



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

Office of the
Secretary

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Secretary's Order No. 2007-W-0003

Re: Application of Robert Parks for a Formal Variance to Install a Permanent Wastewater Holding Tank at Lot 51, Filmore Avenue, Broadkill Beach, Sussex County.

Date of Issuance: February 2, 2007
Effective Date: February 2, 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 Parks 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"). Mr. Parks seeks a variance from the *Regulations* in order to install a permanent holding tank for a house he wants to build on his property at Lot 51, Filmore Avenue, Broadkill Beach, Sussex County ("Property"). The application seeks relief from Section 5.13010 of the *Regulation*, which prohibits the installation of a permanent holding tank on an unimproved lot.

On July 12, 2006, the Department held a public hearing on the application, and the Department's Senior Hearing Officer, Robert P. Haynes, developed a record of decision, and prepared a report of recommendations, dated January 10, 2007 ("Report"), a copy of which is appended to this Order and incorporated herein. The Report

considered the public comments, particularly the opposition from Joseph Nadu, who requested the public hearing.

Mr. Nadu opposed the requested variance as not supported under *Section 6011* of *Title 7* of the Delaware Code and that a holding tank would pose a threat to the local environment and public health. The Report considered the comments, and recommended not granting a variance because the applicant failed to meet Section 6011's high and strict standards. Moreover, Section 6011 limits a variance for a time period of no more than one year, subject to renewals. Clearly a variance would not provide Mr. Parks a permanent solution in order to construct a house on the Property.

The Report discusses the fact that the Property in 1994 obtained an approved soil evaluation, which under the *Regulations* in effect in 1994 would have allowed a permanent holding tank to be built on an unimproved Property. The Department's experts drafted *Section 5.01172* of the *Regulations* provided the five year window to submit the 1994 approved site evaluation in support of a permit application, which the Department will review under the *Regulations* in effect prior to the March 11, 2002 amendments. Under the *Regulations* in effect on March 10, 2002, did not prohibit a permanent holding tank. Consequently, Mr. Parks has until March 11, 2007, to submit the approved soil evaluation and an application for a proposed holding tank, which preserve his ability to have the Department consider a permanent holding tank as allowed under the *Regulations* in effect on March 10, 2002. The Department's encourages the community to seek a central sewer system as the long-term solution to its wastewater disposal as the community has many on-site systems that would not meet the current standards for

approved systems. These systems may fail and cause environmental and public health problems in the future.

This Order clarifies *Section 5.01172* on the Department's procedures when reviewing an application submitted during the five-year window following the adoption of the amended *Regulations* on March 11, 2002. The Department has reviewed numerous applications under this provision, including applications for holding tanks. The Department's practice is to review applications for permanent holding tanks submitted during the five-year window under the *Regulations* in effect on March 10, 2002. This five year window was intended to provide a reasonable amount of time as a transition period to submit any approved soil evaluations as part of a permit application and to allow an option for holding tanks for unimproved lots. Of note, a permanent holding tank is only prohibited in Section 5.13010 "except as provided in these Regulations." Clearly, this intended to allow holding tanks as an option under the *Regulations* in effect on March 11, 2007, albeit grandfathered based upon the *Regulations* in effect on March 10, 2002.

The Report also discusses the *Beach Preservation Act, 7 Del. C. Chapter 68*, because the Property is located in the "beach" area and seaward of the "building line", as these terms are defined in the Beach Preservation Act. The Department's experts indicate that an application for a wastewater permit for a holding tank must be submitted prior to March 11, 2007, but that the Department's Division of Water Resources will not issue a permit (or will condition a permit) until the Department's Division of Soil and Water Conservation determines if a building may be built. This clarifies that the primary

responsibility for regulating any construction in the beach area is under the *Beach Preservation Act*.

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, held the public hearing in a manner required by the law and its regulations, and considered all timely and relevant public comments in making its determination;

3. The record supports denying the application, but the current Regulations allow the applicant to submit a permit application on or before March 11, 2007, based upon the approved 1994 site evaluation for the Property and a permanent holding tank as a mode of wastewater disposal. The Department will review an application submitted on or before March 11, 2007, pursuant to the *Regulations* in effect on March 10, 2002, and issue a permit after, or condition any permit upon, issuance of *Beach Preservation Act* permit; and

4. 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 Parks for a Formal Variance to Install a Permanent Wastewater Holding Tank at Lot 51, Filmore Avenue, Broadkill Beach, Sussex County.

DATE: January 10, 2007

I. BACKGROUND AND PROCEDURAL HISTORY

This Report considers the March 12, 2006, application of Robert Parks for a formal variance. This application was the subject of the Department of Natural Resources and Environmental Control's ("Department") July 12, 2006, public hearing, held at the Delaware Technical College in Georgetown, Sussex County.¹ Joseph Nadu requested the hearing in an April 10, 2006, letter from his counsel. Mr. Parks owns an undeveloped property at Lot 51, Filmore Avenue, Broadkill Beach, Sussex County ("Property") and Mr. Nadu owns an adjoining property.

Mr. Parks applied for a formal variance from the Department's Regulations in order to install a permanent holding tank. The Department previously denied Mr. Parks' application to install an on-site septic system.

I requested the technical assistance from experts within the Department's Division of Water Resources, Groundwater Discharges Section ("GWDS"). In a December 5, 2006, memorandum, a copy of which is attached hereto, GWDS provided its technical response.

¹ 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.

II. SUMMARY OF THE RECORD

At the hearing, Mr. Parks spoke and presented documents, which were included as his hearing exhibits. Mr. Parks explained that he had acquired the lot in 2004 with the intention of building a house on it. Mr. Parks described his attempts to construct a house and his effort to obtain the Department's approval on a method for the disposal of wastewater. Mr. Parks initially sought the Department's approval of an on-site groundwater disposal system based upon the Department's 1994 approval of a soil evaluation. He stated that the Department informed him that a soil evaluation approval was only valid for five years. Consequently, in 2005 he submitted a new soil evaluation for the Department's approval, but the Department denied an on-site groundwater disposal system based upon this evaluation. He claimed that the soil evaluation, as prepared by Soil and Environmental Associates, indicated that the Property was suitable for an in ground septic system. This firm's soil scientist, Bill Ganglof, told Mr. Parks that the Property was suitable for a pressure dosed septic system, but he indicated that the Department may prefer a holding tank.

Mr. Parks also stated that Mr. Nadu's objection to the formal variance really was based upon the fact that Mr. Nadu does not want any construction on the Property because it would hinder the view of the water from Mr. Nadu's property. Mr. Parks also stated that he had retained an engineer to design a holding tank, and was willing to satisfy all of the Department's requirements for constructing a holding tank. Mr. Parks submitted documents as a hearing exhibit for the record.

Mr. Wyatt Hammond spoke in support of the application and stated that his preference was for a community sewer system. If a community sewer system was not possible, then he suggested approval of a holding tank, and not any in-ground disposal system such as septic system or cesspool, which he considered the worst methods. Mr. Hammond owns a nearby lot

that has an in-ground cesspool. Consequently, he anticipates problems in the future with his wastewater disposal method.

Mr. Taylor, counsel for Mr. Nadu, questioned Mr. Parks and developed the record that Mr. Parks had acquired two adjoining lots in 2004, one of which was improved by a house. Mr. Taylor provided documents as hearing exhibits and made a closing statement arguing that the law prohibits the Department from granting the requested formal variance. Mr. Nadu spoke and commented that he had asked the Property's prior owner about purchasing the Property, and the prior owner had informed him that no house could be built on the lot. Mr. Nadu presented photographs of the Property and surrounding area.

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 also has *Regulations Governing the Design, Installation and Operation of On-site Wastewater Treatment and Disposal Systems* (“*Regulations*”), which 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. Parks’ 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. Parks, 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. Parks 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. I find that Mr. Parks has undertaken good faith efforts to obtain a lawful sewage system for the Property. He has gone through the administrative steps to submit the appropriate information to obtain a permit for an on-site system. Unfortunately for Mr. Parks, the Department’s experts did not find that the lot satisfied the regulations for an on-site disposal system. This denied of his application was a final administrative decision, and no appeal was filed from it and it will not be re-considered here, but nothing prohibits him from submitting another application for another permit

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 have found that the Property currently is not suitable for any known on-site groundwater disposal system. The Department has authorized holding tanks under certain temporary conditions, and that option would be the most

cost effect solution allows a structure to be built on the Property. I agree with the experts' assessment that the Property is not suitable for a groundwater disposal system and the proposed holding tank is the most cost effective at this time. Consequently, I find that Mr. Parks has satisfied this standard.

The third standard is that the use of an unapproved system is appropriate and will protect the environment and public health. I find that a holding tank, subject to permit conditions to protect the environment and public health, would protect the environment if a building is built.

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 considerable standard that is not present here. The Property does not have an existing system, but Mr. Parks seeks to install a new system. Consequently, I find that Mr. Parks does not satisfy this standard, although a holding tank would protect the environmental and public health more than an on-site groundwater disposal system. I agree with Mr. Hammond that the long-term solution would be the construction of a community system to serve all the community's wastewater disposal needs.

Even if Mr. Parks obtained a variance, the law restricts the Department from issuing a variance for a time period longer than one year. Consequently, Mr. Parks would have to re-apply for another variance annually. This process is not the long-term or permanent solution that Mr. Parks seeks, but it is what the law requires. The variance would not provide the type of permanent wastewater solution to allow a structure to be built on the Property.

Mr. Parks seeks relief from the Department's regulation that prohibits a permanent holding tank as a method of groundwater wastewater disposal. Instead, the Department

Regulations consider holding tanks as a temporary solution in Section 5.13000. Section 5.13010 states as follows:

The use of a holding tank is an unusual circumstance wherein all wastewater is permitted to be held in a watertight structure until it is pumped and transported by vehicle to a point of disposal. The use of a holding tank on a permanent basis is prohibited except as provided in these Regulations.

The Regulation prohibits permanent holding tanks “except as provided in these Regulations,” but the Department approves holding tanks under certain circumstances as a last resort option, often pending connection to a central sewer system. The Department realizes that holding tanks provide an environmental safe method to temporarily store waste water pending its final disposal away from a property. The Department imposes conditions on holding tank permits that require monitoring, inspections, wastewater hauler contracts, and other appropriate conditions. I find that the Property’s location on Delaware Bay and the fact that it has been subject to flooding from storms makes any form of on-site waste water disposal unacceptable at this time and the available technology. The record includes photos, which show that the Property is subject to high water conditions, so the conditions for a holding tank permit would have to protect the environment under storm conditions. The presence of other houses in the area may support the installation of a community central sewer system, particularly as some of them may be experiencing failing groundwater systems. Thus, a holding tank or a central sewer system are the only means to providing sewer service at this time to the Property, and the law does not support issuing a variance for a permanent holding tank and no central sewer system is present.

The record also shows that the denial of the requested variance will not cause Mr. Parks any undue hardship. He purchased two adjoining lots in a single transaction. One lot was improved and is used by Mr. Parks as a vacation house. There is not sufficient information in this

record to determine whether that transaction included certain warranties. More importantly, the Department does not look at real estate transactions. Instead, the seller's warranties and disclosures to Mr. Parks as to whether a structure can be built on the Property is a matter for the courts to resolve. The Department is charged with enforcing its statutory duties and responsibilities, and is clearly barred from issuing a variance to Mr. Parks as he has requested.

The denial of the requested variance does not preclude the Department in the future from issuing a permit for the wastewater disposal at the Property, either on a temporary or permanent basis. Any such action is not the subject of this application on the variance. The construction of a structure on the Property also is governed by Department under the Beach Protection Act, 7 Del. C. Chapter 68, and Department's Regulations. The issuance of a holding tank permit would require a Beach Use permit from the Department's Division of Soil and Water Conservation.

In addition, the *Regulations* provide an option for a holding tank based upon the approved soil evaluation, which existed before March 11, 2002 effective date of the Department's prohibition of permanent holding tanks in Section 5.13010. The change in the Regulations also provided in Section 5.01172 that an approved site evaluation shall be valid for five years from the date of the Department's approval or the adoption of this Regulation revision..." This Regulation was intended to preserve the existing approved site evaluations for five years, and allow approval of systems grandfathered under the prior *Regulations*. Under this scenario, the 1994 approved site evaluation would remain in effect, and could be subject to amendment to reflect a holding tank as allowed under the prior *Regulations*. The Department is not issuing a permit, particularly absent a Beach Use Permit, but instead explains to Mr. Parks that he has another option that will remain available until March 11, 2007 to submit a revised

proposed system for a permanent holding tank, as allowed the prior *Regulations* under the grandfathering provisions of Section 5.01172.

IV. RECOMMENDED CONCLUSIONS

Based upon the discussion and reasons, I find and conclude that the record, the law and the Regulations support denying the requested application for a formal variance. 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; and

5. 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

TO: Robert P. Haynes, Hearing Officer

THRU: Kevin C. Donnelly

FROM: Dave Schepens
James Cassidy

DATE: 12/05/06

RE: Parks Septic Variance – Public Hearing

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

- 1) Mr. Parks included in the record an exhibit and it refers to certain meetings/discussions with you. This seeks your response or clarification to his description of your conversations.

Jim Cassidy spoke with Mr. Parks in August of 2005. Having knowledge of the parcels that Mr. Parks was speaking of Jim suggested that the soil may have changed to some extent due to beach replenishment, since the 1994 site evaluation was approved and that a new soil evaluation may be required to ensure that some type of system could be located on the property. The subject of variances was not discussed.

The new site evaluation was submitted, site checked and subsequently denied due to recently placed dredge material and frequent flooding and erosion events.

Jim Cassidy spoke with Mr. Parks again about the denial and explained that the Regulations do not allow holding tanks to be installed on un-improved lots and that a formal variance would have to be applied for.

Dave Schepens met with Mr. Parks and discussed the process to apply for a Formal Variance.

2) Is it your expert opinion that the 1994 soil evaluation is no longer valid? Please explain and indicate what caused it to be no longer valid and when did that occurred.

After further review of the 1994 site evaluation that was approved by the Department we are of the opinion that the 1994 site evaluation is not valid for a full depth pressure dosed system for the following reasons:

The approved site evaluation states “Isolation distance requirements, limited area of suitable soils, and/or removal or compaction of the topsoil during where weather may negate construction permit approval or modify the type of system that can be permitted”. Therefore due to beach erosion, tidal influences on the lot and isolation distances the Department can negate and/or modify the system type. This was confirmed by the site evaluation that was received by the Department from William J. Gangloff dated September 30, 2005 and this is the point when the system type was no longer valid.

The Department revised The Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems in 2002 requiring that site evaluations expire after 5 years unless permitted and all existing site evaluations approved prior to March 2002 were to expire 5 years after adoption of the Regulations. Therefore, do to the fact the lot was approved in 1994 for an on-site wastewater treatment and disposal system we believe the Variance should not be granted and the 1994 site evaluation be modified to allow for a permanent holding tank as a system type which was a valid system type until 2002. Please keep in mind that this is just a addendum to the 1994 site evaluation a permit application designed by a Licensed Class C Engineer must be submitted to the to the Ground Water Discharges Section and prior to approval of the Holding Tank the applicant must receive a beach use permit from DNREC’s Division of Soil and Water.

3) Please provide the technical reasons why the 2005 soil evaluation did not support an in ground disposal system.

Tidal influences and weather related events such as Nor-Easters and hurricanes have caused the site to be the recipient of many beach replenishment projects. See attach pictures taken by neighbors of Mr. Parks showing storm surges that have taken place in 2006.

4) Is there any other permanent wastewater disposal and treatment process available for the property other than a holding tank, and if not, what should the Department require if a holding tank is approved; i.e., monitoring, location, testing, maintenance, usage restrictions, inspection, construction, etc?

No at this time a holding tank is the only option unless a central sewer system becomes available. Any holding tank permit issued by the Department is subject to conditions that include monitoring, inspections, wastehauler contracts and other restrictions. Permanent holding tanks as this would be require anti-buoyancy to protect the tank from floating in inundated conditions. As was discussed additional protection such as piling or sheeting may be considered in the design.

5) If there is anything else you would like to add, please let me know.

It is the opinion of the Division of Water Resources, Ground Water Discharges Section that the Formal Variance request should be denied and that the 1994 site evaluation be amended to allow a holding tank as an approved option, as was typically approved in 1994. Holding tanks were accepted options during that time for lots where size constraints existed or on lots with denied soils or where flooding was possible.

It should also be noted that prior to the issuance of a holding tank permit the property owner must provide the Ground Water Discharges Section an approved Beach Use Permit from the Division of Soil and Water.