STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADELE SELLERS, Petitioner, vs. DEPARTMENT OF HEALTH, DIVISION OF ENVIRONMENTAL HEALTH, Respondent.	)	Case No. 00-3445

RECOMMENDED ORDER

Upon due notice, this cause came on for a disputed-fact hearing on November 30, 2000, and December 11, 2000, in Pensacola, Florida, before the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Ella Jane P. Davis.

APPEARANCES

For Petitioner: Steven E. Melei, Esquire
3603 Mobile Highway
Pensacola, Florida 32505

For Respondent: Rodney Johnson, Esquire
Department of Health
1295 West Fairfield Drive
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

Whether Petitioner may be granted a variance from Rule 64E-6.001(4), Florida Administrative Code, pursuant to Section 381.0065(4)(h)1., Florida Statutes.

PRELIMINARY STATEMENT

Petitioner was denied a variance for an on-site sewage treatment and disposal system (OSTDS). The case was referred to the Division of Administrative Hearings on or about August 15, 2000. The disputed-fact hearing was initially convened for one day on November 20, 2000.

At commencement of the hearing, Petitioner presented and argued her Motion in Limine which prayed that the issues of "hardship" and whether Petitioner had authority to represent the property owner be excluded from the hearing. The motion was denied, and Petitioner was required to go forward, bearing the burden of proof as to all elements of Section 381.0065(4)(h)1., Florida Statutes.

Petitioner also filed, in open court, a trial brief.

The case was not concluded on November 30, 2000. With the parties' agreement, the cause was continued to December 11, 2000, when the taking of all evidence was completed.

Petitioner testified on her own behalf and presented the oral testimony of James W. King, Jr., Agnes Nelson, Joe Nelson, Michael James Jones, Martin MacAndrew, Jim McDaniel,

Alma C. Moreno, Charles Barcia, and Melissa Tidman. She had 15 exhibits admitted in evidence.

Respondent Department of Health (Department) presented the oral testimony of Denise Williams Powell, Antonio (Tony) Moreno, Steven A. Burgess, Cheryl N. Bunch, Richard W. Stone, Joseph Scott Hale, Wesley Steven Greene, and Dr. Malcolm Shields. Respondent had eleven exhibits admitted. Respondent's Exhibit 10, one page of tidal information, was not admitted, but a limited proffer was permitted.

The parties' stipulations have been included in this Recommended Order, but not verbatim.

A complete transcript for the fifteen-and-a-quarter hour hearing, spanning two days, twelve days apart, was not offered. The undersigned declined to accept the offer of a transcription of the testimony of only one of Respondent's witnesses, Dr. Shields.

Each party filed a Proposed Recommended Order, each of which has been considered.

FINDINGS OF FACT

1. Tony and Alma Moreno are owners of the building and premises located at 8250 Scenic Highway, Pensacola. They own the real property at that location all the way to road frontage right-of-way at Scenic Highway.

2. The building had been in continuous existence in the same location for twenty or more years before Petitioner became connected with it. During that period of time, except for short hiatuses, either the Morenos or their lessees operated it as a licensed bar, most often under the name, "The Lighthouse Tavern."

3. Sewage lines exist in the right-of-way at Scenic Highway, within 400 feet of the premises. The tavern is equipped with a septic tank. There has never been any history of septic problems on the tavern premises.

4. The Lighthouse Tavern has always been a neighborhood bar of limited success. Martin MacAndrews has been putting amusement games in the tavern since 1978. He testified that during those twenty-two years, the average number of patrons has been eight to 14. Jim McDaniel has sold paper products to successive lessees since the 1970's. He has seen an average of 10 patrons during the day and up to 20 patrons at night. Charles Barcia, a more recent patron, has observed a maximum of nine patrons in the tavern.

5. Denise Powell (nee´ Williams) leased the premises from August 7, 1998, until approximately September 28, 1998, during which time she operated the Lighthouse Tavern. She had approximately ten customers per day, used plastic barware, and

had no septic problems. During the month or so she operated the tavern, she did not have the septic tank pumped.

6. Ms. Powell's lease with the Morenos was not due to expire until July 31, 1999. However, on or about September 28, 1998, Hurricane Georges damaged the Lighthouse Tavern and wreaked destruction on Pensacola and much of the Florida Panhandle. The area was declared both a state and federal "disaster area."

7. Ms. Powell immediately notified the Morenos, and they cancelled the lease by mutual agreement, because the premises were uninhabitable due to substantial water damage.

8. Ms. Powell testified that but for Hurricane Georges, she would have continuously operated the Lighthouse Tavern under the terms of her lease from the Morenos. As it was, she abandoned the lease and the property.

9. The Morenos made no repairs to the building. No commercial activity, as a tavern or otherwise, occurred on the subject property from September 28, 1998, through May 1, 2000, approximately a year-and-a-half.

10. City water service to the property was terminated from October 12, 1998 until April 7, 2000.

11. On April 5, 2000, Petitioner, a widowed mother, applied to Escambia County for an occupational license to run a tavern at that location.

12. On or about April 7, 2000, Petitioner negotiated a new lease with the Morenos. It involved rate and terms favorable to Petitioner in exchange for her substantial investment (approximately $35,000, as of the date of hearing) in renovating the Lighthouse Tavern.

13. Among other renovations to the property, Petitioner has replaced the tavern's back wall and outside deck, added two pool tables, coolers, two complete bathrooms, a three compartment sink, and a handwash sink. Very few of the fixtures, etc. are removable, let alone subject to resale.

14. A five-year lease, Exhibit P-2, was executed on May 1, 2000. It limits Petitioner's use of the property to use as a tavern, so she cannot get her renovation money back by converting to another business. Paragraph 21 of the lease, purporting to be a lease/purchase option, has not been filled-out, so Petitioner's option to purchase the property is potentially unenforceable.

15. Current Florida Administrative Code rules require septic tanks to have a minimum capacity of 1050 gallons, a filter, and a baffle. A baffle is a device to keep water and waste from going into the drainfields.

16. On May 15, 2000, Ensley Septic Tank Service, operated by Agnes and Joe Nelson, pumped, inspected, and certified the existing septic tank as structurally sound.

17. However, the existing septic tank is twenty years old and provides only 750 gallons. It is not baffled and does not have a filter. Its two drainfields are 75 feet and 69 feet, respectively, from the waterfront, whereas by Escambia County Ordinance, the current setback requirement is 100 feet.

18. On May 25, 2000, the Department denied Petitioner a permit to utilize the existing septic tank, based on the contents of her application, which stated that the tavern occupancy would be 75 seats. Departmental analysis showed that 75 patrons would result in 1,000 gallons per day usage. The existing septic tank does not have that capacity.

19. Before the execution of the lease, Petitioner made no inquiries of Respondent Agency. Likewise, no one told her before the execution of the lease that she would not be able to utilize the existing septic tank or use the premises for a tavern. Rather, Petitioner relied on her own interpretation of an Escambia County Ordinance providing additional time to meet County regulations for reopening a business (or nonconforming use) after closing the business due to Acts of God, and on the fact that Denise Powell's lease, by its terms, did not expire until July 31, 1999.

20. When she was denied a permit to use the existing system, Petitioner applied for a variance for 75 patrons.

Petitioner also filed a second application for variance and requested 24 patron occupancy.

21. Petitioner went before the Department's Variance Review Board, which recommended granting the variance with the provisos offered by Petitioner.

22. However, on July 18, 2000, the Department denied the requested variance, stating that the information provided by Petitioner failed to show that no reasonable alternative exists for the treatment of the sewage or that the discharge from the septic tank will not significantly degrade the groundwater or surface waters. The Department offered to permit the tavern to operate either with a connection to the existing sewer system or with a septic tank that meets the current requirements of the Florida Administrative Code.

23. At hearing, Petitioner established that the tavern's water bills from 1996 to 1998 show a use of only 430 to 588 gallons of water per month. This amount reflects the low number of 10-20 patrons per day during that period of time (See Finding of Fact 4), but it also is only approximately three-quarters of the capacity of the existing septic tank.

24. At hearing, Petitioner offered the following cumulative provisos to reduce water flow to the system: limit tavern hours to 11:00 a.m. to 2:00 a.m. (15 hours) daily; use plastic or paper cups; not serve food or mixed drinks; restrict

beverages to beer and wine; and limit occupancy to 24 patrons. She offered to pump the existing septic tank more frequently and provide "port-a-potties," as needed. Petitioner anticipates using 24 seats inside, plus picnic tables on the deck. She offered to eliminate the outside seating. The deck constitutes one-quarter of the 900 square feet of the establishment. She will upgrade the septic system as her income from operating the tavern recoups her investment. She will close-up and terminate her lease if she cannot bring the premises "up to Code," that is, to meet the current Florida Administrative Code requirements for septic tanks and/or sewer connections, in one year's time. She has no objection to such provisos being attached to a variance, if one is granted.

25. At hearing, certified septic tank engineers, Agnes Nelson and Joe Nelson, testified that the existing 750-gallon septic tank should handle 24 patrons and the water use would be further limited by using plastic or paper drink containers. In Mr. Nelson's opinion, since he found no salt water from the Bay or water table inversion in the tank when he inspected it, and since the drainfield slopes away from the building, the only way salt water would enter the existing septic tank is if it got above ground. Agnes Nelson conceded that high tide could fill the tank up. If, for any reason, the drainfields were not working, then the current septic tank would

not work. However, because the building is between the beach and the drainfields; because, in her opinion, 24 patrons probably could not fit inside the building; and because there was so little solid waste in the tank when it was pumped, Ms. Nelson doubted that the tide and the drainfields would create a problem, even in ordinary rainy weather. Unfortunately, in rendering her opinion, Ms. Nelson did not consider the seating capacity of the tavern's deck or the effect on the surface waters of Escambia Bay of operating the tavern with the existing system.

26. As of the date of hearing, the Morenos were in agreement with all of Petitioner's efforts to obtain a variance. They also will allow her to bring the premises "up to Code," if she can.

27. The Department's current opposition to granting a variance with the provisos offered by Petitioner is based in part on immaterial disputes between the parties over who signed the original application for variance and who filled in the number of seats as 75.

28. The Department also is mistrustful of Petitioner because her second variance application stated the building constituted 1,200 square feet. Because the Department and Petitioner now agree that the premises comprise 900 square feet, the error in the second application is also irrelevant.

29. The Department's current opposition to granting the variance with the foregoing provisos volunteered by Petitioner is at least in part due to the on-site audit, wherein Departmental staff determined that the premises, including the outside deck, actually could accommodate 60-75 living, but not necessarily seated, patrons. The Department sees this as an impediment to occupancy being limited to 24 patrons, in practice. Human nature is such that if a bar has a large, outside deck in a tropical climate, it will probably have more patrons then those sitting in the 24 "seats" provided. While this concern might be speculative in other realms, in dealing with possible contaminants to groundwater or to the surface waters of Escambia Bay, it is a legitimate, if uncodified, concern.

30. Joseph Scott Hale, Environmental Health Supervisor I, made the following suggestions which do not require a variance. Petitioner could connect her premises to the existing sewer at the 75-person occupancy limit; or could install a septic tank or tanks and drainfield(s) in accordance with Departmental rules for a 47-person occupancy limit; or could install a much more modest tank and drainfield system for a 24-person occupancy limit.

31. Petitioner has received written bids to accomplish such alternatives in the following ranges. (1) Installation of

the necessary plumbing and pumps to connect to an accessible sewer line is available at a cost of $27,628 to $28,450, although these costs could be inflated to more than $40,000 by adding a grinder station and by charges from CSX railroad for access across its right-of-way to the existing sewer lines; and (2) Installation of one or more septic tanks and drainfield systems in accordance with current rules and in a size for an occupancy capacity of 47 is available for a price ranging from $28,032 to $29,465.

32. Neither of these options is currently feasible for Petitioner, because she has spent her savings on the completed renovations and has only $1,000 +/-, on deposit at this time. She has no current income. Without a contract to purchase the tavern property, she does not believe she can obtain financing. She is not eligible for an upgrade grant from the State because the tavern is commercial property.

33. Petitioner feels that it would be necessary for her to run the tavern at a profit for a year at a minimum capacity of 24 seats in order to be able to pay for either of the foregoing possibilities. She cannot get an alcoholic beverage license without the variance.

34. Petitioner is satisfied that if she cannot make a go of the tavern within one year, she can rescind the lease. The

Morenos were silent on this issue. It is not necessary to interpret the lease on this score in order to resolve this case.

35. Respondent construes part of Mr. and Mrs. Nelson's testimony as providing a third, cost-effective, and reasonable alternative for Petitioner in the form of a septic tank and drainfield which could be installed according to current Code with an occupancy capacity of 24 patrons at an approximate cost of $3,600 to $4,000. This oral estimate was testified to by Mrs. Nelson, who, although a certified septic tank inspector, does not actually do installing of septic tanks. She conceded that dollar figure was purely a guess and based on one elevated tank of 1050 gallons with a baffle. Mr. Nelson, who does the actual installing, estimated that more than one tank, a mount system, and a pump or two might be necessary, at additional cost. His thinking is in line with the components of the other written estimates Petitioner has received. Accordingly, it is found that the estimate that Ensley Septic Tank Service can bring the existing system up to Code at a cost of $3,600 to $4,000 to Petitioner is speculative and not a reasonable alternative.

36. As is common, expert opinions were mixed on the danger, if any, to the groundwater and surface waters which would be occasioned by Petitioner operating the tavern under her

foregoing proposed provisos without upgrading the current septic system.

37. Petitioner's expert in civil engineering and degradation of groundwater did soil borings on the premises and hit no groundwater at 15 inches, even after two weeks of significant rain. However, his experience with soil analysis from "mottling" was limited, and accordingly, his opinion that water in the ground will never or rarely rise above 15 inches, so as to endanger groundwater or surface waters was not persuasive. Instead, I accept the greater weight of the evidence as a whole in order to make the following findings of fact.

38. The top of the drainfields are located 12 to 22 inches below grade and occupy a one foot area, 24-34 inches below grade. The seasonal high water table is 15 inches below grade. The drainfields operate within the groundwater table. Current rules require drainfields to have a separation from the bottom of the drainfield to the top of the seasonal high water table so as to provide space for aerobic biological action. When a drainfield operates within the water table, no opportunity exists for aerobic biological action. Anaerobic biological action is not effective in killing viruses and other pathogens. Viruses can travel in soil from a drainfield to surface water at a rate of 100 feet in eight hours.

39. Mr. Hale, (see Finding of Fact 30), who was accepted as an expert in groundwater table determination, has an impressive list of credentials, and among other qualifications, is State-certified in OSTDSs. He has personally witnessed water rising to the level of the leechfield in this location.

40. Mr. Hale also took borings, but not in the leechfield. Even though standing water was not found until 32 inches below grade, the soil was saturated at 15 inches, which is the seasonal high water table and mean high water mark of Escambia Bay at Petitioner's waterfront.

41. The usual groundwater high water table in this location is 24 inches below natural grade, and the temporary water table rises and falls, as affected by Escambia Bay tides and by rainfall. Another concern is that the leechfields average only 15 inches below grade, and soil "capillary action" or water "wicking" through the soil can result in contamination of the groundwater if they become saturated. The close proximity of the property to Escambia Bay presents the potential for pollution of surface waters.

42. Mr. Hale reported that the tavern location is not subject to frequent flooding. However, it can, and probably will, flood, as before, during a hurricane.

43. Mr. Hale testified further that but for the length of the cessation of business as a result of the hurricane (more

than one year), the tavern could have continued to operate with eight seats and no danger to the groundwater. In his opinion, the existing system, unaltered, can handle waste disposal for only eight patrons.

44. A 47-seat occupancy is the maximum allowable for a 1,000 gallon flow. Even though 24 seats would not be expected to exceed 1,000 gallons a day, 24 seats would not be accommodated by the existing system's 750 gallon tank, drainfields, leechfields, and insufficient set back footage. Mr. Hale reluctantly conceded that 22 seats might be "feasible," with all proposed provisos in place, plus the substitution of low flow toilets, but that solution would not be his best recommendation nor acceptable to the Department.

45. According to Dr. Malcomb Shields, who was accepted as an expert microbiologist in the field of migration of pollutants from drainfields to surface waters, Escambia Bay is already above its threshold in dangerous nutrients.

46. Dr. Shields further opined, with impressive scientific detail, that narrowing the zone in the drainfield, as on the Lighthouse Tavern property, makes the drainfields susceptible to more pathogens. In his opinion, the offered provisos would have absolutely no effect on the existing septic tank and system efficiency except to limit water and waste into the septic tank itself.

47. Dr. Shields conceded that a variance granted upon the terms requested would not, by itself, cause significant degradation of water quality. However, he felt that perpetual use of the variance, even with the foregoing provisos, would, combined with all other factors present, contribute to surface water degradation, which is the test under the rule. Dr. Shields did not feel that a variance absolutely limited to one year's duration would have the same effect.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1) and 381.0065, Florida Statutes, and Chapter 64E-6, Florida Administrative Code.

49. Respondent Department is the agency responsible for oversight of the OSTDS program and variances, pursuant to Chapter 381, Florida Statutes.

50. This is a de novo proceeding in which Petitioner, as the applicant for a variance, has the duty to go forward to establish, by a preponderance of the evidence, her entitlement to a variance. This proceeding does not operate as an appeal to assess whether or not the Department abused its discretion in denying Petitioner's variance request.

51. Laws and rules applicable to this case are:

381.0065 Onsite sewage treatment and disposal systems; regulation. -

(1) Legislative Intent. . . . It is further the intent of the Legislature that the installation and use of onsite sewage treatment and disposal systems not diversely affect the public health or significantly degrade the groundwater or surface water.
(3) Duties and Powers of the Department of Health. - The department shall:

* * *

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

* * *

(4)(h) 1. . . . 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. . . . A person who owns or operates a business that uses an onsite sewage treatment and disposal system that was installed and approved before July 5, 1989, need not obtain a system operating permit. However, upon change of ownership or tenancy, the new owner or operator must notify the department of the change, and the new owner or operator must obtain an annual

> system operating permit, regardless of the date that the system was installed or approved.
>
> 64E-6.001 General.
>
> (1) The provisions of Part I of this rule shall apply to all areas of the state.
>
> * * *
>
> (4) . . . A commercial system out of service for more than one year shall be brought into full compliance with current requirements of this Chapter prior to the system being placed into service.

52. Petitioner's commercial system (that is, the existing septic tank and drainfields) clearly was not servicing a commercial establishment for over one year from September 28, 1998, until April 2000. See Rule 64E-6.001(4), Florida Administrative Code.

53. Likewise, the existing system clearly is not in compliance with existing rule requirements due to low tank capacity (750 gallons is 300 gallons short of the required minimum 1050 gallon capacity), lack of a baffle, lack of a filter, insufficient set back, and the elevation of the drainfields, which is within the existing high water table and less than the minimum 24 inches above the water table.

54. Perhaps Petitioner has been unwise in her business planning, but she has not "intentionally created her own hardship" as that term is usually construed.

55. A financial hardship may be considered in determining if a reasonable alternative exists for the treatment of the sewage. Despite Respondent's reliance on Agnes Nelson's guesstimate that $3,600 - $4,000 will "fix" all problems on this site, the greater weight of the evidence is that Petitioner would have to spend between $27,000 and $40,000 to bring this location into compliance, unless a variance is granted. The hardship is legitimate, and no reasonable alternative to a variance exists.

56. The Department's own witnesses saw no harm inherent in granting a variance permitting Petitioner to operate her tavern with an occupancy of eight patrons, but they doubted she would limit occupancy to that number. Based on the available deck space, Petitioner's current financial situation, and her recoupment projections, it is a reasonable doubt.

57. More than an eight-patron occupancy without Code compliance clearly presents some threat to the groundwater and surface waters.

58. However, the combined testimony of Mr. Hale and Dr. Shields established that with all provisos in place, plus the substitution of low-flow toilets, occupancy absolutely limited to 22 (not 24) patrons for only one year's time would not significantly degrade the groundwater or surface waters.

59. The same doubt remains, however, as to whether the occupancy limit could be enforced. Therefore, if a one year variance is granted, the additional precautions, including but not limited to, removing deck seating should be instituted to insure that the occupancy remains limited to 22 patrons.

RECOMMENDATION

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

RECOMMENDED:

That the Department of Health enter a final order which:

(1) Permits Petitioner to operate her tavern either with a connection to the existing sewer system or with installation of a septic tank and drainfield system in accordance with the current Florida Administrative Code rules for an occupancy capacity of 24 patrons; and alternatively

(2) Grants Petitioner a 12-month variance to utilize the existing tank and drainfield system upon the following terms:

(a) Petitioner shall obtain and maintain an annual OSTDS operating permit allowing inspection at will by the Department;

(b) Petitioner shall maintain an annual contract with a licensed septic tank contractor to inspect and service the existing OSTDS at least once per month, or more frequently as necessary;

(c) Upon notification by the septic tank contractor of any problem with the OSTDS, Petitioner shall provide port-a-potties sufficient for 22 patrons;

(d) During the 12 months the variance is in place, Petitioner shall provide a port-a-potty on any occasion of rain over eight hours' duration.

(e) Petitioner shall not open for business until low-flow toilets are substituted;

(f) Petitioner shall operate the premises as a tavern for no more than 12 months, during which 12 months Petitioner shall take all necessary steps to bring the system up to Code or to connect to the sewer line;

(g) During the 12 months the variance is in place, Petitioner shall limit hours of operation to 15 hours daily; eliminate all deck seating; provide no more than 22 seats inside; use only paper or plastic ware; serve no food or mixed drinks; and actively limit occupancy to 22 patrons at any one time; and

(h) At the end of the 12 months, the system shall be in compliance or the tavern shall be closed and remain closed until compliance is achieved.

DONE AND ENTERED this 12th day of February, 2001, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2001.

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.