

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHYLLIS PETERMAN,)
)
 Petitioner,)
)
 vs.) Case No. 97-4600
)
 DEPARTMENT OF HEALTH,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on February 9, 1999, in Bartow, Florida.

APPEARANCES

For Petitioner: Robert J. Antonello, Esquire
Antonello, Fegers and Cea
Post Office Box 7692
Winter Haven, Florida 33883-7692

For Respondent: Roland Reis, Esquire
Department of Health
1290 Golfview Avenue, 4th Floor
Bartow, Florida 33830-0293

STATEMENT OF THE ISSUE

Should Petitioner's application for variance from the standards for onsite sewage treatment and disposal systems be granted?

PRELIMINARY STATEMENT

On June 27, 1997, Petitioner made application for a permit for construction of an onsite sewage treatment and disposal system (OSTDS) with the Department of Health (Department) which was denied by letter dated July 16, 1997. The denial letter gave Petitioner the option of filing an application for variance from the standards for an onsite sewage treatment and disposal system or requesting a hearing on the denial of her application for the permit. Petitioner chose the option of filing an application for a variance. By letter dated August 7, 1997, the Department denied Petitioner's application for a variance. By letter dated August 25, 1997, Petitioner requested a formal hearing under Chapter 120, Florida Statutes, on the Department's denial of her application for variance.

By a Notice dated October 9, 1997, the Department referred this matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge and for the conduct of a hearing.

The matter was scheduled for hearing, but before the matter could be heard, the parties filed a joint Stipulation for Voluntary Dismissal Without Prejudice and the Division's file was closed by Order Closing File issued on March 2, 1998. On a Motion to Reopen File dated November 25, 1998, an Order Reopening File was issued on December 18, 1998, and the matter scheduled for hearing on February 9, 1999.

At the hearing, Petitioner testified on her own behalf but did not present any other witness. Petitioner's Composite Exhibit 1 was received as evidence. The Department presented the testimony of Mark Shaller. The Department's Exhibits 1-6 were received as evidence.

There was no transcript of this proceeding filed with the Division. The parties were granted an extension of time within which to file their proposed recommended orders with the understanding that the time constraint imposed under Rule 28-106.216(1), Florida Administrative Code, was waived in accordance with Rule 28-106.216(2), Florida Administrative Code. The parties timely filed their Proposed Recommended Orders under the extended time frame.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Department, through its local health units, is the agency in the State of Florida responsible for permitting or granting variances from permitting standards set forth in Chapter 64E-6, Florida Administrative Code, for Onsite Sewage Treatment and Disposal Systems (OSTDS).

2. Sometime around 1970, Petitioner purchased a mobile home park (Park) in Winter Haven, Florida. The Park presently contains 68 spaces for mobile homes, all of which are occupied.

3. The Park is situated due south of Lake Shipp. There are two canals running approximately east and west through the interior of the Park. Another canal borders the Park on the north side.

4. Included with the purchase of the Park was a Sewage Treatment System (STS) which is permitted and regulated by the Department of Environmental Protection and is presently operating at its maximum capacity serving the 68 mobile homes located in the Park.

5. Sometime around 1980, Petitioner purchased a parcel of land (Property) immediately north of, and across a canal (this is the canal that borders the north side of the Park) from, the Park. The Property borders a basin to Lake Shipp. The Property is zoned for mobile home usage and such is the purpose for which Petitioner purchased the Property.

6. Petitioner has designed the Property such that it will accommodate three mobile home lots (Lots numbered 69, 70, and 71) which Petitioner intends to operate as part of the Park.

7. Initially, Petitioner requested approval of the Department of Environmental Protection to connect the new lots to the existing STS. However, since the existing STS was already at capacity, the Department of Environmental Protection denied Petitioner's request to connect the additional three lots to that system. However, the Department of Environmental protection advised Petitioner that it would have no objection to the

installation of septic tanks approved by the Department of Health to serve the additional lots.

8. Subsequently, Petitioner proceeded to obtain the necessary approvals from the local governing authorities and a permit from the Department for the installation of septic tanks on the Property.

9. Petitioner was successful in obtaining the necessary approvals from the local governing authorities but was not successful in obtaining a permit for the installation of septic tanks on the Property from the Department. By letter dated July 16, 1997, the Polk County Health Department denied Petitioner's Application for Onsite Sewage Treatment Disposal System Permit for the following reason: "Domestic sewage flow exceeds 10,000 gallons per day."

10. The denial letter also advised Petitioner that she could request a variance through the Variance Review Board or request an administrative hearing pursuant to Chapter 120, Florida Statutes, on the Department's denial of her application for a permit to install septic tanks on the Property. Petitioner elected to file an application for a variance from Section 381.0065(3)(b), Florida Statutes, with the Variance Review Board.

11. By letter dated August 7, 1997, the Department denied Petitioner's application for variance for the following reasons:

The Variance Review and Advisory Committee
for the Onsite Sewage Treatment and Disposal

Program has recommended disapproval of your application for variance in the case of the above reference property. The granting of variances from established standards is for relieving hardships where it can be clearly shown that the public's health will not be impaired and where pollution of groundwater or surface water will not result, where no reasonable alternative exists, and where the hardship was not intentionally caused by the action of the applicant.

The advisory committee's recommendation was based on the failure of the information provided to satisfy the committee that the hardship was not caused intentionally by the action of the applicant, no reasonable alternative exists for the treatment of the sewage, or the discharge from the system will not adversely affect the health of the public.

I concur with the advisory committee's recommendation and hereby deny your variance request.

12. Subsequently, Petitioner requested and was granted a formal hearing pursuant to Chapter 120, Florida Statutes, on the denial of Petitioner's application for a variance.

13. The Petitioner intends to locate the OSTDS on the Property.

14. The tank and drain field for the OSTDS will be located approximately 125 feet from the basin.

15. The City of Winter Haven's Sewage System is not available to the Property.

16. The Park's existing STS does not have adequate capacity to accept the sewage that will be generated by the Property.

17. There is no publicly-owned or investor-owned sewage system capable of being connected to the plumbing of the Property.

18. Petitioner testified that the estimated cost of increasing the capacity of the Park's Sewage System to accommodate service to the three additional lots was \$30,000.00 - \$40,000.00. However, Petitioner presented no evidence as to how the estimate was determined.

19. The projected daily domestic sewage flow from the Property is less than 1,500 gallons per acre per day.

20. The Property contains 1.78 acres and there will be less than four lots per acre.

21. In a letter dated October 17, 1997, from W. R. Cover, a professional engineer with Cover Engineering, Inc., Mr. Cover expresses the following opinion:

The location of these proposed mobile homes is such that a septic system will not cause adverse effects or impacts on the environment or public health. The unit will be located so as not to significantly degrade groundwater or surface waters. There is no reasonable alternative for the treatment of the sewage in view of the fact that it would be an additional financial burden to attempt to connect these units to the existing sewage treatment plant

Mr. Cover did not testify at the hearing. However, the letter was received as evidence without objection from the Department.

22. Petitioner has failed to present sufficient evidence to show that: (a) no reasonable alternative exists for the

treatment of the sewage, and (b) the discharge from the Onsite Sewage Treatment and Disposal System will not adversely affect the health of the applicant or the public or significantly degrade groundwater or surface waters.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.57(1), Florida Statutes.

24. Sections 381.0065(1)(3)(b)(d) and (4)(g)1.2., Florida Statutes provide as follows:

(1) LEGISLATIVE INTENT.- It is the intent of the Legislature that where a publicly owned or investor-owned sewerage system is not available, the department shall issue permits for the construction, installation, modification, abandonment, or repair of onsite sewage treatment and disposal systems under conditions as described in this section and rules adopted under this section. It is further the intent of the Legislature that the installation and use of onsite sewage treatment and disposal systems not adversely affect the public health or significantly degrade the groundwater or surface waters.

* * *

(3) DUTIES AND POWERS OF THE DEPARTMENT OF HEALTH.- The department shall:

* * *

(b) Perform application reviews and site evaluations, issue permits, and conduct inspections and complaint investigations associated with the construction, installation, maintenance, modification, abandonment, or repair of an onsite sewage treatment and disposal system for a residence or establishment with an estimated domestic sewage flow of 10,000 gallons or less per day, or an estimated commercial sewage flow of 5,000 gallons or less per day, which is not currently regulated under chapter 403.

* * *

(d) Grant variances in hardship cases under the conditions prescribed in this section and rules adopted under this section.

* * *

(4) PERMITS; INSTALLATIONS; AND CONDITIONS.

* * *

(g)1. The department may grant variances in hardship cases which may be less restrictive than the provisions specified in this section. . . . A variance may not be granted under this section until the department is satisfied that:

a. The hardship was not caused intentionally by the action of the applicant;

b. No reasonable alternative, taking in consideration factors such as costs, exists for the treatment of the sewage; and

c. The discharge from the onsite sewage treatment and disposal system will not adversely affect the health of the applicant or the public or significantly degrade the groundwater or surface waters. . . .

2. The department shall appoint and staff a variance review and advisory committee, which shall meet monthly to recommend agency action on variance requests. . . . The committee shall consider the criteria in subparagraph 1. in its recommended agency action on variance requests and shall also strive to allow property owners the full use of their land where possible. (Emphasis furnished).

25. Rule 64E-6.002(21), Florida Administrative Code, provides as follows:

For the purposes of this Chapter, the following words and phrases shall have the meaning indicated:

* * *

(21) Establishment. A multi-family housing, apartment, condominium or townhouse complex, a mobile home park or recreational vehicle park, a non-residential commercial or institutional development or places of business or assembly. An establishment includes all buildings or structures and the land appertaining thereto and shall an owners

association or other legal entity which is responsible for maintenance and operation of the development's sewage treatment and disposal facilities. (Emphasis furnished).

26. In reviewing Petitioner's application for a permit to install septic tanks on the Property, the Department considered the Park and the Property as one mobile home park and thereby one establishment and determined that the estimated domestic sewage flow from that establishment exceeded the allowable domestic sewage flow of 10,000 gallons or less per day authorized by Section 381.0065(3)(b), Florida Statutes. Having made that determination, the Department then took the position that it was not authorized to issue the permit unless Petitioner requested and was granted a variance for the combined domestic sewage flow from the mobile home park to exceed the 10,000 gallons or less per day and denied the permit application.

27. The Department offered Petitioner the opportunity to either challenge its denial of the application by requesting an administrative hearing pursuant to Section 120.57, Florida Statutes, or to request a variance from the 10,000 gallons or less per day requirement from the Variance Review Board under Section 381.0065(4)(g)1.2., Florida Statutes. Petitioner elected to request a variance from the Variance Review Board and did not challenge the Department's position that the Property and the Park constituted a mobile home park and thereby was one establishment and that the combined flow of domestic sewage from that establishment exceeded the maximum flow of

domestic sewage authorized by Section 381.0065(3)(b), Florida Statutes.

28. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 2d DCA 1981). To meet this burden, the Petitioner must establish facts to show her entitlement to a variance from the requirements of Section 381.0065(3)(b), Florida Statutes, by a preponderance of evidence. Section 120.57(1)(h), Florida Statutes.

29. Although the Department did not object to Mr. Cover's letter being received into evidence, the fact remains that Mr. Cover's letter and his opinion are hearsay evidence and without more cannot form the basis for a finding of fact. Section 120.57(1)(c), Florida Statutes. There was no other evidence presented to show that the requirements of Section 381.0065(4)(g)1.b.c., Florida Statutes had been met. Therefore, assuming arguendo that Petitioner has shown that denying her the variance would create a hardship and that the hardship was not caused intentionally by Petitioner's action, she has failed to meet the requirements of Section 381.0065(4)(g)1.b.c., Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Health enter a

final order denying Petitioner's application for variance from the requirements of Section 381.0065, Florida Statutes and Chapter 64E-6, Florida Administrative Code.

DONE AND ENTERED this 30th day of March, 1999, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of March, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.