

The first day of hearing was heard by Commissioner Sreenivasa Rao Dandamudi. The second day of hearing was heard by Commissioner Karen A. Winn. Commissioner Dandamudi, having read the transcript and all the evidence, renders the decision.¹ The parties moved to make the record from *Boaz v. Missouri Department of Natural Resources*, No. 12-1847 CWC (AHC February 6, 2013) (“the prior case”) part of the record in the present case, and we granted the motion.

Findings of Fact

1. Boaz is a homebuilder who owns real property in the Eagles Landing Subdivision, located at the intersection of Highway BB and Howell County Road 1280, Howell County, Missouri (“the Subdivision”).

I. Findings from Prior Case²

2. Dexter Frost is a developer who resides in Howell County, Missouri. Frost originally platted the eighteen-to-twenty-lot Subdivision with the Howell County Recorder of Deeds in 2005.

3. From 2005 to 2006, Frost sold several lots within the Subdivision to various homebuilders, including Boaz.

4. Those homebuilders constructed homes on each lot and connected those homes to individual on-site wastewater treatment systems as their method of wastewater treatment.

5. The Missouri Department of Health and Senior Services issued operation permits for some of these on-site wastewater treatment systems in advance of their construction and for others retrospectively after they were discovered in full operation.

¹ Section 536.080.2; *Angelos v. State Bd. of Regis'n for the Healing Arts*, 90 S.W.3d 189 (Mo. App., S.D. 2002). Statutory references, unless otherwise noted, are to RSMo 2000.

² All cites in this section are to the evidence and transcripts in the prior case.

6. Because Frost failed to obtain approval from DNR for use of the on-site wastewater treatment systems in the Subdivision, on January 11, 2007, DNR issued to Frost its Notice of Violation No. 18308SE to document his violation of the Missouri Clean Water Law.

7. Frost resolved the Notice of Violation by entering into a settlement agreement with DNR on April 30, 2008. Frost agreed to connect the Subdivision to the City of West Plains wastewater treatment system rather than have individual on-site wastewater treatment systems.

8. To date, Frost has failed to comply with the terms of the settlement agreement. DNR asked the Missouri Attorney General's Office to pursue enforcement of the settlement agreement in circuit court.

9. Nearly one year after DNR's settlement with Frost, Boaz purchased Lot 5 of the Subdivision from Frost on February 18, 2009.

10. Between February 2009 and March 2012, Boaz constructed a home on Lot 5. Lot 5 is approximately 1.22 acres in size.

11. Boaz previously purchased two other lots in the Subdivision, built homes on those lots, installed on-site wastewater treatment systems, and sold the homes. Boaz obtained approval from the Missouri Department of Health and Senior Services for the operation of the on-site wastewater treatment systems on these two lots.

12. In March 2012, Boaz's contractor attempted to submit an application to the Howell County Health Department for construction of an on-site wastewater treatment system pursuant to the Missouri On-Site Wastewater Disposal Law.

13. The Howell County Health Department advised Boaz's contractor that it could not accept an application for construction of an on-site wastewater treatment system on Lot 5 because DNR had placed a "hold" on the property.

14. On June 1, 2012, Boaz asked DNR for permission to install an on-site wastewater treatment system on Lot 5.

15. DNR may allow developers to use on-site wastewater treatment if lots within a subdivision are greater than the minimum lot size as related to the geology and possibility of groundwater contamination in the area. To determine the minimum lot size required for on-site wastewater treatment, DNR reviews a geohydrologic evaluation, soils report, and plat map for the Subdivision.

16. On September 12, 2012, DNR advised Boaz that Frost had failed to obtain approval for the use of on-site wastewater treatment systems within the Subdivision and that DNR could not approve the use of an on-site wastewater treatment system on Lot 5 because it was less than 4.8 acres.

17. On October 11, 2012, Boaz appealed DNR's September 12, 2012, decision.

A. Geohydrologic Evaluation

18. DNR's Division of Geology & Land Survey ("DGLS") issues geohydrologic evaluations based on a site visit and a review of geologic information maintained by DGLS and U.S. Geological Survey in the area, including geologic mapping, watershed hydrology, surficial (or surface soil) types and thickness, water supply, bedrock location, available dye trace information, and groundwater velocity.

19. This information is documented by a geologist with DGLS, who uses a Groundwater Evaluation Rating to determine how many acres would be necessary to safely support on-site wastewater treatment systems without impacting groundwater quality. "The geohydrologic evaluation looks at the potential for groundwater contamination should treatment fail."³

³ Tr. at 147.

20. Jeff Crews, a geologist with DGLS, conducted the geohydrologic evaluation for the Subdivision. Peter Price, another geologist with DGLS and Crews' supervisor, reviewed the evaluation and provided his seal on it on December 6, 2006.

21. Crews conducted the geohydrologic evaluation according to DNR's standard operating procedures, which are identified as the Residential Housing Development Geohydrologic Groundwater Evaluation Rating, DNR, Division of Geology and Land Survey, Geological Survey Program, October 1997.

22. The ratings apply to all different geologic settings within the state, but some places are more problematic than others. The Ozarks, which encompasses most of southern Missouri, contains well-developed karst geologic features and relies heavily on groundwater as its drinking water supply.

23. Karst is a landscape type that includes losing streams, caves, springs, and sinkholes. Losing streams and sinkholes allow water to pass from the surface directly to the groundwater table.

24. According to years of catalogued data and dye traces conducted by DGLS, the Subdivision is located within the watershed that drains directly to Mammoth Spring, Arkansas, and runs a risk of sinkhole collapse.

25. The Subdivision is located in an area around West Plains, Missouri, known to contain numerous sinkholes, losing streams, and springs.

26. In the early 1960s, West Plains constructed a wastewater treatment facility consisting of wastewater disposal/treatment ponds with a five or six acre lagoon.

27. In 1966, the West Plains wastewater treatment lagoon collapsed into the karst geology, draining approximately 50 million gallons of wastewater into the underground water

supply. West Plains repaired the treatment facility and it collapsed again.⁴ The city walled off that area.

28. In 1978, another sinkhole opened up, and drained over 50 million gallons of wastewater into the subsurface. At that time, someone had injected water tracing dye into the sinkhole to trace the wastewater. The city's wastewater surfaced a few weeks later in Mammoth Spring, Arkansas, indicating that the wastewater traveled rapidly.

29. The West Plains wastewater treatment lagoon was located just a few miles south of the Subdivision.

30. DNR's geohydrologic evaluation for Eagles Landing Subdivision requires lots to be 4.8 acres in size or greater.

B. Soils Report

31. To obtain approval, the developer must request a soils report prepared by a qualified soil scientist.

32. The report can only be generated after a thorough, systematic investigation of the soil properties and landscapes in the subdivision.

33. Soil observation pits must be used to reveal major soil horizons, and the minimum number of pits must be one every ten acres or one every five acres if the majority of lots are less than two acres.

34. No soils report for the Subdivision was ever conducted by a soil scientist at the request of Frost because the baseline minimum lot size in the subdivision based on the geohydrologic evaluation was 4.8, and all lots in the subdivision were less than 4.8 acres.

35. Boaz hired a qualified soil scientist who conducted a soils report specific to Lot 5 of the subdivision. This soils report is dated February 2, 2012.

⁴ No date was given for the second collapse. The witness described it as "a little while later." Tr. at 137.

36. Boaz's site-specific soils report considers only Lot 5 of the Subdivision rather than the entire Subdivision, and is insufficient to determine whether individual on-site sewage disposal systems, rather than a centralized wastewater treatment system, can be used on each lot.

C. Plat Map

37. None of the lots in the Subdivision is 4.8 acres or more in size, but all of the lots are greater than one acre. The largest lot in the Subdivision is 1.81 acres.

D. Our Decision in the Prior Case

38. On February 7, 2013, we issued a decision recommending that the CWC deny Boaz's request for a permit for an on-site wastewater treatment system because he is not exempt from the requirement to have a permit, and he does not meet the requirements set forth for approval for individual on-site wastewater treatment systems within a residential housing development.

II. Findings from Variance Case⁵

A. Variance Application

39. On October 3, 2012, Boaz submitted an Application for Variance ("Variance Application") to DNR seeking a variance from the requirement of the 4.8 acres requirement for on-site wastewater treatment for Lot 5.

40. Boaz proposed installation of "a septic system up to a drip system or clean water system until a central sewer system is installed for the entire development."⁶

41. In his Variance Application, Boaz did not submit timelines regarding the length of the proposed variance, but stated: "The alternative as offered by Mr. Boaz is the installation of a

⁵ All cites in this section are to the evidence and transcripts in the present case.

⁶ Respondent's ex. 1, attachment A, question 7.

septic system up to a drip system or clean water system until a central sewer system is installed for the entire development.”⁷

42. With his Variance Application, Boaz submitted a soils report prepared by Robert Rouse. The soils report was specific to a home septic system (gravity flow system), not a drip irrigation (pressurized) system.

43. A drip irrigation system uses small diameter tubing with emitters to distribute and discharge the effluent uniformly over the site. The system also consists of a pump, filters, controls, manifold lines, valves, and pretreatment, such as a septic tank or an aerobic treatment unit.

44. Boaz did not submit a design report for the septic system proposed in the Variance Application.

45. On November 9, 2012, DNR informed Boaz that DNR recommended denying Boaz’s application because 1) the 2006 geological evaluation for the Subdivision indicated a minimum lot size of 4.8 acres for approval of an individual on-site wastewater treatment system; 2) Boaz was seeking a permanent variance; and 3) the CWC lacked authority to issue variances from Chapter 701, RSMo.

46. On November 28, 2012, Boaz filed a Request for Reconsideration of Variance Application.

B. Health Effects

47. DNR’s geohydrologic evaluation for Eagles Landing Subdivision requires lots to be 4.8 acres in size or greater.⁸ Boaz’s lot is approximately 1.2 acres.

⁷ Respondent’s ex. 1, Attachment 1, Question 7.

⁸ DNR relies on the geohydrological report indicating that lot sizes needed to be greater than 4.8 acres to prevent potential groundwater contamination and adverse health effects. Because evidence in the prior case was admitted in the present case, we may consider such evidence as it is relevant to this issue.

C. Boaz's Circumstances

48. Boaz owns a lumberyard, and operates a hardware store and lumberyard. He builds and sells homes "on the side."⁹ He has built and resold approximately eight homes; two of those homes are in Eagles Landing.

49. Boaz has a home partially constructed on Lot 5. The home has three bedrooms and two baths. His investment is approximately \$110,000, with a finance rate of 7%. The home on Lot 5 has the same number of bedrooms as the homes on Lots 4 and 12.

50. Boaz used approximately 12 to 15 contractors/subcontractors in the areas of breaking ground, concrete work, framing, roofing, drywall, flooring, heating, and cooling. He also paid for the services of a plumber and electrician.

51. Lot 5 (approximately 1.2 acres) is in the middle of the Eagles Landing development and is surrounded by other homes within the subdivision.

52. Boaz was not made aware of any restrictions on Lot 5 when he purchased it. He had previously followed the procedure of purchasing a lot, obtaining a wastewater construction permit, building a home, causing an on-site wastewater treatment system to be installed, and selling the home. He had been given no notice that there was a problem with this procedure until he attempted to obtain a permit for Lot 5.

53. Construction work on Lot 5 ceased in March of 2012, when Boaz was unable to obtain approval for any type of wastewater disposal on that lot. The plumbing lines were cut to prevent freezing. The home has experienced some deterioration in the form of discoloration and soiling.

⁹ Tr. at 106.

54. Boaz cannot sell or occupy the home because there is no approved wastewater system for it. Boaz has suffered significant financial harm from his inability to proceed with building on Lot 5, including cessation of his building business.

Conclusions of Law

Boaz is entitled to a hearing under § 644.061.5. We serve as hearing officer for the CWC.¹⁰ Boaz requests a variance on a permit or license to build the wastewater treatment system. Therefore, Boaz has the burden of proof.¹¹

I. Extent of the AHC's Recommended Decision

DNR argues that § 644.066.3(2) limits our recommendation to whether the CWC has or lacks the discretion to grant a variance. DNR argues that we do not have the authority to make a recommendation as to how the CWC should exercise its discretion to grant or deny a variance.

We do not see this limitation in the statute's language:

The hearing officer or commission member shall preside at the hearing and hear all evidence and rule on the admissibility of evidence. The hearing officer or commission member shall make recommended findings of fact and may make recommended conclusions of law to the commission[.]

The regulation on these hearings does not support DNR's argument. Regulation 10 CSR 20-1.020 names the AHC as its hearing officer and makes many references to the AHC's recommended decision:

(4) Procedures.

(A) The hearing shall be conducted in accordance with the provisions of Chapter 536, RSMo, and the regulations of the Administrative Hearing Commission promulgated thereunder.

(B) Upon receipt of the hearing officer's recommendation and the record in the case, the commission shall--

¹⁰ Section 621.250.3, RSMo Supp. 2012; Regulation 10 CSR 20-1.020(3)(A). All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

¹¹ Section 644.061.5.

1. Distribute the hearing officer's recommendation to the parties or their counsel;
2. Allow the parties or their counsel an opportunity to submit written arguments regarding the recommendation;
3. Allow the parties or their counsel an opportunity to present oral arguments before the commission makes the final determination;
4. Complete its review of the records and deliberations as soon as practicable;
5. Deliberate and vote upon a final written determination during an open meeting
6. Issue its final, written determination as soon as practicable, including findings of fact and conclusions of law. The decision of the commission shall be based only on the facts and evidence in the record; and
7. **The commission may adopt the recommended decision of the hearing officer as its final decision.** The commission may change a finding of fact or conclusion of law made by the hearing officer, or may vacate or modify the recommended decision, only if the commission states in writing the specific reason for a change.

(Emphasis added.)

Neither of these laws even suggests such a limitation, and the emphasized language in the regulation argues against it. If the CWC may simply adopt our written decision, that decision would need to reach the ultimate question of whether the variance should be granted. DNR cites no other support for this limitation, and we find none. The CWC issues the final decision and may ignore our recommendation, but we see nothing that prevents us from making a full recommendation, including whether or not the variance application should be granted or denied.

II. Objection Taken with Case

DNR objected to the testimony of Jim Gaughan, with DHSS, and we took the objection with the case. We will allow the testimony. Any objections shall go to the weight of the evidence.

III. Application for Variance

Section 644.061 sets forth the law on variances:

1. Unless prohibited by any federal water pollution control act, or if an application does not require a permit pursuant to any federal water pollution control act, the commission may grant individual variances beyond the limitations prescribed in sections 644.006 to 644.141 whenever it is found, upon presentation of adequate proof, that compliance with any provisions of sections 644.006 to 644.141 or rule or regulation, standard, requirement, limitation, or order of the commission or director adopted pursuant thereto will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case, without sufficient corresponding benefit or advantage to the people; but no variance shall be granted where the effect of a variance will permit the continuance of a condition which may unreasonably cause or contribute to adverse health effects upon humans or upon fish or other aquatic life or upon game or other wildlife, and any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance.

2. In determining under what conditions and to what extent a variance may be granted, the commission shall exercise a wide discretion in weighing the equities involved and the advantages and disadvantages to the applicant and to those affected by water contaminants emitted by the applicant.

3. Variances shall be granted for such period of time and under such terms and conditions as shall be specified by the commission in its order. The variance may be extended by affirmative action of the commission. In no event shall the variance be granted for a period of time greater than is reasonably necessary for complying with sections 644.006 to 644.141 or any standard, rule or regulation promulgated pursuant to sections 644.006 to 644.141.

4. Any person seeking a variance shall file a petition for variance with the director. There shall be a two hundred fifty dollar filing fee payable to the state of Missouri with each petition for variance. The director shall promptly investigate the application and make a recommendation to the commission within sixty days after the application is received as to whether the variance should be granted or denied. The director shall promptly notify the petitioner of his or her action and at the same time shall send notice to those persons registered with the director pursuant to section 644.036

who reside in the county where the water contaminant or point source is located.

5. If the recommendation of the director is to deny the variance, a hearing as provided in section 644.066 shall be held by the commission if requested by the petitioner within thirty days of the date of notice of the recommendation of the director. If the recommendation of the director is for the granting of the variance, the commission may grant the variance without a hearing, or, if not, shall set the matter for a hearing. If the commission grants the variance without a hearing the matter shall be passed upon at a public meeting no sooner than thirty days from the date of notice of the recommendation of the director, except that upon petition, filed within thirty days from the date of notice, of any person aggrieved by the granting of the variance, a hearing shall be held and such petitioner shall become a party to the proceeding. In any hearing pursuant to this section the burden of proof shall be on the person petitioning for a variance.

6. The commission may require the filing of a bond as a condition for the issuance of a variance in an amount determined by the commission to be sufficient to ensure compliance with the terms and conditions of the variance. The bond shall be signed by the applicant as principal, and by a corporate surety licensed to do business in the state of Missouri and approved by the commission. The bond shall remain in effect until the terms and conditions of the variance are met and the provisions of sections 644.006 to 644.141 and rules and regulations promulgated pursuant thereto are complied with.

7. Upon failure to comply with the terms and conditions of any variance as specified by the commission, the variance may be revoked or modified or the bond may be revoked, or both, by the commission after a hearing held upon not less than thirty days' written notice. Notice shall be served upon all persons who will be subjected to greater restrictions if the variance is revoked or modified, or who have filed with the director a written request for notification.

8. Any decision of the commission made pursuant to a hearing held pursuant to this section is subject to judicial review as provided in section 644.071.

A. No Authority to Issue Variances from Chapter 701, RSMo.

The CWC has no authority to order DHSS to do anything with regard to a wastewater treatment permit. We only have jurisdiction as a hearing officer over DNR's permitting process.

This case concerns a variance for a Department permit, and the variance application need not be denied for this reason.

B. Permanent or Temporary Variance

DNR argues that it could not issue a variance in this case because variances must be temporary, and the Department considered the variance Boaz is seeking as a permanent variance. DNR argues that there are no timelines in the application as to when the variance will end. In his application, Boaz stated: “The alternative as offered by Mr. Boaz is the installation of a septic system up to a drip system or clean water system until a central sewer system is installed for the entire development.”¹²

We agree with Boaz that § 644.061.3 states that the CWC may set the terms and conditions of the variance and the time period it will be operational. Therefore, the time period of the variance is not unknown, indefinite or speculative. If the CWC may set the time period and extend it, whether the application appears to be for a permanent variance is not a factor that mandates denial.

C. Adverse Health Effects/Weighing Equities

DNR argues that granting the variance would “permit the continuance of a condition which may unreasonably cause or contribute to adverse health effects upon humans” or wildlife.¹³ DNR relies on the geohydrological report indicating that lot sizes needed to be greater than 4.8 acres to prevent potential groundwater contamination and adverse health effects. Because evidence in the prior case was admitted in the present case, we may consider such evidence as it is relevant to this issue.

¹² Respondent’s ex. 1, Attachment 1, Question 7.

¹³ Section 644.061.1.

Chris Wieberg, Section Chief with DNR's Water Pollution Control Program, testified that one of the reasons DNR denied the Variance Application was the requirement of 4.8 acres. But on cross-examination, he admitted that he had no other evidence about the conditions at Eagles Landing:

THE REPORTER: "Question: Do you know whether current conditions at Eagles Landing subdivision with respect to wastewater disposal present an unreasonable contribution or actually cause adverse health effects to humans?"

THE WITNESS: Actually caused? No.

Q: Do you know whether current conditions at Eagles Landing present an unreasonable cause or contribute to adverse health effects upon fish or other aquatic life?

A: No.

Q: Do you know whether current conditions at Eagles Landing with regard to wastewater disposal on the site unreasonably cause or contribute to adverse health effects upon game or other wildlife?

A: No.^[14]

Tony Kerley, with DNR's Southeast Regional Office, admitted that there have been no tests to determine whether there is actual groundwater pollution in Eagles Landing as a result of the on-site wastewater treatment systems that have already been installed. None of the systems has failed, but all of them are in violation of the Clean Water Law. When asked why adding another system would adversely affect the groundwater if the system were properly designed, Kerley based his opinion on the geohydrologic evaluation's requirement of 4.8 acres, even though none of the lots in Eagles Landing are that large.

Boaz is correct in arguing that this decision is different than the decision whether to issue a regular permit. This is a variance – by definition something different from a regular permit.

¹⁴ Tr. at 34-35.

“Variance” is defined as “a license to do some act contrary to the usual rule[.]”¹⁵ A court described the variance process as follows:

The legislature, realizing that economic hardship could ensue from immediate compliance with the Clean Water Act, provided that the [CWC] could, upon application from a person found to be in violation of the Act, grant a variance from the compliance sections of Chapter 204, for no greater time than is reasonably necessary for the violator to comply with the provisions of the Clean Water Act, provided that such variance is not prohibited by any federal water pollution control act, and if the granting of the variance would not cause or contribute to cause adverse health effects to humans and wildlife.^{16]}

Allowing one more wastewater treatment system in the subdivision will have some effect; it is hard to argue otherwise. One more occupied house will produce wastewater that will require treatment. But other than supposition, there is no evidence that granting this variance for a limited period of time would unreasonably cause or contribute to adverse health effects upon humans or wildlife.

DNR argues that, with the Variance Application, Boaz submitted a soil report that was prepared for a conventional septic system using gravity pressure and not for drip dispersal or low pressure, and that Boaz did not submit a design report. The former is not problematic because Robert Rouse, a soil scientist with DNR, testified that he could simply use different rates to convert the report to a pressurized system. There was very little testimony as to the design report requirement, other than that it was required. There are two septic systems set forth as options by Boaz – the standard septic system and the drip system. Testimony indicated that the drip system was preferable, and we make our variance order mandating that system.

Having decided that the CWC is not barred from issuing a variance because it is temporary or because of health/safety issues, we turn to the question of whether there has been

¹⁵ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1384 (11th ed. 2004).

¹⁶ *Hammack v. Missouri Clean Water Comm'n*, 659 S.W.2d 595, 600 (Mo. App., S.D. 1983).

an arbitrary and unreasonable taking of property or the practical closing and elimination of any lawful business, occupation or activity without corresponding benefit to the people.

While a “taking” does not require actual physical taking of any part of property, “it is necessary that there must be an invasion or an appropriation of some valuable property right which the landowner has to the legal and proper use of his property, which invasion or appropriation must directly and specially affect the landowner to his injury.”¹⁷ The court stated that there must be a direct disturbance of a right in connection with the property and that gives it additional value. The disturbance of that right caused special damage with reference to that property above that which is sustained by the public.¹⁸

There is often a discussion of “unreasonable taking” in the zoning context. In one case, the denial of a variance was found to be an unreasonable taking because it amounted to a denial of any use under the existing ordinances.¹⁹ In another case, the court determined that showing a mere difference in value of the land was insufficient to rebut the presumed validity of a zoning ordinance.²⁰ The land was still suitable for some use, and the owner had knowledge that the land was zoned as residential.

In Boaz’s case, we find that failure to grant the Variance Application would be an unreasonable taking of his property. He cannot occupy or sell the house on Lot 5 without a wastewater treatment system. He did not know and had no way of knowing that there was such a restriction, particularly since a state agency had been granting permits prior to his application with regard to Lot 5. Boaz testified as to significant financial harm that has resulted from the inability to proceed with building on Lot 5, including cessation of his building business.

¹⁷ *Hamer v. State Highway Commission*, 304 S.W.2d 869, 871 (Mo. 1957).

¹⁸ *Id.*

¹⁹ *Ogawa v. City of Des Peres*, 745 S.W.2d 238, 243-44 (Mo. App., E.D. 1987).

²⁰ *Wells & Highway 21 Corp. v. Yates*, 897 S.W.2d 56, 62 (Mo. App., E.D. 1995).

The factual circumstances in this case place Boaz squarely in the middle of two state agencies, neither of which claims to be able to do anything to remedy the problem of a house without a wastewater treatment system and other houses that were granted permits for what are now wastewater treatment systems operating against the law. The permits from DHSS appeared perfectly valid, but now DNR maintains that those wastewater treatment systems violate the law. Mary Ann Sutter, an environmental specialist with DNR, described the situation that exists in Eagles Landing:

Q. Okay. That's fine. Thank you. You've not told anyone that they could put in a septic tank on Eagles Landing; is that right?

A. I've not told anyone?

Q. That they could put in a septic tank?

A. Yes. We've never told anyone that they could put in a septic tank.

Q. Did you ever tell anyone to take them out?

A. No.

Q. Why not?

A. Well, because there was going to be a solution. Obviously they needed -- if there were houses and they were being lived in, it's certainly not the Department's goal to have -- to cause pollution. So if there's houses there and they're being resided in and there's wastewater treatment of some sort there, it's better than telling them take them out and have none at all. And plus the Department had no knowledge at that point of what -- what was happening with them. We had no idea. We had no idea of those systems whatsoever. But the main issue would be that we certainly don't want to have them remove what little treatment was even there to cause -- to actually, to me, in my mind, cause pollution if you were to remove them.

Q. Ms. Sutter, if there -- you said you didn't want them to remove them to cause pollution. Is it your contention that they're currently causing pollution?

A. There's no -- I have no knowledge that they are.

Q: Okay.

A: But if there's no treatment system – you said why did we not ask them to remove them. Obviously if you remove them and you've got a straight pipe, then you're going to be causing pollution.

Q. Or you have a vacant house, isn't that a possibility?

A. If there's a vacant house? If there's a vacant house, obviously there's no pollution occurring at that time.

Q. So if someone has a system which is in violation of DNR, Department of Natural Resources laws and regulations and they're operating that system, they're in violation, do you have the authority to tell them to stop using that system?

A. So you're saying -- I guess I'm taking this a little bit farther then. So actually telling people who are residing in homes that have an illegal system that they need to discontinue the use of that system?

Q. Do you have that authority?

A. Not that I'm aware of.

Q. Okay. So you indicated that they were in violation of the rules and laws. What is your remedy?

A. Well, we thought that the remedy was the remedy that was outlined in the settlement agreement, and we thought that it was going to occur.

Q. Okay. But what is your remedy with the individual homeowners?

A. At this time?

Q. Yes, ma'am.

A. I guess that's why this case isn't resolved and it's now at the Attorney General's Office.

Q. Ma'am, there are approximately 17 lots, and correct me if this is wrong, which have occupied homes.

MR. MENEES: 15.

BY MS. KEATON:

Q. 15? Okay. 15. Something over 10. There are houses out there. People are using those septic tanks every day. Are they in violation of DNR laws or statutes or –

A. Yes.

Q. -- statutes and regulations?

A. Yes.

Q. What is your remedy?

A. That remedy hasn't been defined yet because –

Q. Let's talk about Lot 4. The person who lives on Lot 4, is that person in violation of DNR statutes or regulations?

A. Lot 4?

Q. Yeah.

A. Is there a house there?

Q. I believe there is.

A. Is there someone living there?

Q. I believe there is. We'll assume for purposes of my question.

A. Okay.

Q. And that it is not Dexter Frost.

A. Okay.

Q. Okay. Now, we've got Lot 4. It's occupied. Has a septic tank. It's not occupied by Dexter Frost. It's not owned by Dexter Frost. That person has a septic tank. DNR didn't tell that person they could have a septic tank. What is the remedy?

A. There is no remedy at this time with that person. The remedy is the case against the developer so that he can provide a remedy.

MS. KEATON: Okay. No further questions.

COMMISSIONER DANDAMUDI: Mr. Menees?

RE-CROSS-EXAMINATION BY MR. MENEES:

Q. So you -- I think you answered both of our questions that those septic systems are currently in violation, correct?

A. Correct.

Q. And then you answered her question in the negative as to whether you could take action against them. Are you -- I guess I would like to reask the question. If something is in violation, you could take action on that violation, the Department could take violation or --

A. Take action against --

Q. Take action on that violation and require the homeowners to do something? How about not answer that. Has the Department chosen to take action against any of those individuals?

A. No.

Q. What has the Department chosen to do to correct those violations?

A. Well, I mean, obviously we're going forward with the enforcement against the developer.

Q. To enforce the settlement agreement?

A. To enforce the settlement agreement.

Q. And that's the preferred remedy, and the Department has chosen not to take action against the individual homeowners?

A. Correct.^[21]

According to § 644.061.1, the competing interests in this case are “sufficient corresponding benefit or advantage to the people” and “arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity[.]” The advantage to the public is that there is an immeasurable increase in the chance of groundwater contamination. As stated previously, allowing one more wastewater treatment

²¹ Tr. at 99-104.

system in the subdivision will have some effect. But that effect is speculative and can be controlled by the conditions of the variance. Boaz has shown that he is suffering from a serious taking of his property. He cannot sell the property; he cannot even live in it without a wastewater treatment system. He must still pay a 7% finance rate on his investment of approximately \$110,000. Boaz testified that the condition of the home on Lot 5 is deteriorating and will require additional funds to repair and refurbish. In addition, he has been caught between two state agencies, and built the home on Lot 5 after experiencing no difficulties in getting permits for wastewater treatment systems for two other homes within the subdivision.

The equities in this situation lead us to grant the Variance Application in this case, if not in future cases. DNR must pursue the settlement agreement with Frost before any future construction is commenced in Eagles Landing.

Summary

We recommend the CWC issue a permit variance to allow Boaz to construct and maintain a drip wastewater treatment system on Lot 5 for one year with the ability for the CWC to renew if it deems necessary and appropriate.

SO RECOMMENDED on April 3, 2013.


SREENIVASA RAO DANDAMUDI
Commissioner