

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLETCHER C. BISHOP, JR.,)
)
 Petitioner,)
)
vs.) Case No. 98-0056
)
DEPARTMENT OF HEALTH,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 24, 1998, in Tavares, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert P. Jencic
 102 South Palm Avenue
 Howey in the Hills, Florida 34737

For Respondent: Marya Reynolds Latson, Esquire
 Post Office Box 2408
 Ocala, Florida 34478

STATEMENT OF THE ISSUE

The issue is whether Petitioner's request for a variance from agency rules governing daily domestic sewage flow so as to authorize an increase in the number of seats for his restaurant located in Howey in the Hills, Florida, should be approved.

PRELIMINARY STATEMENT

This matter began on December 4, 1997, when Respondent,

Department of Health, issued a letter denying a request by Petitioner, Fletcher C. Bishop, Jr., through his lessee, Robert P. Jencic, for a variance from the requirements of Chapter 64E-6, Florida Administrative Code, for property located in Howey in the Hills, Florida. Thereafter, Jencic requested a formal hearing to contest the proposed denial of his request.

The matter was referred by Petitioner to the Division of Administrative Hearings on January 8, 1998, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated January 27, 1998, a final hearing was scheduled on February 24, 1998, in Tavares, Florida.

At final hearing, Petitioner was represented by Robert P. Jencic, who currently leases the property and has a contract to purchase the property on March 1, 1998. Also, Petitioner presented the testimony of Andrew Patrick, who is the grandfather of Jencic's fiancée, and he offered Petitioner's Exhibit 1 which was received in evidence. Respondent presented the testimony of Roberta H. Gutting, an environmental supervisor for the Lake County Health Department; and David H. Hammonds, an environmental specialist for the Bureau of Onsite Sewage Programs of the Department of Health. Also, it offered Respondent's Exhibits A-F. All exhibits were received in evidence.

There is no transcript of hearing. Proposed findings of fact and conclusions of law were due by March 6, 1998. None were filed by either party. However, on March 4, 1998, Petitioner

submitted a letter with several documents identified as "Defense Exhibits A through H." This submission is discussed in the Conclusions of Law portion of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. Petitioner, Fletcher C. Bishop, Jr., is the owner of a parcel of property located at Lot 22, Block C-2, Lakeshore Heights Subdivision, 102 South Palm Avenue, Howey in the Hills, Florida. The property consists of .0946 acre, or approximately one-tenth of an acre, and is one of several parcels located in Block C-2. Since January 1997, the property has been leased to Robert P. Jencic, who now operates a pizza restaurant on the premises known as Hungry Howies Pizza Shop. According to Jencic, he has a contract to purchase the property from Bishop at the end of his lease, or on March 1, 1998. Whether the property was actually purchased by Jencic on that date is not of record.

2. Lakeshore Heights Subdivision is not served by a central wastewater treatment system; rather, each lot is served by a septic tank and drainfield system. Lot 22 adjoins several other commercial or business establishments situated on Lots 20, 21, 23, and 23A in the western half of Block C-2, and all share a common drainfield easement located to the rear of the lots. Except for Lot 20, all lots have tied into the drainfield and now

use the easement for waste disposal purposes. Because they share a common easement, each lot has been allocated a portion of the easement for its respective septic tank and drainfield. In Petitioner's case, he has been allocated approximately 990 square feet.

3. After Jencic signed a commitment in January 1997 to lease and purchase the property, he made extensive renovations in order to convert the property to a restaurant. On or about February 20, 1997, Jencic met with a representative of the Lake County Health Department, an agency under the direction and control of Respondent, Department of Health (Department). At that time, Jencic filed an application for a site evaluation concerning the replacement of the existing onsite sewage disposal system. The application noted that he intended to operate a pizza restaurant with 56 proposed seats.

4. On February 21, 1997, a site evaluation was conducted by Robin Gutting, a Lake County Department of Health environmental supervisor. According to her report

[t]he property size of 4120 square feet with available central water will allow a maximum 236 gallons of sewage flow per day . . . This will allow a 12 seat restaurant using single service articles and operating less than 16 hours per day. . . . The size of the Onsite Sewage Treatment and Disposal System would be a minimum 900 gallon tank with 197 square feet of drainfield trench configuration. (emphasis added)

Jancic received a copy of the report on or about March 12, 1997, and it clearly conveyed to him the fact that he could operate no more than 12 seats in his restaurant due to sewage flow limitations on his property.

5. Despite being on notice that the restaurant would be limited to only 12 seats due to the lot flow restrictions, on March 19, 1997, Jencic filed an application with the Lake County Health Department for a construction permit to replace the existing septic tank with a 900 gallon septic tank, install a 900 gallon grease trap, and utilize a 197 square-foot primary drainfield and a 200 square-foot bed system. The application indicated that Jencic intended to operate a restaurant "for 12 seats, single service, open less than 16 hours per day."

6. On May 28, 1997, Jencic's application was approved for "12 seats, single service, open less than 16 hours per day." After installing the new tank and grease trap, Jencic began restaurant operations subject to the above restrictions.

7. After operating his pizza restaurant for a short period of time, Jencic determined that he could generate a profit only if the restaurant could be expanded to allow more seats, and he could use china and silverware (full service articles) rather than single service articles (throwaway utensils). To do this, however, he would need a larger sewage treatment system.

8. By letter dated November 9, 1997, Jencic requested a variance from various Department standards for onsite sewage

treatment and disposal systems so as to "increase the seating from 12 seats to a maximum of 36 seats and [authorize] the use of china, silverware, and dishes." Although the letter does not refer to any rules, the Department has treated the letter as seeking a variance from three of its rules found in Part I, Chapter 64E-6, Florida Administrative Code.

9. First, Rule 64E-6.001(4)(c), Florida Administrative Code, provides that an establishment cannot exceed the lot flow allowances authorized under Rule 64E-6.005(7)(c), Florida Administrative Code. If the seating capacity in the restaurant were increased, Jencic would exceed the lot flow allowances in violation of this rule.

10. Second, Rule 64E-6.005(7)(b), Florida Administrative Code, prescribes the manner in which a determination of lot densities shall be made. Among other things, daily sewage flow cannot exceed an average of 2,500 gallons per day per acre. The easement which Petitioner shares with other lots is far less than an acre, even counting the space allocated to the adjoining lots.

11. Finally, Rule 64E-6.008(1), Florida Administrative Code, provides that minimum design flows for systems serving a structure shall be based on the estimated daily sewage flow as determined by Table I of the rule. That table specifies an estimated daily sewage flow of 20 gallons per seat for restaurants using single service articles only and operating less than 16 hours per day. Therefore, a 12-seat restaurant with

those operating characteristics would require a system that could handle at least 240 gallons of sewage flow per day. The table further provides that a restaurant operating 16 hours or less per day with full service will generate an estimated sewage flow of 40 gallons per seat. Thus, a restaurant with up to 36 seats, as Jencic has requested, would require a system handling at least 1,440 gallons of sewage flow per day.

12. In order to qualify for a variance, an applicant must show that (a) the hardship was not caused intentionally by the action of the applicant; (b) no reasonable alternative 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 significantly degrade the groundwater or surface waters. In its letter denying the variance, the Department asserts that Jencic has failed to show that items (a) and (c) have been satisfied.

13. Jencic, who recently immigrated to this country, will suffer considerable financial hardship if the request for a variance is denied. Indeed, he demonstrated at hearing that his life savings have been invested in the restaurant, and his parents have placed a substantial mortgage on their property to assist him in his endeavor. If he does not purchase the property as required by his contract, he will be forced to restore the property to its original condition at great expense. In short, given his investment in renovations and equipment, unless the

restaurant is expanded, he fears he must file for bankruptcy.

14. Both parties agree that Jancic will suffer a hardship if the variance is not approved. However, Jancic was aware of the lot flow limitations before he made application to replace the existing septic tank in March 1997, and well before he began operating the restaurant in May 1997. Unfortunately, then, it must be found that the hardship was intentionally created by Jancic's own actions.

15. If the variance were approved, it would result in a much larger amount of sewage being discharged into the easement, which could not handle that amount of flow. This in turn could cause the system to fail, thus creating a sanitary nuisance and the leaching of sewage into the groundwater. In this respect, Jancic has failed to show that the discharge will not adversely affect the health of the applicant or significantly degrade the groundwater or surface waters.

16. Jancic offered into evidence a summary of his water usage during a representative period in 1997. That document indicated that metered water usage was approximately 3,000 to 4,000 gallons per month, even when he temporarily (and without authority) expanded his restaurant to 24 seats during a recent two-month period to test water consumption at the higher seating capacity. However, because the sewage strength of a restaurant is far greater than that of a residence, a sewage system must be sized on estimated waste flow, and not metered water flow rates.

Therefore, the fact that Jancic's monthly metered water usage is less than 4,000 gallons is not relevant to a determination of the issues. The same finding must be made with respect to Jancic's well-intentioned efforts to decrease water flow by installing high pressure toilets and timed spring systems on his hand sinks.

17. Jencic also requested that he be allowed "spike time" during the hours of 11:30 a.m. to 1:00 p.m. and 6:00 p.m. to 7:30 p.m., which are his peak hours of the day. In other words, the undersigned assumes that he is asking that consideration be given to the fact that he has virtually no business during the other hours of the working day, and that the flow during the peak hours alone would not be excessive on a daily basis. However, the Department's rules are calculated to maximum usage, and thus a "spike" allowance is not allowed.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.569, Florida Statutes (1997).

19. In this proceeding, Petitioner requests a variance from the requirements of various Department rules which restrict the number of seats in his restaurant due to lot flow limitations. Although variances are now generally subject to the requirements of Section 120.542, Florida Statutes (1997), those requirements do not "abrogate the variance and waiver provisions in any other statute." See Section 120.542(1), Florida Statutes (1997). Because other variance provisions are found in Chapter 381, Florida Statutes, the latter provisions are controlling.

20. Section 381.0065(3)(d), Florida Statutes (1997), provides that, in its administration of the onsite sewage treatment and disposal systems program, the Department may "[g]rant variances in hardship cases under the conditions prescribed in this section and rules adopted under these provisions. Section 381.0065(4)(g)1.a-c, Florida Statutes (1997), provides that a variance may not be granted until the Department is satisfied that:

- a. The hardship was not caused intentionally by the action of the applicant;
- b. No reasonable alternative 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.

21. Petitioner has failed to demonstrate that the hardship was not caused intentionally by his own actions. That is to say, despite being aware of the lot flow limitations which restricted his restaurant to 12 seats, Jancic nonetheless invested a large sum of capital to renovate and equip his restaurant, and he commenced operations.

22. Even assuming that Jancic did not intentionally create his own dilemma, he has failed to show that the increased discharge from the restaurant will not adversely affect the health of the applicant or significantly degrade the groundwater or surface water. This is based on the fact that a variance would allow a larger amount of sewage to be discharged into an easement which is not designed to handle that amount of flow. This being so, despite Jancic's good intentions and the extremely unfortunate circumstances he now finds himself in, the request for a variance from Rules 64E-6.001(4)(c), 64E-6.005(7)(b), and 64E-6.008(1), Florida Administrative Code, must be denied.

23. At hearing, Jancic discussed the possibility of obtaining an easement from the owner of the eastern half of Block C-2 so as to increase the size of his allocated easement. Whether this is a viable alternative or would cause other lot owners in the eastern half of the Block to be subject to

enforcement proceedings due to their allocations being reduced is not the subject of this proceeding. Rather, it would have to be the subject of another variance request, once the new easement is recorded. In any event, Jancic would be well-served to discuss this option with the Lake County Department of Health before attempting to obtain the easement.

24. Finally, on March 4, 1998, Petitioner filed a letter and eight documents identified as "Defense Exhibits A through H." Because the record in this proceeding was closed on February 24, 1998, the exhibits have not been made a part of this record. Parenthetically, however, it is noted that the documents simply corroborate the already established fact that he has expended large amounts of money in opening his business.

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 request for a variance.

DONE AND ENTERED this 11th day of March, 1998, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of March, 1998.

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 Department of Health.