous material "and/or petroleum." R.I.G.L. § 23-19.14-3(k).

(b) *Eligible Participants*

The Rhode Island brownfields program provides opportunities primarily for two classes of participants: volunteers (defined as parties who do not currently own or operate a site and who come forward to conduct environmental assessment and/or remediation) and bona fide prospective purchasers of contaminated property. R.I.G.L. § 23-19.14-7.

Volunteers

There are two classes of volunteer eligible participants. The first is composed of those who are not responsible for contamination but undertake a site assessment and provide the results to RIDEM. R.I.G.L. § 23-19.14-8(a), (b); *see also* Remediation Regulations at § 2.02. The second category includes those who are not responsible for contamination but who undertake and successfully complete cleanup activities according to the terms of a remedial action plan approved by RIDEM. R.I.G.L. § 23-19.14-8(a).

Bona Fide Potential Purchasers

Under the law, a "bona fide prospective purchaser" (BFPP) is one who

- is not responsible for contamination on the property;
- has not held a 10 percent or greater interest in the property or in "any of the operations related to the contamination";
- has "documented the intent to buy the property in writing"; and

- has offered fair market value for the site in its contaminated condition.

R.I.G.L. § 23-19.14-3.

Practice Note

Although the Reuse Act does not define prospective tenants as falling within the definition of a BFPP, RIDEM may allow them eligibility for the program, as evidenced by at least one settlement agreement RIDEM has entered into with a tenant leasing contaminated property. There is a risk in doing this, however, given the definition of a BFPP.

§ 10.1.3 Site Remediation Process

RIDEM's Division of Site Remediation deals with the state's remediation regulations, which outline the steps that a party must take when investigating or remediating a site. The type and scope of remediation activity required on a property is determined by the present and intended uses of the property. For instance, on single family residential property, where the risk to human health is potentially the greatest, the most stringent standards apply. The standards are different, and in some ways reduced, for industrial or commercial property, often allowing a lesser extent of remediation work or applied in conjunction with other controls such as an engineered cap and/or a deed restriction on future uses of the property. Remediation Regulations §§ 8.01–.11.

RIDEM has developed three methods of determining appropriate remedial objectives at a contaminated site. The first method (Method 1) relies on preset numerical levels, called remedial objectives. These remedial objectives include a list of hazardous substances, with direct exposure criteria for residential and industrial and/or commercial land usage. Remediation Regulations §§ 8.02(B), 8.03(B). Method 2 establishes a process whereby a performing party may consider site-specific circumstances and modify the normally applicable Method 1 objectives. RIDEM may require the use of Method 2 objectives if there are certain specified "complicated conditions at a contaminated site" (for instance, where there are potential environmental impacts to adjacent surface water bodies). Remediation Regulations § 8.02(C). Method 3 allows for a site-specific human health and/or ecological risk assessment to be performed in order to determine the appropriate remedial objectives for contamination in soil or groundwater. Remedial objectives under Method 3 must protect certain defined "environmentally sensitive areas," including parks, wetlands, and surface water bodies. Remediation Regulations § 8.04.

Where remedial action is determined to be necessary, the responsible party for the site will prepare and submit a remedial action work plan (RAWP) that must be approved by RIDEM prior to the initiation of any work. The RAWP must comply with the cleanup criteria set out in the remediation regulations for each hazardous substance found in all impacted media, including groundwater, surface water, sediment, soil, and air. RIDEM's approval of a RAWP will depend on the property's current and foreseeable future uses and may include an environmental land use restriction (ELUR), described below. A party that implements an approved RAWP and is issued a remedial

action decision letter is thereafter not liable for costs or damages associated with the release of hazardous materials from the property. R.I.G.L. § 23-19.14-7.

Environmental land use restrictions limiting certain current and future land uses are often implemented at sites where some contamination remains because it is not advisable, feasible, practical, or even necessary to achieve complete remediation. An ELUR can serve as a cost-effective cleanup solution. A property owner may negotiate an ELUR with RIDEM that imposes a variety of institutional controls on the property. The ELUR runs with the land, binds future purchasers, and has a yearly inspection requirement. RIDEM provides a standard form ELUR, a copy of which is included as **Exhibit 10A**.

§ 10.1.4 Liability Protections and Reopeners

In exchange for participation in the brownfields program, volunteers and BFPPs receive protections against liability in the form of a settlement agreement with the state. In a typical brownfields settlement agreement, the state will issue a covenant not to sue, whereby it agrees not to pursue any enforcement action against the settling party for all environmental conditions included within the agreement. These conditions usually include only contamination known at the time the settling party and the state enter into the agreement.

To obtain a settlement agreement with the state, a settling party must agree to complete certain defined remediation activities. These activities may include, for instance, an investigation and assessment of the environmental condition of the property and completion of all remedial tasks required by RIDEM. Remediation Regulations § 2.02. RIDEM has also established a memorandum of understanding (MOU) with the U.S. Environmental Protection Agency (EPA) under which the EPA will refrain from initiating an enforcement action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for matters covered in a RIDEM brownfields settlement agreement if the eligible participants fulfill their settlement obligations. The MOU assures that sites meeting certain criteria set forth in settlement agreements will be archived with the federal Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) upon receipt of a letter of compliance from RIDEM. Once the settling party has completed all work required under an approved work plan, the state will usually issue a letter of compliance for the property.

In addition to the liability protections afforded under an enforceable settlement agreement, a party that has received a remedial decision letter may enter into a remedial agreement with the state that includes a covenant not to sue and contribution protection. R.I.G.L. § 23-19.14-7.1. This agreement is assignable and distinct from a letter of compliance. When the state enters into a remedial agreement under this section, the liability (to the state) of the parties, including any future liability, arising from the release or threatened release that is the subject of the agreement, shall be limited as provided in the agreement. R.I.G.L. § 23-19.14-7.1.

At RIDEM's discretion, a covenant not to sue may be transferred to a settling party's successors or assigns, so long as such entities are not responsible parties under the

Reuse Act. R.I.G.L. § 23-19.14-10(b). Under a recorded settlement agreement and corresponding documents, the settling party is protected against a wide range of claims by other entities for any additional remediation costs sought by the state.

However, the Reuse Act also provides various means by which a volunteer or a BFPP may become a responsible party and thus exposed to liability to the state. For instance, if a volunteer exacerbates adverse environmental conditions at a site while conducting remediation activities or if a BFPP fails to enter into a settlement agreement before purchasing a property or violates the agreement, it may become liable to the state just as any other current owner or operator.

Under the Reuse Act, responsible parties have strict joint and several liability for the following:

- removal or remedial actions necessary to rectify the effect of a release of hazardous material so that it does not cause a substantial danger to the present or future public health or welfare or to the environment;
- all costs of removal or remedial action incurred by the state including direct costs, indirect costs, and the costs of overseeing response actions conducted by private parties;
- any other necessary costs of removal or remedial action incurred by any other person; and
- damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from a release of hazardous material.

R.I.G.L. § 23-19.14-6.

§ 10.1.5 Brownfield Remediation and Economic Development Fund

In September 2015, RIDEM began instituting new regulations that would create the Brownfields Remediation and Economic Development Fund (the fund), which would provide grants to public, private, and nonprofit entities for brownfield remediation projects, with particular emphasis on job creation and economic development. The fund, which will administer $5,000,000 from the 2014 Rhode Island Clean Water, Open Space, and Healthy Communities Bond, encompasses four enumerated categories of grants:

- predevelopment planning grants,
- redevelopment grants,
- site preparation grants, and
- small-business assistance grants.

DEM Fund Rules § 10.02.

The regulations also enumerate various costs that are ineligible for grant assistance, including

- preaward costs, unless incurred within ninety days of application approval and preapproved by the DEM;
- administrative costs;
- costs associated with a supplemental environmental project (a project beyond that required by law, which produces environmental or public health benefits that the party agrees to undertake in settlement of an enforcement action);
- state or federal lobbying costs;
- land acquisition projects that do not have tangible public health or environmental benefits and physical construction or redevelopment;
- response costs for emergency response actions caused or exacerbated solely by the applicant or its agents or assigns; and
- proposed projects associated with unresolved litigation (administrative or judicial) with the department or conditions that have violated statutes or regulations administered by the department.

These projects may be eligible to receive funds with the express written consent of RIDEM and resolution of the underlying litigation. DEM Fund Rules § 10.02.

Awards given out by the fund will be made biannually on a competitive basis. DEM Fund Rules § 8.02. Recipients will receive up to eighty percent of eligible costs, and the recipient must be able to match at least twenty percent of eligible costs. DEM Fund Rules § 8.01.

§ 10.2 WETLANDS REGULATIONS

§ 10.2.1 Uniform Statewide Wetlands Standards

Before 2015, wetlands regulations consisted of a patchwork of twenty-two different sets of municipal regulations and overlapping state regulations. The resulting uncertainty made it difficult for property owners and developers to predict and budget the permitting process when similar projects in different towns were subject to different and conflicting wetlands standards. Significant permitting delays could also result, with both state and municipal authorities performing duplicative reviews.

In 2015, however, the state enacted legislation providing for uniform wetland regulations. 2015 R.I. Pub. Laws ch. 218 (the 2015 Act). The legislation called for RIDEM and the Coastal Resources Management Council (CRMC) to collaborate on regulations for freshwater wetland buffers and setbacks. R.I.G.L. § 2-1-20.1(c). The regulations were initially due in 2016, but are now due early in 2018 (18 months after the most recent amendment, *see* P.L. 2016, chs. 306, 321 (effective July 2, 2016)).

The new state regulations will govern freshwater wetlands, buffers, floodplains, areas subject to storm flowage and flooding, and setbacks of 200 feet from a river's edge or drinking water supply reservoir and 100 feet from any other freshwater wetlands. R.I.G.L. § 2-1-20(9). The 2015 Act also authorizes the director of RIDEM to establish additional "jurisdictional areas" around protected wetlands, which will be subject to the state wetland standards. R.I.G.L. § 2-1-20.1(b). RIDEM and the CRMC must consider agricultural and plant-based green infrastructure practices in developing the regulations, and the revisions must address "normal farming" activities.

The new state regulations will preempt existing municipal wetlands regulation, including, for example, the more-restrictive 150 foot setback under Jamestown's existing zoning ordinance. Under the new regulations, cities and towns are no longer authorized to adopt zoning provisions specifying buffers or wetland setbacks, or setbacks between onsite wastewater treatment systems and wetlands. R.I.G.L. § 45-24-30(b). Cities and towns must revise their ordinances to conform to the new state regulations within twelve months of the regulations being issued. R.I.G.L. § 45-24-30(d).

Although municipalities will no longer have regulatory authority over wetlands, the 2015 Act requires that RIDEM and the CRMC implement procedures for "local input." R.I.G.L. § 2-1-27. The 2015 Act provides that such procedures must be "designed to facilitate municipal input during the permit application review process and shall, to the extent feasible, utilize information technology to automate making information available in a timely manner," and be "implemented in a manner that avoids introducing delay in issuance of permit decisions."

In addition to the required procedures for "local input," the 2015 Act concedes to municipalities the ability to petition the director of RIDEM to expand the size of the buffer within certain jurisdictional areas. R.I.G.L. § 2-1-20.1(c). Cities and towns therefore have the potential ability to indirectly regulate wetlands and undermine the uniformity of the new statewide standards.

Notwithstanding the to-be-enacted procedures for municipal input, the 2015 Act will likely expedite wetlands permitting and development review. Developers will have the benefit of one-stop shopping and certainty after receiving state approvals. Additionally, the 2015 Act promises to increase transparency and bring technological improvements to the application process. The 2015 Act and new regulations to be issued thereunder must provide both municipalities and the public with access to information regarding state freshwater wetland permit applications. R.I.G.L. § 2-1-27. Increased transparency and electronic records will help developers determine how RIDEM and the CRMC have ruled on similar projects.

§ 10.2.2 Development Applications Currently Under Review

Until the state regulations are issued, municipal regulations will continue to apply to pending development applications. Any development application submitted to a town or city before the effective date of the state regulations will remain subject to the applicable municipal wetland regulations in effect when the application was filed or

granted approval. The city or town, however, will have discretion to waive its existing setbacks. R.I.G.L. § 45-24-30(16)(c).

§ 10.3 OTHER MUNICIPAL ENVIRONMENTAL REGULATIONS

Although wetlands regulations are now uniform, municipal and state authorities continue to exercise concurrent jurisdiction over other areas of environmental law, such as storm water, groundwater, and solid waste management.

§ 10.3.1 Soil Erosion and Sediment Control

Most towns and cities have regulations to address soil erosion, sediment control, illicit discharge detection and elimination, and postconstruction storm water management. Pursuant to R.I.G.L. § 45-46-2, municipalities are authorized to adopt ordinances to control erosion and sedimentation and prevent resulting damage.

Municipal ordinances regulating erosion and sediment control must incorporate the provisions of the model ordinance provided in R.I.G.L. § 45-46-5. Among these provisions is a requirement that erosion and sediment control plans submitted to the municipality conform to guidelines prepared by the U.S. Department of Agriculture's Natural Resources Conservation Service (formerly the U.S. Soil Conservation Service), RIDEM, and the Rhode Island Conservation Commission. A sample municipal ordinance regulating soil erosion and sediment control is included as **Exhibit 10B**.

§ 10.3.2 Storm Water Management

Municipalities are also authorized to regulate storm water management. Rhode Island General Laws § 45-61-4 authorizes city and town councils to enact ordinances that create storm water management districts with the authority to, among other things, establish and assess fees, prepare long-range master plans for storm water management, and maintain and retrofit existing structures within the district.

Additionally, cities or towns that operate a "municipal separate storm sewer system" (MS4) are required by state regulation to implement and enforce a program regulating construction-site storm water runoff from new development and redevelopment projects wherever an acre of land is disturbed. RIDEM Office of Water Resources, Regulations for the Rhode Island Pollutant Discharge Elimination System (RIPDES), Rule 31(c). Operators of an MS4 must use ordinances or other regulatory mechanisms to address postconstruction runoff from new development and redevelopment projects to the extent allowable under state or local law. RIPDES Rule 31(e)(ii)(D)–(E).

In addition to compliance with municipal zoning or ordinance requirements, certain storm water discharges require a RIPDES permit issued by RIDEM. A RIPDES permit is required for

- storm water discharges associated with industrial activity,

- small construction activity,
- discharges from an MS4,
- discharges for which the last permit was issued prior to February 4, 1987, and
- discharges designated by the RIDEM director or the EPA regional administrator.

RIPDES Rule 31(a)(1).

A sample municipal ordinance regulating postconstruction storm water management is included as **Exhibit 10C**.

§ 10.3.3 Groundwater Regulation

Municipalities may also adopt groundwater regulations and designate groundwater protection districts pursuant to the Zoning Enabling Act, R.I.G.L. §§ 45-24-33(a)(7), (a)(20). More specifically, the Zoning Enabling Act provides that an express purpose of municipal zoning ordinances is to control and abate groundwater pollution. R.I.G.L. § 45-24-30(4). Municipalities are authorized to establish permitting related to groundwater quality. R.I.G.L. § 45-24-33(3).

At least four municipalities—South Kingstown, North Kingstown, Exeter, and Warwick—have enacted ordinances regulating groundwater protection districts. Pursuant to R.I.G.L. § 45-24-33(a)(7), municipalities may designate "special protection areas for water supply and limiting or prohibiting development in these areas, except as otherwise provided by state statute."

A municipality's designation of a groundwater protection zone may also trigger RIDEM's regulatory jurisdiction. *See* R.I.G.L. § 23-18.9-9.1(b)(7) (prohibiting solid waste landfill facilities in "water protection areas designated by duly adopted zoning ordinances" and approved by the Water Resources Board); *Hometown Props. v. R.I. Dep't of Envtl. Mgmt.*, 592 A.2d 841, 845 (R.I. 1991) (reversing RIDEM's denial of a license to expand a landfill allegedly sited over a groundwater reservoir recharge area because the town did not properly designate the site as a groundwater protection area).

A sample municipal ordinance establishing a groundwater protection zone is included as **Exhibit 10D**.

§ 10.3.4 State Preemption of Municipal Regulations

State laws with statewide applicability will preempt municipal ordinances addressing the same subject if "the legislature intended that they thoroughly occupy the field." *Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 109 (R.I. 1992).

Certain Rhode Island statutes authorizing state agencies to adopt environmental regulations or issue environmental approvals provide for concurrent jurisdiction with municipal authorities, either expressly or by inference. In some instances, the CRMC shares concurrent jurisdiction with municipalities by providing that local approvals

must be obtained before the CRMC's approval is deemed effective. *Ocean Road Partners v. State*, 612 A.2d 1107, 1112–13 (R.I. 1992) (holding that CRMC approval was insufficient to permit a beachfront development to commence when a local zoning approval expired).

Other environmental statutes and regulations expressly state that the applicable state agency shall have exclusive authority to regulate a certain subject or jurisdictional area. Section 46-23-6(2)(ii)(A) of the Rhode Island General Laws, for instance, provides that "the [CRMC] shall have *exclusive jurisdiction* below mean high water for all development, operations, and dredging, consistent with the requirements of chapter 6.1 of this title and except as necessary for the department of environmental management to exercise its powers and duties and to fulfill its responsibilities." The Rhode Island Supreme Court has interpreted this language to mean that the general assembly intended to preempt all municipal regulation of development below the mean high-water mark. *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1169 (R.I. 2003). Municipal regulation of such activities is preempted regardless of whether the "regulatory activity . . . [is] disruptive or otherwise inconsistent with the state's regulatory scheme." *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d at 1169. (citing *Town of E. Greenwich v. Narragansett Elec. Co.*, 651 A.2d 725, 729 (R.I. 1994)).

Where the general assembly has expressly delegated certain regulatory power to municipalities and this delegation conflicts with the jurisdiction granted to the state, the courts will endeavor to read the conflicting provisions harmoniously. *Local 400, Int'l Fed'n of Tech. & Prof. Eng'rs v. R.I. State Labor Relations Bd.*, 747 A.2d 1002, 1004 (R.I. 2000).

The author thanks Rhiannon A. Campbell, Alexa T. Millinger, and Jessica Y. Wang for their assistance in the preparation of this chapter.

EXHIBIT 10A—Environmental Land Usage Restriction

This Declaration of Environmental Land Usage Restriction ("Restriction") is made on this _____ day of _____, 20___ by **[property owner]**, and its successors and/or assigns (hereinafter, the "Grantor").

WITNESSETH:

WHEREAS, the Grantor _____ (name) is the owner in fee simple of certain real property identified as **[specify Plat, Lot(s), address and Town or City]** Rhode Island (the "Property"), more particularly described in Exhibit A (Legal Description) which is attached hereto and made a part hereof;

WHEREAS, the Property (or portion thereof identified in the Class I survey which is attached hereto as Exhibit 2A and is made a part hereof) has been determined to contain soil and/or groundwater which is contaminated with certain **[hazardous materials and/or petroleum] in excess of applicable [residential or industrial/commercial direct exposure criteria, and/or applicable groundwater objectives]** criteria pursuant to the *Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases ("Remediation Regulations"*);

WHEREAS, the Grantor has determined that the environmental land use restrictions set forth below are consistent with the regulations adopted by the Rhode Island Department of Environmental Management ("Department") pursuant to R.I.G.L. § 23-19.14-1 et seq.;

WHEREAS, the Department's written approval of this Restriction is contained in the document entitled: **[Remedial Decision Letter/Settlement Agreement/Order of Approval/Remedial Approval Letter]** issued pursuant to the Remediation Regulations;

WHEREAS, to prevent exposure to or migration of **[hazardous materials and/or petroleum]** and to abate hazards to human health and/or the environment, and in accordance with the **[Remedial Decision Letter/Settlement Agreement/Order of Approval/Remedial Approval Letter]**, the Grantor desires to impose certain restrictions upon the use, occupancy, and activities of and at the **[Property/Contaminated Site]**;

WHEREAS, the Grantor believes that this Restriction will effectively protect public health and the environment from such contamination; and

WHEREAS, the Grantor intends that such restrictions shall run with the land and be binding upon and enforceable against the Grantor and the Grantor's successors and assigns.

NOW, THEREFORE, Grantor agrees as follows:

A. Restrictions Applicable to the [Property/Contaminated Site]: In accordance with the **[Remedial Decision Letter/Settlement Agreement/Order of Approval/**

Remedial Approval Letter], the use, occupancy and activity of and at the **[Property/Contaminated Site]** is restricted as follows:

i No residential use of the **[Property/Contaminated Site]** shall be permitted that is contrary to Department approvals and restrictions contained herein;

ii No groundwater at the **[Property/Contaminated Site]** shall be used as potable water;

iii No soil at the **[Property/Contaminated Site]** shall be disturbed in any manner without written permission of the Department's Office of Waste Management, except as permitted in the Remedial Action Work Plan (RAWP) or Soil Management Plan (SMP) approved by the Department in a written approval letter dated _____(date) Exhibit B and attached hereto;

iv [Humans engaged in activities at the **[Property/Contaminated Site]** shall not be exposed to soils containing hazardous materials and/or petroleum in concentrations exceeding the applicable Department approved direct exposure criteria set forth in the *Remediation Regulations*];

v [Water at the **[Property/Contaminated Site]** shall be prohibited from infiltrating soils containing hazardous materials and/or petroleum in concentrations exceeding the applicable Department approved leachability criteria set forth in the **Remediation Regulations**];

vi [No subsurface structures shall be constructed on the **[Property/Contaminated Site]** over groundwater containing hazardous materials and/or petroleum in concentrations exceeding the applicable Department approved GB Groundwater Objectives set forth in the *Remediation Regulations*];

vii [The engineered controls at the **[Property/Contaminated Site]** described in the **[RAWP or SMP]** contained in Exhibit B attached hereto shall not be disturbed and shall be properly maintained to prevent humans engaged in **[residential or industrial/commercial]** activity from being exposed to soils containing hazardous materials and/or petroleum in concentrations exceeding the applicable Department-approved **[residential or industrial/commercial]** direct exposure criteria in accordance with the *Remediation Regulations*]; and

viii [The engineered controls at the **[Property/Contaminated Site]** described in the **[RAWP or Soil Management Plan SMP]** contained in Exhibit B attached hereto shall not be disturbed and shall be properly maintained so that water does not infiltrate soils containing hazardous materials and/or petroleum in concentrations exceeding the applicable Department-approved leachability criteria set forth in the *Remediation Regulations*.]

B. No action shall be taken, allowed, suffered, or omitted at the [Property/Contaminated Site] if such action or omission is reasonably likely to:

i Create a risk of migration of hazardous materials and/or petroleum;

ii Create a potential hazard to human health or the environment; or

iii Result in the disturbance of any engineered controls utilized at the **[Property/ Contaminated Site]**, except as permitted in the Department-approved **[RAWP or SMP]** contained in Exhibit B.

C. Emergencies: In the event of any emergency which presents a significant risk to human health or to the environment, including but not limited to, maintenance and repair of utility lines or a response to emergencies such as fire or flood, the application of Paragraphs A (iii.-viii.) and B above may be suspended, provided such risk cannot be abated without suspending such Paragraphs and the Grantor complies with the following:

i Grantor shall notify the Department's Office of Waste Management in writing of the emergency as soon as possible but no more than three (3) business days after Grantor's having learned of the emergency. (This does not remove Grantor's obligation to notify any other necessary state, local or federal agencies.);

ii Grantor shall limit both the extent and duration of the suspension to the minimum period reasonable and necessary to adequately respond to the emergency;

iii Grantor shall implement reasonable measures necessary to prevent actual, potential, present and future risk to human health and the environment resulting from such suspension;

iv Grantor shall communicate at the time of written notification to the Department its intention to conduct the emergency response actions and provide a schedule to complete the emergency response actions;

v Grantor shall continue to implement the emergency response actions, on the schedule submitted to the Department, to ensure that the **[Property/Contaminated Site]** is remediated in accordance with the Remediation Regulations (or applicable variance) or restored to its condition prior to such emergency. Based upon information submitted to the Department at the time the ELUR was recorded pertaining to known environmental conditions at the **[Property/Contaminated Site]**, emergency maintenance and repair of utility lines shall only require restoration of the **[Property/Contaminated Site]** to its condition prior to the maintenance and repair of the utility lines; and

vi Grantor shall submit to the Department, within ten (10) days after the completion of the emergency response action, a status report describing the emergency activities that have been completed.

D. Release of Restriction; Alterations of Subject Area: The Grantor shall not make, or allow or suffer to be made, any alteration of any kind in, to, or about any portion of the **[Property/Contaminated Site]** inconsistent with this Restriction unless the Grantor has received the Department's prior written approval for such alteration. If the Department determines that the proposed alteration is significant,

the Department may require the amendment of this Restriction. Alterations deemed insignificant by the Department will be approved via a letter from the Department. The Department shall not approve any such alteration and shall not release the **[Property/Contaminated Site]** from the provisions of this Restriction unless the Grantor demonstrates to the Department's satisfaction that Grantor has managed the **[Property/Contaminated Site]** in accordance with applicable regulations.

E. Notice of Lessees and Other Holders of Interests in the [Property/Contaminated Site]: The Grantor, or any future holder of any interest in the **[Property/Contaminated Site]**, shall cause any lease, grant, or other transfer of any interest in the **[Property/Contaminated Site]** to include a provision expressly requiring the lessee, grantee, or transferee to comply with this Restriction. The failure to include such provision shall not affect the validity or applicability of this Restriction to the **[Property/Contaminated Site]**.

F. Enforceability: If any court of competent jurisdiction determines that any provision of this Restriction is invalid or unenforceable, the Grantor shall notify the Department in writing within fourteen (14) days of such determination.

G. Binding Effect: All of the terms, covenants, and conditions of this Restriction shall run with the land and shall be binding on the Grantor, its successors and assigns, and each owner and any other party entitled to control, possession or use of the **[Property/Contaminated Site]** during such period of ownership or possession.

H. Inspection & Non-Compliance: It shall be the obligation of the Grantor, or any future holder of any interest in the **[Property/Contaminated Site]**, to provide for annual inspections of the **[Property/Contaminated Site]** for compliance with the ELUR in accordance with Department requirements.

[An officer or director of the company with direct knowledge of past and present conditions of the [Property/Contaminated Site] (the "Company Representative"), or] A qualified environmental professional will, on behalf of the Grantor or future holder of any interest in the **[Property/Contaminated Site]**, evaluate the compliance status of the **[Property/Contaminated Site]** on an annual basis. Upon completion of the evaluation, the **[Company Representative or]** environmental professional will prepare and simultaneously submit to the Department and to the Grantor or future holder of any interest in the **[Property/Contaminated Site]** an evaluation report detailing the findings of the inspection, and noting any compliance violations at the **[Property/Contaminated Site]**. If the **[Property/Contaminated Site]** is determined to be out of compliance with the terms of the ELUR, the Grantor or future holder of any interest in the **[Property/Contaminated Site]** shall submit a corrective action plan in writing to the Department within ten (10) days of receipt of the evaluation report, indicating the plans to bring the **[Property/Contaminated Site]** into compliance with the ELUR, including, at a minimum, a schedule for implementation of the plan.

In the event of any violation of the terms of this Restriction, which remains uncured more than ninety (90) days after written notice of violation, all Department approvals and agreements relating to the **[Property/Contaminated Site]** may be voided at the sole discretion of the Department.

I. Terms Used Herein: The definitions of terms used herein shall be the same as the definitions contained in Section 3 (DEFINITIONS) of the Remediation Regulations.

IN WITNESS WHEREOF, the Grantor has hereunto set (his/her) hand and seal on the day and year set forth above.

[Name of person(s), company, LLC or LLP]

By: _____ _____

Grantor (signature) Grantor (typed name)

STATE OF RHODE ISLAND

COUNTY OF _____

In (CITY/TOWN), in said County and State, on the _____ day of _____, 20__, before me personally appeared _____, to me known and known by me to be the party executing the foregoing instrument and (he/she) acknowledged said instrument by (him/her) executed to be (his/her) free act and deed.

Notary Public: _____

My Comm. Expires: _____

EXHIBIT 10B—Sample Soil Erosion Control Ordinance

Narragansett, Rhode Island Code of Ordinances, App. B § XIII.F

F. Erosion and sediment control.

All major land developments and major subdivisions shall submit a soil erosion and sediment control plan as required herein. Minor land developments, minor subdivisions and administrative subdivisions may not be required to submit a soil and sediment control plan unless such a plan has been determined by the planning board to be necessary. In making such a determination, the planning board shall consider site characteristics such as the topography and slope, soil conditions, the proposed grading and drainage system, the degree of proposed site disturbance and proximity to waterbodies and wetlands. A soil and sediment control plan may be required if the planning board determines that the proposed development may cause soil erosion and sedimentation impacts if uncontrolled.

1. *Plan preparation.* The erosion and sediment control plan shall be prepared by a registered engineer, a registered landscape architect, a soil and water conservation society certified erosion and sediment control specialist, or a certified professional soil scientist.

2. *Plan contents.* The erosion and sediment control plan shall include sufficient information about the proposed activities and land parcel(s) to form a clear basis for discussion and review and to ensure compliance with all applicable requirements of these regulations. The plan shall be consistent with the data collection, data analysis, and plan preparation guidelines in the current Rhode Island Soil Erosion and Sediment Control Handbook, prepared by the U.S. Department of Agriculture, Soil Conservation Service, R.I. Department of the Environment, R.I. Conservation Committee, and at a minimum, shall contain:

a. A narrative describing the proposed land disturbing activity and the soil erosion and sediment control measures and stormwater management measures to be installed to control erosion that could result from the proposed activity. Supporting documentation, such as a drainage area, existing site conditions, and soil maps shall be provided as required by the planning board.

b. Construction drawings illustrating in detail all land disturbing activity including existing and proposed contours, cuts and fills, drainage features, and vegetation; limits of clearing and grading, the location of soil erosion and sediment control and stormwater management measures, detail drawings of control measures; stockpiles and borrow areas; sequence and staging of land disturbing activities; and other information needed for construction.

c. Other information or construction plans and details as deemed necessary by the planning board for thorough review of the plan prior to action being taken as prescribed in these regulations.

3. *Performance principles.* The contents of the erosion and sediment control plan shall clearly demonstrate how the principles, outlined below, have been met in the design and are to be accomplished by the proposed development project. The Rhode Island Soil Erosion and Sediment Control Handbook, as amended, shall be followed as a guide whenever practicable.

a. The site selected shall show due regard for natural drainage characteristics and topography. Land clearing and the removal of existing vegetation shall be kept to a minimum.

b. To the extent possible, steep slopes shall be avoided.

c. The grade of slopes created shall be minimized.

d. Postdevelopment runoff rates should not exceed predevelopment rates, consistent with other stormwater requirements which may be in effect. Any increase in stormwater runoff shall be retained and recharged as close as feasible to its place of origin by means of detention ponds or basins, seepage areas, subsurface drains, porous paving, or similar techniques.

e. Original boundaries, alignment, and slope of watercourses within the project locus shall be preserved to the greatest extent feasible.

f. In general, drainage shall be directed away from structures intended for human occupancy, municipal or utility use, or similar structures.

g. All drainage provisions shall be of such a design and capacity so as to adequately handle stormwater runoff, including runoff from tributary upstream areas which may be outside the locus of the project.

h. Drainage facilities shall be installed as early as feasible prior to any additional site clearance or disturbance.

i. Fill located adjacent to watercourses shall be suitably protected from erosion by means of rip-rap, gabions, retaining walls, vegetative stabilization, or similar measures.

j. Temporary vegetation and/or mulch shall be used to protect bare areas and stockpiles from erosion during construction; the smallest areas feasible shall be exposed at any one time; disturbed areas shall be protected during the nongrowing months, November through March.

k. Permanent vegetation shall be placed immediately following fine grading.

l. Trees and other existing vegetation shall be retained whenever feasible; the area within the dripline shall be fenced or roped off to protect trees from construction equipment. Land clearing and the removal of vegetation for the construction of roads and structures, or the future sale of house lots shall not take place until preliminary approval of the land development or subdivision plan

has been granted by the planning board. Only selective removal of existing vegetation for the evaluation of land development or subdivision feasibility will be permitted prior to preliminary plan approval.

m. All areas damaged during construction shall be resodded, reseeded, or otherwise restored. Monitoring and maintenance schedules, where required, shall be predetermined.

4. *Maintenance of measures.* Maintenance of all erosion-sediment control devices under this ordinance shall be the responsibility of the subdivider. The erosion-sediment control devices shall be maintained in good condition and working order on a continuing basis until no longer needed. Watercourses originating and located completely on private property shall be the responsibility of the subdivider to their point of open discharge at the property line or at a communal watercourse within the property. If proper maintenance procedures are not followed, the planning board may authorize the administrative officer to take the steps necessary to ensure proper maintenance by using improvement guarantee funds as provided in section VII.

5. *Periodic inspections.* The director of public works may require inspections at such intervals as he/she may deem necessary to assure proper compliance with the approved erosion and sediment control plan. Copies of all inspection reports shall be made available to the subdivider upon request.

EXHIBIT 10C—Sample Storm Water Ordinance

East Providence Code of Ordinances § 19-455. Drainage/erosion standards

(a) Purpose and objectives. The purpose of this section is to promote the design of developments which effectively control the impacts of erosion, inadequate drainage and stormwater runoff. Effective drainage, site design techniques and erosion control can accomplish the following:

(1) Reduce nonpoint source pollutants generated from erosion of sediments and stormwater runoff;

(2) Prevent damage to private and public property from flooding caused by poor drainage system design;

(3) Improve surface water and groundwater quality by minimizing runoff volumes and peak discharge rates, and by promoting the overland flow and infiltration of uncontaminated runoff;

(4) Minimize the negative impacts of stormwater runoff to enhance and protect surface and groundwater quality, and promote effective flood management;

(5) Through vegetative root systems, stabilize groundwater tables and play an important part in soil conservation, erosion control and flood control.

(b) Soil erosion and sedimentation. Soil erosion and sediment runoff shall be adequately controlled during and after construction and shall not adversely affect adjacent or neighboring properties, surface water and groundwater, or public facilities and services.

(c) Drainage standards.

(1) Drainage system. All developments shall be provided with a drainage system that is adequate to prevent the undue retention of surface water on the development site. Surface water shall not be regarded as unduly retained if:

> a. The retention results from a technique, practice or device installed as part of an approved sedimentation or stormwater runoff control plan; or
>
> b. The retention is not substantially different in location or degree than that experienced by the development site in its predevelopment stage, unless such retention presents a danger to health or safety.

(2) No surface water may be channeled or directed into a sanitary sewer.

(3) To the maximum extent practicable, all development shall conform to the natural contours of the land and natural and preexisting manmade drainageways shall remain undisturbed.

(4) Whenever practicable, the drainage system of development shall coordinate with and connect to the drainage system or drainageways on surrounding properties or streets.

(5) In areas where a comprehensive watershed drainage study has been performed, the DPR committee may require, based on preliminary review of plans, that a proposed drainage system be subject to an independent engineering evaluation, performed by a qualified engineering consultant. Such evaluation shall be performed by the developer and results of the evaluation shall be provided to the DPR committee to establish that soil drainage conditions can support the proposed drainage system. The costs of such an evaluation shall be borne by the developer. A written report of such evaluation shall be provided to the developer. The consultant shall be selected upon consultation with the developer and upon the joint review and approval of the proposed scope of work and cost estimate.

(6) Drainage systems shall be designed so that there will be no increase in the rate of runoff from the post-development site as compared to the predevelopment site based on an assumption of a predevelopment site condition of vacant land. The DPR committee may modify the requirement for an assumption of a predevelopment site condition of vacant land, provided that the applicant demonstrates to the satisfaction of the DPR committee that special site and drainage conditions so warrant, and that there will be no adverse impacts on off-site drainage or water quality.

(7) The city prefers that use of underground systems for drainage retention or detention purposes because of safety and maintenance considerations. Aboveground drainage retention or detention systems shall be permitted where the applicant demonstrates, to the satisfaction of the DPR committee that special site and drainage conditions so warrant, and provided the standards and conditions of the DPR committee regarding such aboveground drainage retention or detention systems are fully met. Such retention or detention systems shall be appropriately landscaped or buffered.

(8) Underground or aboveground detention or retention basins shall be designed to accommodate a minimum 25-year storm. For any detention or retention systems proposed to be located within special flood hazard zones (as defined by the Federal Emergency Management Agency's flood insurance rate map and flood boundary and floodway map, as may be amended), such systems shall be designed to accommodate a minimum 100-year storm.

For all retention or detention basins, whether aboveground or underground, percolation tests and test pits shall be performed at the proposed site of the basin in accordance with the requirements of the city engineer. This information will determine the suitability of the subsurface to accommodate the designed basin. The maximum high groundwater (HGW) level shall also be determined at the location of any proposed detention or retention basins. The HGW level shall be determined between January and April. If the HGW level is not determined between January and April a registered professional engineer shall estimate and certify the maximum HGW.

(9) When retention or detention basins, oil and water separators, or drainage swales are proposed to be incorporated in the drainage system with the approval of the DPR committee, such facilities shall be maintained by the developer or successor property owners in accordance with maintenance guidelines established by the DPR committee upon final approval. Failure to properly maintain such facilities shall result in an expense imposed by the city to be legally established as a lien against the property. If the city agrees to accept maintenance, the developer shall deposit funds with the city in sufficient amount to cover projected maintenance needs for a 20-year period.

(10) Stormwater management. All developments shall be constructed and maintained such that adjacent or neighboring properties are not unreasonably burdened with surface waters as a result of such developments. More specifically:

a. No development may be constructed or maintained such that development unreasonably impedes the natural flow of water from higher adjacent or neighboring properties across such development, thereby unreasonably causing substantial damage to such higher adjacent or neighboring properties;

b. No development may be constructed or maintained such that surface waters from the development are unreasonably collected and channeled onto lower adjacent or neighboring properties at such locations or at such volumes as to cause substantial damage to such properties. The drainage plan shall address potential impacts on downstream property based on a 25-year storm. Off-site analysis shall be included in the drainage plan when required by the DPR committee; and

c. Storm drains shall be designed based on a ten-year storm design.

(11) Impermeable surface coverage.

a. Impermeable surfaces. For the purposes of calculating the amount of impermeable surface coverage, impermeable surfaces shall include all roads, driveways, parking areas, buildings, decking, rooftop landscapes and other impermeable construction covering the natural landscape. Swimming pool surface water areas for pools which discharge to the storm drainage system shall also be included. Water quality and detention basins, swales, and conveyances for drainage purposes only shall be calculated as impervious cover.

b. Amount permitted. The maximum amount of the site that may be covered by an impermeable surface shall be determined by adding 20 percent of the site area to the maximum percent of lot building coverage established in schedules in sections 19-145 and 19-146, as applicable, of the zoning ordinance. For developments located near (within 200 feet of surface waters which are sensitive to runoff impacts, or for any developments from which runoff is discharged into any wetland or coastal feature, as defined by the state department of environmental management or the RI CRMC, the DPR committee may require a reduction of up to ten percent of the maximum allowable area of impermeable surface in order to mitigate the potential impact to the surface waters or wetland system. For devel-

opments located near wetlands or coastal features, compliance with requirements imposed by the DPR committee shall not remove the need to obtain appropriate state or federal approvals and to comply with any associated conditions.

c. Design. Applicants shall integrate the location of permeable surfaces with the overall drainage plan for the site. Natural buffer strips should be maintained adjacent to surface waters. Where this is not possible, vegetative filter strips, using seed mixtures recommended for this purpose and which require minimal or no fertilization should be used.

d. Parking areas. For developments located near surface waters, or for any developments from which runoff is discharged into any wetland, the DPR committee may permit the use of permeable paving materials for surfacing parking areas, provided adequate provisions have been made for delineation of parking spaces and for maintenance. It is the intent of this section that permeable surface areas shall be landscaped, and use of permeable paving materials for parking areas shall be permitted only where warranted by water quality and drainage enhancement considerations.

EXHIBIT 10D—Sample Groundwater Ordinance

Town of South Kingstown Code of Ordinances, App. A, § 602

602.1. *Establishment of district.* There is hereby established a Groundwater Protection Overlay District (GPOD) which shall be the area defined as lots of record which are indicated as the GPOD on the Official Zoning Map of the Town of South Kingstown. The GPOD is superimposed over any other zoning district established by this Ordinance. The regulations imposed by the GPOD shall apply in addition to the regulations of the underlying zoning district. In the event of a conflict or inconsistency between the regulations imposed by the GPOD and those imposed by the underlying zoning district, the regulations imposed by the GPOD shall govern.

602.2. *Purposes.* The purposes of this section are to protect, preserve and maintain the quality and supply of certain groundwater reservoirs in the Town of South Kingstown through regulation of land use and certain activities in the areas over the groundwater reservoirs and critical portions of their groundwater recharge area. It is further the intent of this section to permit the use of land within the GPOD for agricultural purposes, and to encourage the use of farmland in a manner which is consistent with protection of surface and groundwater resources.

602.3. *Delineation of districts.* The Groundwater Protection Overlay District is intended to regulate uses within the following areas:

A. Groundwater reservoirs are the highest yielding portions of the state's stratified drift aquifers (saturated thickness greater than 40 feet and transmissivity greater than 4,000 feet squared per day) that are capable of serving as a significant source of public supply; and

B. Critical portions of the recharge areas to the above groundwater reservoirs, as defined by the Rhode Island Department of Environmental Management (RIDEM) as groundwater classified as GAA; and that portion of the Beaver-Pasquiset recharge area within South Kingstown; and

C. Area adjacent to Factory Pond defined by RIDEM as the area of contribution to existing public water supplies.

602.4. *References.* Identification of areas within the GPOD have been made by reference to maps and studies prepared by the following:

A. Ground-Water Resources of the Kingston Quadrangle, Rhode Island, by the Rhode Island Development Council, Geological Bulletin No. 9, 1956.

B. Availability of Ground Water, Upper Pawcatuck River Basin, Rhode Island, Geological Survey Water-Supply Paper 1821, prepared in cooperation with the Rhode Island Development Council and the Rhode Island Water Resources Coordinating Board, 1966.

C. Groundwater Quality Regulations, materials used in the development of the Rhode Island DEM groundwater regulations, pursuant to Chapters 46-12, 46-13.1, 42-17.1 and 42-35 of the General Laws of Rhode Island, as amended.

D. Hydrology, Water Quality, and Groundwater Development Alternatives in the Chipuxet Groundwater Reservoir, R.I., U.S.G.S. Water Resources Investigation Report 84-4254. by Herbert E. Johnston and David C. Dickerman, 1985.

602.5. *Permitted and prohibited uses.*

A. All uses indicated in Section 301 as permitted uses (Y) and special permit uses (S) in the underlying zoning district are permitted or conditionally permitted in the Groundwater Protection Overlay District, with the exception of prohibited uses and activities as further provided in subsection B., below. Also permitted are uses or structures accessory to any permitted use.

B. The following principal uses and activities are prohibited in the GPOD:

1. Any use prohibited (N) in the underlying zoning districts;

2. General automotive service and repair shops, including repair to motorcycle, marine, aircraft, recreational vehicles, farm or lawn mowing equipment, or other similar vehicles and equipment. Included among these uses are establishments which sell, store, lease or rent such equipment and which include service and repair as accessory activities. Noncommercial repair work, or repair work incidental to a permitted use, is not prohibited.

3. Gasoline service stations (minor repairs only);

4. Automobile body shops;

5. Lawn and garden supply stores;

6. Welding shops, sheet metal shops, machine shops;

7. Automobile junk yards, junk and salvage yards of any type;

8. Fuel dealers, oil and bottled gas sales and service, and open lot storage of such fuels;

9. Metal plating, finishing and polishing, including jewelry manufacturing;

10. Dry cleaning plant (not including pick-up);

11. Beautician, barber or cosmetologist, except if serviced by public sewers;

12. Commercial wood preserving and furniture painting or refinishing;

13. On site photographic processing or printing;

14. Incinerators, sanitary landfill sites, solid waste disposal facilities, solid waste transfer stations, resource recovery or recycling facilities, injection wells, and hazardous waste management facilities;

15. Land disposal of septage or sewage sludge, including composted industrial sludge. Not prohibited is the application of wastewater treatment facility composted sludge, applied according to the Rhode Island Department of Environmental Management "Rules and Regulations Pertaining to the Treatment, Disposal, Utilization, and Transportation of Wastewater Treatment Facility Sludge," 1991.

16. All uses which involve the use, storage or generation of hazardous or toxic waste or materials or other toxic pollutants as defined herein. Provided, however, that minor or insignificant quantities of such materials may be stored on the premises of any lawful use, if, in the opinion of the Building Official, the presence of such substance does not constitute a potential for degradation of surface or groundwater resources in the area and such substance is contained in a suitable storage area. In making a determination of the presence of significant quantities of such materials, the Building Official shall obtain the written opinions of the Rhode Island Department of Environmental Management (DEM) Division of Air and Hazardous Materials, the Rhode Island DEM Division of Agriculture, or the Rhode Island Pesticide Coordinator, as applicable. Insignificant quantities of hazardous materials may be construed as that which is necessary for the operation of a farm, residence, office, or business including the operation of equipment, vehicles or other mechanical systems necessary for the operation of a permitted use;

17. Underground storage tanks as defined in Article 12 are prohibited. However, storage tanks used for storing home heating oil (No. 2 fuel oil) and serving a one- or two-household dwelling are permitted if the following conditions are met:

a. The tank capacity does not exceed 300 gallons (per dwelling unit); and

b. The tank is located in a basement or cellar, and is above the surface of the basement floor and the basement floor is constructed of concrete or contains a membrane liner capable of containing spills; or the tank is located above ground or in a basement having a dirt floor provided the following criteria are met:

i. Provision is made to protect the tank from the elements;

ii. Rust-proofing is applied to all tank surfaces;

iii. The tank shall be securely anchored; and

iv. The tank shall be placed onto a concrete foundation capable of supporting the tank, which foundation must be larger than the size

of the tank in length and width to prevent leaks onto pervious surfaces.

All storage tanks of 300 gallons capacity or greater and which are located above ground shall be governed by the provisions of subsection 602.6.B. Above ground storage tanks which exceed 10,000 gallons per lot are permitted only by the granting of a special use permit by the Zoning Board of Review. In reviewing said special use permit the Zoning Board shall require an applicant to submit a detailed report by a qualified specialist on the design and construction of storage tanks and containment devices, and shall consider the potential impact on groundwater in the event of leaks, spills, fires, maintenance, deliveries and other such activities and events;

18. Storage of road salt and deicing materials which are not covered by a roof and located on an impermeable base;

19. The parking of vehicles for the storage or delivery of fuel oil or other hazardous or toxic materials for a period exceeding two hours in any 24-hour period. This shall not prohibit the use of vehicles for delivery of fuels or for application of fertilizers, pesticides, or herbicides to any use permitted by this Ordinance;

20. Vehicle washing shop (including automatic);

21. Motor freight terminal;

22. Fish hatcheries;

23. Textile Mill Products Manufacturing, Use Code 72, except assembly of finished textile products.

602.6. *Site design standards*. The following site design and construction standards shall be required for all new and substantially reconstructed uses, other than one or two-household residential uses within the GPOD, established after the effective date of this article. "Substantial reconstruction" shall mean the improvement, alteration or replacement of more than 30 percent of the floor area or land area of the existing use. Site design and construction standards shall follow, where applicable, the recommendations and guidelines as provided in the following documents: the Rhode Island Soil Erosion and Sediment Control Handbook, 1989, as amended; the Rhode Island Department of Environmental Management's Recommendations of the Stormwater Management and Erosion Control Committee Regarding the Development and Implementation of Technical Guidelines for Stormwater Management, 1988, as amended; and Controlling Urban Runoff: A Practical Manual for Planning and Designing Urban B.M.P.s, by the Metropolitan Washington Council of Governments, 1987, as amended.

A. Storage of hazardous or toxic waste or materials, where permitted, shall be located within a building having roofing, walls, and floor(s) constructed of such

materials as to render said building weather tight, so as to prevent leakage of such products or materials into or onto the ground.

B. Storage tanks for petroleum products or hazardous or toxic materials excluding portable fuel tanks for farm uses may be located outdoors provided they are located within a containment structure that has an impermeable base and surrounding dike. Such base and dikes shall be constructed of material which is both impermeable and compatible with the material being contained. At minimum, the structure shall be designed to contain 110 percent of total tank capacity. Such containment structures shall be covered to protect the tanks and prevent accumulation of precipitation within the dike. Where roofing is not practical, the containment structure shall be designed with an additional capacity sufficient to contain precipitation from a 25-year 24-hour rainfall event. Runoff from the containment shall be controlled by means of pumps, siphons or piping designed to eliminate discharge of contaminated water into the environment in the event of a spill, or have a drain valve which will allow clear stormwater to be manually released as needed.

C. Interior floor drains designed to permit fluid from any interior space to be discharged into or onto the ground shall be prohibited. Provided, however, that such interior floor drains may be permitted if designed to empty into an aboveground storage tank, capable of completely containing anticipated flows. Such tanks, if provided, shall also be subject to containment provisions specified in subsection 602.5.B.17., above.

D. Dumpsters which are used to store solid wastes shall be covered or located within a roofed area and have drain plugs intact. No washing or rinsing of dumpsters on-site shall occur.

E. Rainwater collected upon permanent roofing over 1,500 square feet in total area per lot shall be directed into dry wells, injection wells, or underground leaching galleys or otherwise diverted to a permeable ground surface, so as to encourage recharge of the ground water. Provided, however, that such rainwater shall not be mixed with stormwater runoff from any parking area, roadway, or area subject to contamination from any hazardous or toxic waste or material or petroleum product prior to discharge into or onto the ground.

F. Stormwater runoff from paved parking lots, public and private streets, loading areas, storage and operating areas, and other impervious surfaces subject to contamination from road deicing materials or petroleum products, shall be:

1. Collected and diverted through an oil/water separator prior to discharge to the environment; and/or

2. Collected and discharged into “wet” stormwater detention basins capable of achieving water quality enhancement of the runoff; and/or

3. Collected and discharged into extended detention dry basins; and/or

4. Diverted toward vegetated filter strips, swales, or riprap lined channels; and/or

5. Diverted into sand bed filters; and/or

6. Discharged or diverted to other stormwater management facility(s) designed to attenuate runoff and provide pollutant removal capabilities.

The procedure for review of stormwater runoff controls shall be as specified in subsection 505.1 of this Ordinance; provided, however, that said site plans shall also be submitted to the Conservation Commission for their site review and advisory opinion. The Planning Board shall have the authority to approve the design of all such stormwater runoff controls required under this section.

The above stormwater management requirements shall incorporate best management practices, as that term is used in "Controlling Urban Runoff: A Practical Manual for Planning and Designing Urban B.M.P.s", by the Metropolitan Washington Council of Governments, 1987, as amended, and be designed to be effective in pollutant removal sufficient to minimize harmful impacts to groundwater and surface water resources. They shall be commensurate with the size and nature of the proposed use; provided, however, that the following shall not be required to provide said stormwater management facilities:

a. Single- or two-household residential uses on a single lot; and

b. Streets serving a residential compound or minor subdivision approved by the Planning Board.

G. Garbage disposal systems (in sinks) shall be prohibited in areas not serviced by public sewers.

H. At least 20 percent of the area of each lot shall be covered with existing or introduced vegetation.

I. Commercial earth removal, as defined in Section 506 of this Ordinance, excluding construction necessary for new farm ponds, new drainage structures, and new farm roads, shall be subject to the following restrictions in the GPOD:

1. A minimum separation distance of three feet between the bottom of the excavation and the seasonal high water table, as verified by RIDEM, shall be maintained;

2. The installation and regular maintenance of permanent soil erosion and sediment control measures, as outlined in the Rhode Island Soil Erosion and Sediment Control Handbook, 1989, as revised, shall be required, including permanent revegetation of the land surface upon cessation of earth removal operations; and

3. The provisions of items 1. and 2. of this subsection as set forth above shall also be deemed to apply to earth removal activities conducted as part of an approved subdivision.

J. Any use which would utilize an individual sewage disposal system, or multiple systems, serving the same use, or combination of uses on a lot for which the total maximum daily design sewage flow exceeds 2,000 gallons per day shall be permitted, only upon the granting of a special use permit for such ISDS by the Zoning Board of Review. In reviewing said special use permit the Zoning Board shall require an applicant to submit a detailed report by a qualified specialist on the present water quality conditions and the potential impact to ground and surface waters from the proposed use, including the cumulative impacts of sewage discharge over an extended period of time.

602.7. *Maintenance of facilities*. All facilities constructed in accordance with subsection 602.6 shall be maintained by the owner so as to assure their ability to function as designed. Failure to properly maintain said facilities shall constitute a violation of this Ordinance, and is subject to enforcement action by the Town as provided in Article 9. As a condition of granting a building permit for any such facility, the Building Official is empowered to enter onto the premises in order to inspect said facilities for the purpose of determining their functionality.