



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Office of the
Secretary

Phone: (302) 739-9000
Fax: (302) 739-6242

Secretary's Order No. 2009-W-0026

Re: APPLICATION OF JEFFREY AND RHONDA BANNING FOR A FORMAL VARIANCE FROM THE DEPARTMENT *REGULATIONS GOVERNING THE DESIGN, OPERATION AND INSTALLATION OF ON-SITE WASTEWATER TREATMENT AND DISPOSAL SYSTEMS IN DELAWARE, 7 DE ADMIN. CODE REGULATION 7101 SECTION 7.2.1*

**Date of Issuance: August 26, 2009
Effective Date: August 26, 2009**

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control (“Department” or “DNREC”), the following findings, reasons and conclusions are entered as an Order of the Secretary.

Procedural History

Jeffrey and Rhonda Banning applied for a variance for their property located at Sussex County Tax Parcel #3-31-3.00-153.00 (“Property”) in order to install an on-site wastewater treatment and disposal system (“OSWTDS”) for a proposed residential structure. The variance seeks relief from the Department’s *Regulations Governing the Design, Operation and Installation of On-site Wastewater Treatment and Disposal Systems in Delaware* (“*Regulations*”) that require a minimum lot size of ½ acre for a residential OSWTDS. *7 DE Admin. Code Regulation 7101 Section 7.2.1*.

The Department provided public notice of the application and received a request for a public hearing from Kenneth Dunn, who owns property at 8564 Hearn Pond Road, Seaford, adjacent to the Property. The Department provided public notice of and held a

public hearing on the application, and the Department's assigned Hearing Officer, Robert P. Haynes, developed a record of decision, and prepared a report of recommendations, dated July 31, 2009 ("Report"), a copy of which is appended to this Order and incorporated herein.

The Report recommends certain documents be introduced into the record, makes several proposed findings of fact, and recommends denial of the application as not meeting the high standard the General Assembly has imposed on the Department in Section 6011 of Title 7 of the Delaware Code. *7 Del. C. §6011.*

Discussion and Order

I agree with the reasoning and findings in the Report and adopt it in its entirety. I agree that the General Assembly clearly has limited the Department's authority to issue variances in Section 6011. Section 6011 requires that the Department make four specific findings, and the Report indicates that Applicants have failed to support all four findings. Moreover, the Department's technical experts indicate that the Applicants have the ability to seek a permanent solution to allow an OSWTDS on the Property by increasing the size of the Property by a small amount so that no variance would be needed.

In addition, the General Assembly determined that any Department issued variance can only last no longer than a year and will expire without any Department action. The Applicants would have to apply again to continue to operate an OSWTDS beyond one year from the date of issuance of the variance if the Department was to grant the application. The Department would have to provide public notice and possibly hold another public hearing before issuing a final decision to extend any variance beyond one year. Applicants seek a permanent relief from the minimum lot size. The variance

procedure does not provide any permanent relief. I do not consider the variance procedure to be a reasonable or administratively practicable method to provide permanent relief to the Applicants.

In sum, as more fully described in the reasons and findings above and in the Report, I adopt and direct the following as a final order of the Department:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;

2. The Department provided adequate public notice of the proceeding and the public hearing, and held the public hearing in a manner required by the law and its regulations;

3. The Department considered all timely and relevant public comments in making its determination;

4. The record supports the denying the application, and allowing the Applicants to seek permanent relief through increasing the size of the lot as may be granted by Sussex County if such approval is required; and

5. The Department shall provide notice of this Order to the persons affected by this Order, as determined by the Department, including those who participated in the hearing process, and shall publish notice of its decision on its web page.

s/Collin P. O'Mara
Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: APPLICATION OF JEFFREY AND RHONDA BANNING FOR A FORMAL
VARIANCE FROM THE DEPARTMENT *REGULATIONS GOVERNING THE
DESIGN, OPERATION AND INSTALLATION OF ON-SITE WASTEWATER
TREATMENT AND DISPOSAL SYSTEMS IN DELAWARE, 7 ADMIN. CODE
7101 SECTION 7.2.1*

DATE: July 31, 2009

I. BACKGROUND AND PROCEDURAL HISTORY

This Report considers the record developed for the Secretary of the Department of Natural Resources and Environmental Control ("Department") on an application of Jeffrey and Rhonda Banning ("Applicants") for a variance seeking relief from the Department's *Regulations Governing the Design, Operation and Installation of On-site Wastewater Treatment and Disposal Systems in Delaware, Regulation 7101 Section 7.2.1*. ("Regulations"). Applicants seek to install an on-site wastewater treatment and disposal system ("OSWTDS") on their lot located on Sussex County Tax Parcel #3-31-3.00-153.00 ("Property"), which is less than one-half acre in size as required by *7 DE Admin. Code Regulation 7101 Section 7.2.1* for a new OSWTDS.

The Department provided legal public notice of the variance application and received a request for a public hearing from Kenneth Dunn, a property owner of 8564 Hearn's Pond Road, Seaford, adjacent to the Property. Mr. Dunn's request indicated his opposition to the variance application based upon his concern with possible contamination to the well on his property.

The Department published public notice of and held a public hearing on October 23, 2008 at the Seaford Town Hall. Mrs. Banning, Timothy Willard, Esquire, who entered his appearance as counsel for the Applicants, Mr. Dunn, and James Cassidy, from the Division of

Water Resources, Ground Water Discharge Section (“GWDS”) attended the public hearing. No other members of the public were present. Due to an administrative error, no court reporter was present, but I asked the representatives of the Applicant and Mr. Dunn if they wanted to proceed forward with the hearing and indicated that an electronic recording device would be used. Those present agreed to hold the hearing and there was no objection to the use of the electronic recording device. The electronic recording is available of the public hearing, which may be transcribed.

After the hearing, I requested the technical assistance from experts within Division of Water Resources, Ground Water Discharge Section (“GWDS”), and Mr. Cassidy provided a memorandum, a copy of which is attached hereto, as its technical response. Mr. Cassidy recommends that the variance application be denied due to the availability of an alternative, namely, that Applicants can enlarge the Property to allow an OSWTDS to be installed on the Property to comply with the Regulations as a permanent long-term solution. The Property, if enlarged, also allows an OSWTDS to be located that will also satisfy the *Regulations* on the proper isolation distances from Mr. Dunn’s well or from other areas where isolation distances apply to an OSWTDS.

II. SUMMARY OF THE RECORD

At the hearing, Mr. Cassidy presented for the public hearing record the documents in the Department’s files including the correspondence, public notices and notes from various meetings with the Applicants and Mr. Dunn. Applicants appeared through counsel and presented the reasons why the Department should grant Applicants a variance. Mrs. Banning made comments supporting the underlying reasons for the variance to allow the Property to be improved by a single family residential structure that would be beneficial to the area and those in need of such housing. Applicants also introduced the following exhibits: Banning Exhibit 1 consisting of the

tax map, photographs, survey 1) 7 Del C. §6011, 2) DNREC Regulation 10.200, Sussex County Variance Case §6011, 2) DNREC Regulation 10.200, 3) Sussex County Variance Case 9759-2007 approving the subdivision of the Property, 4) Sussex County Building permit for a single family dwelling, 5) Soil Evaluation, 6) Concept Septic Plot Plan, 7) Septic Inspection Report on the Dunn property, and 8) Secretary's Order 2007-W-0002 on a variance application for Robert Bocek. Mr. Dunn presented his comment that were his reasons based upon his concern with the contamination of his well, but he did not introduce any documents as exhibits.

As noted above, the Department's hearing was electronically recorded and a verbatim transcript can be prepared from the electronic recording. To date there has been no request for a verbatim transcript. Because I was present to hear the comments I do not need a transcript prepared for my benefit. I also do not recommend a transcript be prepared for the benefit of the Secretary because I consider that the documents in the record provide the fundamental relevant facts, which I do not believe are not in dispute. I find that the documents in the public hearing record, this Report and the attached GWSD memorandum provide the Department with sufficient information and facts to form a record sufficient to support a final decision to deny the requested variance, which is my recommendation.

III. DISCUSSION, RECOMMENDED FINDINGS AND REASONS

The Department's authority to grant a formal variance is set forth below based upon the following Department findings:

- (1) Good faith efforts have been made to comply with this chapter;
- (2) The person applying is unable to comply with this chapter because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time or the financial cost of compliance by using available technology is disproportionately high with respect to the benefits which continued operation would bestow on the lives, health, safety and welfare of the occupants of this State and the effects of the variance would not substantially and adversely affect the policy and purposes of this chapter;

- (3) Any available alternative operating procedure or interim control measures are being or will be used to reduce the impact of such source on the lives, health, safety and/or welfare of the occupants of this State; and
- (4) The continued operation of such source is necessary to national security or to the lives, health, safety or welfare of the occupants of this State.

7 Del. C. §6011.

The Department's Regulations in Section 10.02000 states that a variance may be granted if *7 Del. Code Section 6011* is satisfied, that strict compliance with the *Regulations* is inappropriate for cause, or special physical conditions render strict compliance unreasonable, burdensome or impractical. The Applicants have the burden to support the request for a formal variance.

I recommend the relevant factual findings be adopted:

1. Applicants own the Property, identified on Sussex County Tax Parcel as parcel #3-31-3.00-153.00 and located along Hearn's Pond, Seaford, Sussex County.
2. The Property has 19,704 square feet in size, which is less than the one half acre minimum lot size for an OSWTDS for a single family residential structure as set forth in the Department's *Regulations*.
3. Applicants seek to improve the Property with a single family residential structure using an OSWTDS.
4. An OSWTDS would allow Applicant to build a single family residential structure on the Property, but the Property may be used for other purposes without an OSWTDS.
5. Sussex County approved the creation of the Property by its subdivision of the adjacent parcel, also owned by the Applicants, at 8137 Hearn's Pond Road, Seaford, Sussex County.
6. The Applicant's lot adjacent to the Property is improved by an existing residential dwelling served by an OSWTDS.

7. The Property is located next to the property owned by Kenneth Dunn, and improved by a single family residential house that uses a well.
8. The Department's experts consider that the Property may be reconfigured through available legal methods in order to add to its size so that it may have after its reconfiguration one-half acre and thereby satisfy the *Regulations* and still provide the isolation distance required from an OSWTDS and the well on Mr. Dunn's property.
9. The presence of the alternative to increase the size of lot would not require any variance, which would expire after one year absent renewal through the Department's variance procedures.
10. The Applicants failed to meet their burdens to satisfy the strict standards the General Assembly has imposed on the Department in *7 Del. C. 6011* to justify a formal variance because Applicants are able to comply with the minimum lot size if they increase the size of the Property through seeking changes from Sussex County by reducing the size of the adjacent lot that was created when they subdivided to create the Property.
11. The Regulations are designed to protect the environment and public health from excessive amounts of pollutants from OSWTDS entering the waters and the one-half acre minimum lot size was determined to be a reasonable size to reduce the risk of pollution from excessive pollution entering the groundwater and possibly contaminating domestic drinking water and surface waters such as Hearn's Pond or public or private drinking supply wells.
12. The Applicants acted in good faith in the efforts to subdivide and improve the Property with an OSWTDS.

13. Applicants are able to comply with the *Regulations* because they have an alternative method available by increasing the size of the lot to meet the minimum lot size for an OSWTDS.

14. Applicants do not satisfy the requirement of “continued operation of such source is necessary to the lives, health, safety or welfare of the occupants of this State” because the variance seeks to install a new OSWTDS and not to continue an existing OSWTDS

Based upon the above proposed findings of facts and applying the above legal and regulatory requirements, I recommend that the Department find that the requested variance fails to meet the strict and rather inflexible legal and regulatory standards the General Assembly has imposed upon the Department before it may grant a variance from its *Regulations*.

7.2 The following maximum siting densities shall be maintained:

7.2.1 For residential dwellings, the maximum siting density shall be one (1) dwelling unit per one-half (1/2) acre

The first legal standard entails a good faith effort to comply with the Department’s laws and regulations. I find that the Applicants satisfied the good faith effort standard based upon their compliance with the law in the subdivision and following the Department’s procedures to seek a variance. Good faith traditionally means conduct consistent with the law and Applicants complied with the law, and did not conduct any fraudulent or deceptive practices. The subdivision was consistent with the law and Sussex County approved the subdivision, but Sussex County does need to follow the Department’s *Regulations* when it creates lots. The purpose of the subdivision is the real problem because Applicants seek to install an OSWTDS, but Sussex County does not have jurisdiction over whether an OSWTDS could be installed on the Property. For example, the Property can still be used for any lawful purpose other than to install an

OSWTDS. It is Applicants' intended use of the Property to install an OSWTDS that causes the subdivision to conflict with the minimum lot size required for a residential OSWTDS. I find nothing in the record to question the Applicants' good faith, which traditionally is to be presumed. Thus, Applicants have satisfied this standard.

The second statutory finding is based upon applying a best available technology and a cost benefit standard to the proposed wastewater system that is proposed, but otherwise not authorized by the *Regulations*. I find that this standard does not apply to these facts. The Department's experts recommend denial of the request even though the Property could accept an advanced OSWTDS if it was large enough for any OSWTDS. The problem is the minimum lot size and not the best available technology. Thus, the Applicants have satisfied this standard because an advanced OSWTDS could otherwise be installed absent the minimum lot size.

The third standard is whether the use of the proposed system is appropriate and will protect the environment and public health. I find that Applicants' facts do not support a variance because the Regulations are based upon installing an OSWTDS on the Property, which would not protect the environment and public health more than not installing an OSWTDS. The minimum sized lot in the Regulations was to protect the environment and public health and Applicants have not shown any way that the proposed installation of an OSWTDS will protect the environment and public health more than denying the variance, which will prevent any discharge into the groundwater from an OSWTDS. The Department's minimum lot size is to reduce cumulative impacts from lots with OSWTDS adversely impacting water quality. The location of the Property next to Hearn's Pond also warrants this reason for denial under this standard because the water conditions could become more impaired by a new OSWTDS installed on a lot that did meet the Department's minimum lot size.

The fourth standard is that “[t]he continued operation of such source is necessary to national security or to the lives, health, safety or welfare of the occupants of this State.” This language is very broad, and I find that Applicants have not supported that the installation of an OSWTDS on the Property. The language “continued operation,” which, in my opinion, allows the grant of a variance only for an existing system that may be in conflict with the *Regulations* and not a proposed system. Applicants proposed system would not meet the “continued operation” and “necessary” language” in the statutory language. I also find no support for finding that an OSWTDS on the Property is necessary to national security or to the lives, health, safety or welfare of the occupants of Delaware. To me this clearly indicates that this or any variance should be very important, and Applicants’ proposed OSWTDS I find is not that important to the lives, health, safety or welfare of the occupant of Delaware.

Another problem with the variance request is that a variance does not provide a permanent solution. Instead, even if the Applicants satisfied the four standards, the law limits a variance to no more than one year. After a year the variance would expire without any further Department action. Consequently, the Applicants would have to re-apply annually to receive on-going variances. An annual process of renewal is not the long-term or permanent solution that the Applicants seek, but nevertheless it is what the law requires. The Department has no authority to issue anything variance for any period longer than a year. The Department’s experts suggest a permanent solution for the Applicants is to seek a change in the size of the Property by including more of the original parcel to meet the minimum lot size. This solution appears reasonable and one that was present before the subdivision occurred to avoid any problems with environmental harm from an OSWTDS. But the decision to increase the lot size must be one that the Applicants seek from Sussex County and not the Department.

In sum, I find that the requested variance does not meet the strict legal and regulatory requirement the law has imposed on the Department, and that a revision of the lots sizes would provide the relief requested, albeit by seeking approval from Sussex County.

IV. RECOMMENDED CONCLUSIONS

Based upon the above discussion and reasons, I find and conclude that the record, the law and the *Regulations* support denying the requested application for a formal variance and recommend the Secretary adopt the following findings and conclusions:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and its regulations;
3. The Department held a public hearing in a manner required by the law and its regulations;
4. The Department considered all timely and relevant public comments in making its determination;
5. The Department denies the requested variance because its fails to satisfy all of the legal and regulatory standards for such a relief from the Department's *Regulations*, which establishes minimum lot size for an OSWTDS in order to protect the environment and public health; and
6. The Department shall serve its decision on all affected persons, as determined by the Department, including the persons who participated in the public hearing process.

s/Robert P. Haynes

Robert P. Haynes, Esquire
Senior Hearing Officer



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MEMORANDUM

TO: Robert Haynes

FROM: James Cassidy

RE: Banning Formal Variance (T.M. 3-31-3-153)

DATE: February 18, 2009

As requested, this memorandum provides a brief synopsis of the situation on the above referenced property and the options available to the Department.

Ms. Rhonda Banning applied for a Formal Variance due to the size of their newly subdivided lot, which is less than the one-half acre required by the Department's Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems in Delaware. (The Regulations)

Mr. Kenneth Dunn opposed the variance due to the possible proximity of the proposed on-site wastewater treatment and disposal system (OSWTDS) on the Banning property to his well; however the Dunn well is not visible. Mr. Dunn contends that his may be located within 100' of the OSWTDS proposed on the Banning Property. The Department is unable to verify the exact location of the well located on the Dunn property and accordingly the isolation distances can not be determined.

Typically, regulations require a horizontal separation distance of 100' from an OSWTDS and potable water well, however, in cases where advanced wastewater treatment incorporating nutrient reduction is employed, the Regulations allow the isolation distance to be decreased to 50'

Ms. Banning has had a preliminary design done to show that a 50' isolation distance can be met from the common property so no matter where the Dunn well is located it would meet setback criteria.

Other options would include re subdividing the Banning property to meet the required lot size of ½ acre on the newly created parcel. This idea has already been presented to Ms. Banning as well as their counsel and I feel should be looked into before other options are considered.

If, indeed the re-configuring of the two adjoining lots is not possible, through the Sussex County Planning and Zoning Department then the Department should require the use of advanced treatment with nutrient removal be added to the OSWTDS, if the Secretary determines that a Formal Variance should be approved.