



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL

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Office of the  
Secretary

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**Secretary's Order No. 2007-W-0002**

**Re: Application of Robert Bocek for a Formal Variance for an Existing On-site Wastewater Treatment and Disposal System at 24387 Boblin Court, Lot 7 Woodsboro Subdivision, Millsboro, Sussex County**

**Date of Issuance: January 16, 2007**

**Effective Date: January 16, 2007**

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") under *7 Del C. §§6011 and 6006*, the following findings, reasons and conclusions are entered as an Order of the Secretary. This Order considers the application of Robert Bocek for a formal variance from the Department's *Regulations Governing the Design, Operation and Installation of On-site Wastewater Treatment and Disposal Systems in Delaware* ("Regulations") at his property at 24387 Boblin Court, Lot 7 Woodsboro Subdivision, Millsboro, Sussex County ("Property"). The relief requested is to allow an existing septic system to remain in place and operating despite the system's location, which is in violation of the standard distances set forth in the *Regulations*.

On July 12 and August 10, 2006, the Department 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 January 8, 2007 ("Report"), a copy of which is appended to this Order and incorporated herein.

The Report considered the public comments made by Raymond Swords, who requested the public hearing, and other neighbors of the Property. The Report indicates that there was an underlying dispute over the sale of land between Mr. Bocek, as a potential buyer, and his neighbor, Raymond Swords, as a potential seller. The sale of land would have provided Mr. Bocek with the necessary distance between Mr. Swords' property and the proposed septic system. Mr. Bocek applied for a permit based upon a 20 foot distance from the septic system, but the system as installed was only five feet from the Swords property. The Report questions Mr. Bocek's good faith effort to comply with Section 6.05010 of the *Regulations*, which require a minimum of a 10 foot distance between a septic system and a property line.

Most of the public comments opposed the issuance of a variance on environmental grounds. The Report relies on the Department's technical experts, who indicated that the application fails to justify a variance, but that the existing system does not currently pose a risk of harming the environment or public health. The Report reviews the law and the Department's *Regulations*, and recommends that no variance be issued because the applicant failed to meet the law's strict standards for a variance. The Report further does not recommend any enforcement action be taken or the existing permit be revoked at this time because the continued operation of the system now occurs without harming the environment or public health. The Report indicates, based upon the Department's experts, that the long-term solution is a minor modification to the system by shortening the laterals in the drainage field in order to provide the appropriate ten foot isolation distance. The Report also states that the septic and dosing chamber tanks may be moved, or the Department may grant a permit amendment to allow reduced distances.

I adopt the Hearing Officer's review of the record and recommendations. I agree with the Report that Section 6011 of Title 7 imposes upon an applicant a high and strict standard to meet in order to allow the Department to issue a variance. Moreover, even if a variance is justified, the law limits it to remain in effect for only up to one year. Thus, the Department is unable to provide the long-term relief requested.

The Report also recommends allowing the existing system to continue to operate in the short-term until the minor modifications to shorten the system's laterals in order to have the system comply. The Report also notes that the Department can approve reduced isolation distances, and recommends such reduction in order to allow the septic tank and dosing chamber to remain where they are.

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 applicant to submit permit minor modifications to bring the system into compliance, although no enforcement action is appropriate if the system continues to operate without harming the environment or public health. The Department in reviewing a permit

amendment for the minor modifications needed to bring the system into compliance may consider revising the isolation distances for the septic and dosing tanks to allow the existing tanks to remain where they now are; 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 in a manner provided by the public notice requirements of *7 Del. C. Section 6004*.

*s/John A. Hughes*

John A. Hughes  
Secretary

## HEARING OFFICER'S REPORT

TO: The Honorable John A. Hughes  
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 Robert Bocek For A Formal Variance For An Existing On-Site  
Wastewater Treatment And Disposal System At 24387 Boblin Court, Lot 7  
Woodsboro Subdivision, Millsboro, Sussex County.

DATE: January 8, 2007

### I. BACKGROUND AND PROCEDURAL HISTORY

This Report considers the March 14, 2006, application of Robert Bocek for a formal variance, which was the subject of the Department of Natural Resources and Environmental Control's ("Department") July 12 and August 10, 2006, public hearing held at the Delaware Technical College in Georgetown, Sussex County.<sup>1</sup>

Mr. Bocek owns property at 24387 Boblin Court, Lot 7, Woodsboro Subdivision, Millsboro, Sussex County ("Property"). In 1999, he applied for a permit to treat and discharge wastewater at the Property in order to serve a proposed three bedroom house. The Department's Division of Water Resources, Ground Water Discharge Section ("GWDS") approved the installation of a Low Pressure Pipe ("LPP") septic system in Permit No. 162660-S issued March 10, 1999. The permit's approval was based upon the application's design, as prepared by licensed professional engineer, Raymond Brotherton. The design showed that the system would be 20 feet between the proposed septic system's components and the adjoining properties. Pursuant to the Department's procedures, Mr. Bocek submitted a construction report form, and an inspection report/certificate of completion, which the Department approved July 2, 2003. The inspection report and certificate of completion were signed by Ed Grimm, as the installer,

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<sup>1</sup> This Hearing Officer was assigned to preside over the hearing, to develop a record of decision and to prepare a report of recommendations for the Secretary of the Department.

and by Mr. Brotherton, as the designer, and certified that the system complied with the permit and *Regulations Governing the Design, Operation and Installation of On-site Wastewater Treatment and Disposal Systems in Delaware* (“*Regulations*”). This certification included that the system was more than 10 feet from the property lines and that no changes had been made to the initial designs.

Ray Swords owns property that adjoins the Property. Mr. Bocek approached Mr. Swords about purchasing a portion of Mr. Swords’ property that adjoined the Property. Mr. Bocek thought he had a deal on the sale, but Mr. Swords did not and a lawsuit ensued in which Mr. Bocek sued Mr. Swords. The Court of Chancery found in favor of Mr. Swords. The purchase of this portion of Mr. Swords’ land would provide the needed isolation distance needed by the *Regulations*.

In March 2005, Mr. Swords complained to the Department that the septic system, as installed, did not provide the required ten feet isolation distance from his property. James Cassidy of GWDS investigated and in an April 4, 2005, letter to Mr. Bocek determined that the end of the laterals in drain field was approximately 5-6 feet from Mr. Swords’ property line and that the septic tank and dosing chamber were approximately 7 feet away. Mr. Cassidy indicated that these distances, if accurate, would violate the Department’s *Regulations*. Mr. Cassidy suggested moving the system or seeking a variance from the *Regulations*. The Department requested Mr. Bock to accurately measure the distances, but the Department did not receive a survey until late February 2006, despite reminder letters from the Department on October 10, 2005, and February 13, 2006.

Mr. Bocek on March 14, 2006, submitted a letter that requested a variance from the required ten foot isolation distance. The Department notified the public and adjoining property

owners of this request. Mr. Swords requested a public hearing in an April 10, 2006, letter from his counsel.

The duly noticed public hearing was held, and thereafter I requested the technical assistance from experts within GWDS for assistance. In a December 5, 2006, memorandum, a copy of which is attached hereto, GDS provided its technical response.

## **II. SUMMARY OF THE RECORD**

At the hearing, Mr. Swords described his efforts to require that Mr. Bocek bring his septic system into compliance with the Department's *Regulations*. He also spoke on Mr. Bocek's effort to acquire real estate from him into order to build a house, and how that effort ended with the courts upholding his right not to sell his land to Mr. Bocek.

Mr. Frank Hoesch, a property owner three houses away from the Property, spoke in opposition to the potential health risks from the Bocek septic system. He also stated that on July 15, 2006, he saw liquid on the ground at the Property and a strong, putrid septic odor came from the Property. The Department investigated this complaint and the results of the investigation are included in this record. The investigation showed that that there was no problem with the septic system's operation.

Mr. and Mrs. Adeline Yodice, property owners who live two houses away from the Property, spoke in opposition to the health risk from a septic system contamination.

Ed Grimm spoke on how the system was installed based upon adequate isolation distances using the property line markers, but that there had been problems with the markers. He was questioned by Mr. Cassidy about the discharge of water from a water conditioner in the area of the septic system.

This report of recommendations is based upon the record of decision, which contains: 1) a sixty-nine page verbatim transcript of the public hearing, 2) documents, marked as Exhibits

("Ex."), which were admitted into the record as hearing exhibits, and 3) information I reviewed or obtained during discussions or review of Department files, records and other post-hearing communications, including DWR's technical response memorandum attached hereto as Appendix A. I consider the record of decision to be well-developed, and will provide ample support for the Secretary's final decision.

### **III. DISCUSSION, FINDINGS AND REASONS**

The Department's authority to grant a formal variance is set forth below in Section 6011 of Title 7 of the Delaware Code:

§ 6011. Variance.

- (a) The Secretary may, upon application of a person (except an application concerning (1) a source of water or a sewerage facility for 3 or fewer families or (2) open burning, on which the Secretary may act without public notification), grant a variance to that person from any rule or regulation promulgated pursuant to this chapter after following the notice and hearing procedure set forth in § 6004 of this title.
- (b) The variance may be granted if the Secretary finds that:
  - (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.

- (c) The Secretary shall publish his or her decision, except a decision involving (1) a source of water or a sewerage facility for 3 or fewer families or (2) open burning, and the nature of the variance, if granted, and the conditions under which it was granted. The variance may be made effective immediately upon publication.
- (d) Any party may appeal a decision of the Secretary on a variance request to the Environmental Appeals Board under §6008 of this title within 15 days after the Secretary publishes his or her decision.
- (e) No variance can be in effect longer than 1 year but may be renewed after another hearing pursuant to this section.
- (f) The granting of a variance shall not in any way limit any right to proceed against the holder for any violation of the variance. This chapter, or any rule, or regulation, which is not incorporated in the variance provisions, shall remain in full effect.
- (g) Notwithstanding other provisions of this section, the Secretary is not authorized to approve requests for fundamentally different factor variances from categorical pretreatment standards promulgated by the Administrator of the United States Environmental Protection Agency pursuant to § 307(b) or (c) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1317(b) or (c). The Secretary is authorized to accept and review such variance requests, and, upon review, deny such request or recommend that the Administrator of the United States Environmental Protection Agency approve such a variance request.

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. Mr. Bocek's application for a variance must meet the above legal and regulatory standards. Section 6011 requires that the Department must make the four findings. 7 *Del C. § 6011(b)(1)-(4)*. Mr. Bocek, as the applicant, has the burden to support the request for a variance.

Based upon the record and applying the above legal and regulatory requirements, I recommend that the Department find that Mr. Bocek has not satisfied the legal and regulatory standards for the Department to grant a variance from its *Regulations*.

The first legal standard entails a good faith effort to comply with the Department's laws and regulations. The record raises certain questions about whether Mr. Bocek did undertake good faith compliance with the Department's *Regulations*. First, if the system had been installed consistent with the permit application's description, then there would be no need for a variance. The 1999 permit application that shows a proposed 20 foot distance between Mr. Bocek's property and Mr. Swords' property, but the installed distance was approximately 5 feet. The difference may be attributable to the change in the design of the house that added a garage, but Mr. Bocek still had to comply with the isolation distances and the permit extension required him to state that no changes had been made to the design. There is no explanation in the record for this large discrepancy in the proposed isolation distances and the installed distances. The record includes evidence that Mr. Bocek knew that he needed more land to build his house, and that he was unsuccessful in his efforts to acquire Mr. Swords to sell him more land, including suing him when the sale did not go to settlement. Thus, the situation appears to be one where Mr. Bocek submitted a permit application that was not correct based upon the actual house that was built, and this ambiguous compliance record does not support a finding of good faith efforts.

The second standard 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*. The Department's experts find that the Property currently has a permitted authorized system, which is properly operating and in compliance except for the need to relocate the discharge of the water conditioning equipment. The drain field is oversized and can be readily reduced to bring the system into compliance, and I find that the location of the dosing and septic tanks poses no threat of harm to the environment. Consequently, I find that Mr. Bocek has satisfied this standard.

The third standard is that the use of the proposed system is appropriate and will protect the environment and public health. I find that the low pressure pipe (“LPP”) system is an approved system, but was incorrectly situated on the lot, possibly due to Mr. Bocek’s changes to the design of the house. Thus, this standard is satisfied.

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 indicates that variances should be granted to allow existing systems to continue to operate. The other language on national security, and to protect the lives, safety or welfare of the occupants of this State, also imposes a high standard. The Property does have an existing system, and it is operating properly except for some minor changes. Consequently, I find that Mr. Bocek does satisfy this standard if the existing system was posing a threat to the environment or public health, but it is not.

Even if the Department issues a variance, the law limits a variance to no more than one year. Consequently, any variance Mr. Bocek would have to re-apply annually to maintain a variance. This annual process is not the long-term or permanent solution that Mr. Bocek seeks, but it is what the law requires and the Department has no authority to issue anything longer. The variance would not provide the type of permanent wastewater solution to the Property to be marketable as an improved lot with a legal sewer system. Mr. Bocek is a builder and intended to sell the Property, but now lives at the Property pending the removal of the problems with the septic system’s location.

Mr. Bocek seeks relief from the Department’s regulation on the isolation distances. These distances were determined to provide a margin of safety in the event of a system failure and ensure that no wastewater intrudes migrates underground or flows above ground on to another person’s property. The Department’s experts indicate that a properly operating system will not

harm the adjoining properties at the installed system's isolation distances. In the event of a failure, the permit conditions would require that the environmental harm be remedied, and a failure could cause harm even at the ten foot isolation distance required by the *Regulations*.

The Department's experts suggest a solution for Mr. Bocek, which is to reduce the size of the drain field. The drain field was constructed with sufficient capacity to allow the length of the laterals to be reduced in order to comply with the isolation distance required by Section 6.05010 of the *Regulations*. I agree that this solution would provide a long-term solution that Mr. Bocek seeks, and recommend that the Department allow Mr. Bocek to pursue this solution upon his submission of a plan and the Department's approval of it. In addition, the Department may be able to allow closer isolation distance under Section 6.05030 of the *Regulations* through a permit amendment.

The septic tank and dosing chamber also are located less than ten feet from the property line, and these could be moved, but this would cause possible damage to the existing drain field. I find that the continued use of the system does not pose any harm to the environment that warrants an enforcement action; again based upon the expert assessment of the existing system. The Department has discretion to not take any enforcement action or to revoke the permit. The Department issued a permit for the septic system, albeit based upon an application that showed a design with adequate isolation distances and authorized the use of the installed system. Consequently, the Department seeks to provide an equitable solution to a problem that entails a minor technical violation of the *Regulations*. Nevertheless, the technical violation impairs the marketability of the Property. This equitable consideration of the Department's approval is weighed against Mr. Bocek's questionable disclosures to the Department in the permitting process. In sum, I find that requiring Mr. Bocek to undertake the minor modifications to the system, albeit at some cost, is appropriate to provide the long-term solution of the Property

complying with the Regulations, and that the short-term solution is to allow the existing system to remain in use and not require any change by an enforcement action of a minor technical violation, so long as it does not impair the environment or public health.

#### **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, but allowing a long-term solution to bring the Property into compliance through changes to the system. I 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 shall consider minor amendments to the permit in order to comply with the *Regulations*, including allowing reduced isolation distances and reducing the length of the laterals and that no enforcement action is warranted at this time pending compliance as long as the system operates properly; 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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TO: Robert P. Haynes, Hearing Officer

THRU: Kevin C. Donnelly

FROM: Dave Schepens  
James Cassidy

DATE: 12/05/06

RE: Bocek Septic Variance – Public Hearing

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As requested the following comments from the Division of Water Resources, Ground Water Discharges Section regarding the above mentioned Public Hearing.

For the record it is our opinion that the Secretary should deny the variance because applicant does not meet the standards as set forth in 7 Del. C. Section 6011s. We do however recommend the Secretary allow the existing on-site wastewater treatment and disposal system to remain operational with the following modification to the drainfield ends. Abandon the drainfield ends to make the 10 foot isolation distance to the property line. The system was oversized by 568 square feet (sqft) and the abandonment of 3-5 feet on each lateral will not effect the minimum sqft requirement of The Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems.

With respect to the septic tank and dosing chamber the GWDS recommends not requiring Mr. Bocek to relocate them for the following two reasons; 1) The septic tank and dosing chambers do not pose any environmental threat because regulations require these tanks to be watertight and they are greater than five feet from the property line. 2) Relocation of these tanks could cause major damage to the existing drainfield due to the fact heavy equipment would have to transverse over the system to get to the tanks.

The GWDS also requires that the runoff from the roof drains and the discharge from the water conditioner be rerouted away from the septic tank and dosing chamber.

It is the responsibility of the licensees to insure the system meets all isolation distances met, however in this case it appears that the property line was in dispute and a formal survey was not done until three (3) years after the installation of the system. The GWDS recommends that no further enforcement action be taken for this installation of the system.