

RHODE ISLAND LAWYERS WEEKLY

www.rilawyersweekly.com

Volume 39, Issue No. 20

\$8.00 per copy

May 14, 2018

Six-unit residence required to install 'backflow' device

Large enough to be
deemed 'commercial'

The Providence Water Supply Board can require properties with four units or more to have backflow prevention devices, a Superior Court judge has determined.

The plaintiff, the owner of a six-unit residential property, claimed to be exempt based on the Legislature's amendment to G.L. §46-13-22(b), which removed the requirement that cross-connection control devices be installed at residential service connections.

But Judge Brian P. Stern found that Providence Water's treatment of the plaintiff's property at 421 Pine St. as a "commercial" property was not unreasonable.

The 18-page decision is *421 Pine Street Realty, LLC v. Providence Water Supply Board, et al.*, Lawyers Weekly No. 61-041-18. The full text can be found at rilawyersweekly.com.

The full text of the ruling in
*421 Pine Street Realty,
LLC v. Providence
Water Supply Board,
et al.* can be found at
rilawyersweekly.com.

Matter of deference

John M. Verdecchia of Providence represented the plaintiff property owner. The defendants were represented by Leo J. Wold, Michael R. McElroy and Leah J. Donaldson, all of Providence. None of the lawyers could be reached for comment.

Providence attorney John M. Boehnert, a real estate practitioner who was not involved in the case, said Stern's decision was attributable to the deference owed to the agency under the Administrative Procedures Act.

"The APA involves a narrow scope of review," he pointed out.

Boehnert added that the standard of review is limited and the court cannot substitute its judgment.

"That doesn't mean there aren't other interpretations that would be reasonable," he said. "But the judge found that it wasn't unreasonable for the agency to interpret state law in the manner in which it did."

Boehnert noted the agency's rule that properties with four units or more are not residential and must have backflow devices.

"The agency's view is that this is investment property we're talking about, and therefore the owners can bear that burden," Boehnert stated.

Continued on page 13

IMPORTANT OPINIONS OF THE WEEK

Arbitration | Counsel fees

Defendants who obtained a court order requiring arbitration of a plaintiff's Copyright Act claims should not have been awarded counsel fees, as the defendants do not qualify as prevailing parties under the statute, the 1st U.S. Circuit Court of Appeals rules. [page 4](#)

Negligence | Hockey rink

The owner and operator of an ice rink were not entitled to summary judgment in a suit brought by a plaintiff who claimed that he became ill as a result of inhaling noxious fumes while playing in a hockey game there, the Rhode Island Supreme Court finds. [page 7](#)

Products liability | Asbestos

A defendant manufacturer should be awarded summary judgment based on an absence of evidence that the plaintiff's decedent had regular, frequent and proximate exposure to asbestos while aboard a U.S. Navy vessel, a Superior Court judge decides. [page 12](#)

Residence required to install 'backflow' device

Continued from page 1

Administrative appeal

421 Pine Street Realty, a single-member entity managed by plaintiff John Verdecchia, was informed by the Providence Water Supply Board that, under the "Cross-Connection Control Program," installation of a backflow preventer device was required. The plaintiff later was directed to install a reduced-pressure-zone backflow preventer.

On Oct. 4, 2012, the board issued a "Notice of Violation and Order of Penalty" to the plaintiff informing him that "421 Pine Street is in violation of the 'Public Drinking Water Protection' Act, Chapter 46-13-22 of the Rhode Island General Laws as amended, and the Rules and Regulations of the Providence Water Supply Board Cross Connection Program."

The plaintiff requested an exemption, which was denied.

On Sept. 5, 2013, the plaintiff filed an appeal with the Division of Public Utilities and Carriers. At a hearing, Peter McLaughlin, a manager and engineer in customer service for the Providence Water Supply Board, testified that the PWSB's recent policy required properties with four units or more to have backflow devices.

Jeffrey Lykins, director of the Providence Department of Inspections and Standards, stated that one- and two-family buildings are residential and buildings constructed for three or more families are commercial.

On May 5, 2014, the division denied the plaintiff's appeal, stating that it was unable to accept the plaintiff's argument that G.L. §46-13-22 prohibited Providence Water from requiring the installation of a backflow prevention device on his six-unit residential property by virtue of the property's residential nature.

Ambiguous terms

On appeal in Superior Court, the plaintiff-appellant made two main contentions. "First, the Appellant argues against the requirement of §46-13-22(b) to install a backflow valve device, because he believes the Property is exempt based on the Legislature amending §46-13-22(b) which removes the requirement that cross-connection control devices be installed at residential service connections," the judge wrote.

While conceding that the Legislature delegated its authority to Providence Water to develop regulations for the installation of backflow prevention devices, the plaintiff argued that the Legislature did not delegate the authority to any state agency, including the PWSB, to determine which category of property was exempt from the requirements of §46-13-22. That determination, the plaintiff argued, was reserved exclusively for the Legislature.

Because the General Assembly did not define the terms "residential" or "commercial" in §46-13-22 — and because the judge found those terms to be subject to

more than one reasonable interpretation — Stern deemed the terms "residential" and "commercial" to be ambiguous.



"The agency's view is that this is investment property we're talking about, and therefore the owners can bear that burden. What the judge is really saying is that the agency's rule was not clearly erroneous."

— John M. Boehnert, Providence

"Although the Division could have reasonably interpreted the distinction between the terms 'residential' and 'commercial' in an alternate manner, the Division chose a reasonable interpretation of these undefined terms," Stern said.

"Therefore, the Division's classification of the Property as a commercial property was not clearly erroneous in view of the reliable, probative, and substantive evidence on the whole record," the judge found.

The plaintiff went on to argue that the

action of Providence Water in requiring only those owners of properties of four units or more to install backflow prevention devices at their own expense constituted an illegal tax and violation of the Equal Protection Clause under both the state and federal constitutions.

Stern disagreed.

"The installation of a backflow preventer is not a monetary charge, nor is it intended to yield public revenue, as the definition of a tax may suggest," he stated.

"Here, the backflow preventer is required based on the parameters laid out in §46-13-22 pursuant to §9.4(a) of the 'Rules and Regulations Pertaining to Public Drinking Water' as a safety precaution," the judge said.

As for the equal protection issue, the plaintiff asserted that there was no rational basis for imposing the requirement of a cross-connection control device on a small percentage of rate payers.

"The Appellees provide that the installation of a cross-connection control device is a reasonable public utility requirement authorized by law to safeguard Providence Water's distribution system and to prevent contamination within the water system," Stern wrote.

"Therefore, the Court finds the Division's Order No. 21401 was not in violation of any constitutional or statutory provision," he concluded.

— THOMAS E. EGAN

TEGAN@LAWYERSWEEKLY.COM