

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CONNIE BIANCARDI,)
)
 Petitioner,)
)
 vs.) Case No. 99-4251
)
 DEPARTMENT OF HEALTH,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This matter came on for final hearing before the Honorable Stephen F. Dean, Administrative Law Judge, Division of Administrative Hearings, by video teleconference at 210 North Palmetto Avenue, Room A101, Daytona Beach, Florida, and 4030 Esplanade Way, Room 109, Tallahassee, Florida, commencing at 11:00 a.m., on January 24, 2000.

APPEARANCES

For Petitioner: Connie Biancardi, pro se
2820 Howland Boulevard
Deltona, Florida 32725-1606

For Respondent: Charlene J. Petersen, Esquire
Department of Health
Volusia County Health Department
420 Fentress Boulevard
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

The issue in this case is whether the Variance Review and Advisory Committee and the Department of Health had just cause to disapprove Petitioner's application for a variance.

PRELIMINARY STATEMENT

Petitioner applied for a variance to extend her existing variance until sometime in year 2001 when county sewer lines are anticipated to be installed to serve Petitioner's commercial property. Petitioner was previously granted a six-month variance with provisos to utilize her existing septic system to handle increased sewage flow for a lessee's restaurant until she could install a properly sized system. At the formal hearing, Respondent presented testimony of Eric Maday, Dale Holcomb, and David Hammonds. Respondent introduced Exhibit Nos. 1-8, which were admitted into evidence. Petitioner represented herself and introduced Exhibit Nos. 1-20, which were introduced into evidence. Respondent filed a proposed recommended order which was read and considered in preparing this recommended order.

FINDINGS OF FACT

1. The Department of Health (DOH) is the agency responsible for oversight of the on-site sewage treatment and disposal systems program and the Variance Review and Advisory Committee which meets monthly to recommend agency action on variance requests pursuant to Chapter 381, Florida Statutes.

2. In August 1999, Petitioner applied to the DOH for a second variance to extend a variance previously granted in June 1999, to use an existing septic system for six months. Petitioner's application for the second variance stated that county sewer would be available in 2001, and she would be required to hook into the sewer. Therefore, Petitioner wanted an extension to continue using the existing undersized septic system until the sewer was available. She also attached water usage records for June 1998 through July 1999, for her property.

3. Petitioner owns the commercial property served by the septic system and located on Howland Boulevard in Deltona, Florida. The property consists of a strip mall with five offices and one restaurant. The property originally contained six office spaces in 1990, when Petitioner applied for a permit to install a septic system to handle the building's sewage flow. See Petitioner's Exhibit No. 1. Petitioner was granted a construction permit for the septic system on August 14, 1990, which contained the statement: "no food service operations permitted in this building."

4. Prior to May 1999, Petitioner leased an office in her commercial property to Milagros Martinez to operate a sandwich shop. Ms. Martinez applied to DOH for approval to use Petitioner's existing septic system to handle her sandwich shop

sewage, and was denied because of increased water use and septic system demands of a restaurant.

5. Petitioner's septic system contains a 750-gallon tank with 162 square feet of drainfield. In order to handle the additional sewage generated by the sandwich shop, the Florida Administrative Code requires a 1350-gallon tank and a drainfield of 787 square feet. There is enough room on Petitioner's property to install a separate septic system to handle the sewage generated from the sandwich shop.

6. Petitioner applied to DOH for her first variance in May 1999, requesting to utilize the septic system to handle the waste from the sandwich shop. Petitioner appeared before the DOH Variance Review and Advisory Committee in June 1999. The committee recommended, and DOH concurred, to approve the first variance with four provisos. See DOH Exhibit No. 2.

7. The four provisos were:

A. The applicant shall obtain and maintain an annual onsite sewage treatment and disposal system operating permit in accordance with subsection 64E-6.003(5), F.A.C.

B. The owner shall maintain an annual contract with a licensed septic tank contractor to inspect and service the onsite sewage treatment and disposal system at least once per month or more frequently as necessary.

C. This variance allows operation of the sandwich shop for no more than six months.

During that six months, the applicant shall take all necessary steps to increase the capacity of the system to accommodate the additional 230-gallon sewage flow from the sandwich shop.

D. At the end of the six months, the system shall be in compliance or the sandwich shop shall be closed and remain closed until compliance is achieved.

8. The four provisos were additionally explained to Petitioner in a letter dated July 14, 1999, from Sharon Heber, Director of the DOH Environmental Health Division. See DOH Exhibit No. 1. Petitioner accepted the provisions of the first variance on July 20, 1999. See DOH Exhibit No. 4.

9. Petitioner does not have a current annual on-site sewage treatment and disposal system operating permit as required by the first proviso.

10. Petitioner did not contract with a licensed septic tank contractor to inspect and service her system at least once per month as required in the second proviso. Petitioner called a contractor to inspect her system four times in the six-month period since the first variance was granted.

11. Within six months, Petitioner did not take the necessary steps to increase the capacity of her septic system to handle the additional flow as required by the third proviso of the first variance.

12. The system is not in compliance and the sandwich shop is not closed as stated in the fourth proviso.

13. In August 1999, Petitioner filed for a second variance requesting that the first variance be extended until year 2001. That is the date the county plans to install a sewer line on Howland Boulevard in Deltona, which will serve her commercial property. She submitted a letter from the Volusia County Public Works Service Center stating that the "sewer service is planned to be available sometime in the year 2001." See Petitioner's Exhibit No. 4.

14. The Variance Review and Advisory Committee considered Petitioner's request at their September meeting. The variance committee unanimously denied Petitioner's request for a second variance.

15. The Petitioner's system was not designed to handle an increased amount of sewage flow, and that it would eventually collapse or fail. The committee's approval of the first variance was to allow Petitioner adequate time to install the necessary septic system for the restaurant, and not put Petitioner in the position of telling her tenant she could not open her restaurant. See DOH Exhibit No. 5.

16. When Petitioner's existing system fails, sewage will pond on the ground. The ponding fluid will consist of raw sewage. The leaking/ponding sewage may seep into the

groundwater and then into drinking water aquifers. In the right conditions, this pollution can cause the spread of waterborne diseases such as typhoid and cholera, or viral infections, such as hepatitis A or polio.

CONCLUSIONS OF LAW

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

18. The duties and powers of the Department of Health as they relate to the on-site sewage treatment and disposal systems are set forth in Section 381.0065(3), Florida Statutes. The applicable sections state:

The Department shall:

(a) Adopt rules to administer ss. 381.0065 - 381-0067.

(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

(c) Develop a comprehensive program to ensure that onsite sewage treatment and disposal systems regulated by the department are sized, designed, constructed, installed, repaired, modified, abandoned, and maintained in compliance with this section and rules adopted under this section to prevent groundwater contamination and surface water contamination and to preserve the public health. The State Health Office

is the final administrative interpretive authority regarding rule interpretation. . .

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

19. The duties and powers of the agency as they relate to variances from the on-site sewage treatment and disposal system statutes and code are set forth in Section 381.0065(4)(h), Florida Statutes. The applicable sections state:

(h)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 into consideration factors such as cost, 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 make its recommendations on variance requests at the meeting in which the application is scheduled for consideration, except for an extraordinary change in circumstances, the receipt of new information that raises new issues, or when the applicant requests an extension. 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. . . .

20. Petitioner applied for her first variance to obtain approval to use her existing septic system because she rented a commercial office space to a lessee for use as a sandwich shop. Petitioner's septic system was not sized large enough to handle anticipated sewage flow for a restaurant, and the Petitioner applied for a variance to use the existing system to permit the restaurant to open. The variance committee and DOH granted Petitioner a six-month variance with provisos to give Petitioner time to enlarge her existing system or install a separate system to handle the restaurant's sewage requirements to permit the restaurant to stay open.

21. During the six months of the first variance, Petitioner learned that the County of Volusia is planning to install sewer lines along the street in front of her commercial property sometime in the year 2001. The Petitioner took no action to enlarge the septic system or install a separate system for the restaurant. The Petitioner applied for an extension of the first six-month variance until the sewer is available in 2001.

22. Section 381.0065(4)(h)1., Florida Statutes, sets forth the factors to be considered by the variance committee when

reviewing and granting a variance. The first factor is that the hardship was not "caused intentionally by the action of the applicant." Petitioner made the choice to rent commercial office space to a tenant who intended to operate a sandwich shop. The Petitioner did not use the period of the first variance to remedy the problem. In this case, the hardship was caused by the applicant/Petitioner's choice to rent office space for a sandwich shop and not remedy the situation after obtaining her first variance. Petitioner caused her own hardship.

23. The second factor to be considered by the committee is whether there is a reasonable alternative to solve the sewage problem. In this case, a separate system could be installed to serve the restaurant. There is room on the property for this expanded system.

24. When the system fails, it will cause a sanitary nuisance and health hazard which will adversely effect the public health.

25. The variance committee and DOH considered the statutorily-required factors in granting a variance and disapproved Petitioner's application for a second variance because it did not meet the statutory criteria.

RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED:

That the Department of Health enter a final order affirming the decision of the Variance Review and Advisory Committee and the Department of Health to disapprove Petitioner's second variance application.

DONE AND ENTERED this 17th day of April, 2000, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 2000.

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.