

BEFORE THE ENVIRONMENTAL APPEALS BOARD

APPEAL OF THE FRIENDS
OF HERRING CREEK

This appeal by the Friends of Herring Creek of the issuance of a permit to construct an on-site sewage disposal system to serve the Angola Beach Travel Trailer Park was heard by the Board on October 2, 1985. Sitting for the Board were Thomas J. Kealy, Chairman, Clifford Hubbard, Evelyn Greenwood, and Richard Sames. The Board was represented by Barbara MacDonald, Deputy Attorney General. Appellant, Friends of Herring Creek, was represented by Norman C. Barnett, Esquire. The Department of Natural Resources and Environmental Control ("DNREC") was represented by Peter Hess, Deputy Attorney General. The permit applicant, Elliott Hindman, was represented by James F. Waehler, Esquire.

SUMMARY OF THE EVIDENCE

Robert J. Zimmerman, Supervisor of the Water Pollution Control Branch of DNREC testified that DNREC's regulations at the time of Mr. Hindman's application allowed an acreage density of 1,250 gallons per acre per day. Mr. Zimmerman testified that as of January 4, 1985, DNREC's regulations limited the acreage density to 500 gallons per one half acre per day for commercial property. Mr. Zimmerman said that it is DNREC policy to apply the

regulations in effect at the time the application is received and that the application as received met the regulations then in effect. Mr. Zimmerman testified that he did not know whether the application would meet the current regulations.

Mr Zimmerman testified that 4 Del. C. §6032 requires that percolation testers "shall be certified" and must be insured. Mr. Zimmerman testified that although this requirement has existed since 1978, prior to January 4, 1985, no percolation tester, including Mr. Hindman had been certified since the DNREC did not have regulations establishing guidelines for certification in place until that date.

Mr. Zimmerman testified that the water flow guidelines under DNREC regulations formerly estimated flow from "trailers" at 250 gallons per day for units of three bedrooms or less. He further testified that the current regulations estimate flow from trailer camps at 150 per day. Mr. Zimmerman testified that the DNREC does not consider travel trailers to be comparable to "trailers" and that it is DNREC policy to consult outside sources when the DNREC flow guidelines do not provide an estimate for the type of unit proposed. In this case, the DNREC considered 150 gallons per day to be a reasonable estimate of flow although at the time the application was received, the DNREC had no specific flow guideline in its regulations for "travel trailers."

Mr. Zimmerman testified that DNREC regulation do not require the cumulative effect of development to be considered in issuing on site sewage disposal system permits and that Mr. Ray Brotherton, a former DNREC employee, had been involved in evaluating the application for a permit while employed while at DNREC and that upon leaving DNREC he became the registered engineer for the project.

Mr. Jay W. Pochomis, a soil engineer, testified as an expert that in his opinion the soil survey report completed by William R. Ratledge for the applicant, was unreliable and that the septic system designed on the basis of that report was not sufficient to prevent untreated or partially treated sewage from seeping into Herring Creek.

Mr. Barnett read into evidence a statement by Robert F. Rocheleau to the effect that it is Mr. Rocheleau's opinion as an environmental engineer that the proposed sewage disposal system will result in pollution in Herring Creek. In particular, Mr. Rocheleau's opinion is that the size of the seepage bed is inadequate and that an assumption of 150 gallons per day per unit is unrealistic.

Mrs. Mathilda Purnell, a resident of the Herring Creek area, testified that she and her fellow residents fear that the development of a travel trailer camp at Angola Beach will cause further stress in an already environmentally fragile area.

Mr. Roy R. Parikh testified on behalf of the DNREC that he conducted a hearing on this matter on November 15,

1984. Mr. Parikh testified that at that previous hearing the Friends of Herring Creek had presented essentially the same evidence, including statements by Mr. Pochomis and Mr. Rocheleau, that he considered all evidence presented by the Friends of Herring Creek, as well as the Applicant, and that he concluded that the sewage disposal system as proposed complied with DNREC regulations, provided certain limiting recommendations which he specified were adopted.

Mr. Elliott Hindman testified that in his experience travel trailers of the sort which would occupy the Angola Beach Travel Trailer Camp are not the same as the trailers which occupy trailer parks, in that travel trailers have smaller water storage capacity, less water using appliances, and a much smaller water flow per day. Mr. Hindman testified that under the current permit, the camp is required to closed for six months per year, and that in addition in his experience usage of the park will be light during the weekdays during the open season and that these periods of light or no usage will allow the soil to cleanse itself.

Mr. Hindman testified that no matter what form of ownership is ultimately adopted for the proposed trailer park, the owners' association will be required by law to check the water usage every month. Mr. Hindman testified that Mr. Brotherton was not directly employed by him and that at the time that Mr. Brotherton was employed by DNREC Mr. Hindman did not know what his role was.

CONCLUSIONS OF LAW

The Friends of Herring Creek argued that the Secretary erred in:

1. Failing to consider the evidence presented to the Hearing Officer challenging the adequacy of the proposed sewage disposal system.
2. Allowing the use of the acreage density standard set in the "old" regulations in combination with a 150 gallon per day flow estimate not contained in those regulations.
3. Allowing Mr. Hindman to conduct the percolation tests when he had not been certified in accordance with 7 Del. C. §6032.

The Friends further argued that the possibility of a condominium form of ownership would make it impossible for the DNREC to police the effectiveness of the sewage treatment system once it was in place and that, therefore, the permit should not be issued, and finally, that the involvement of Mr. Brotherton on the project, first for the DNREC, and later for the applicant, created a conflict of interest which is sufficient to require reversal.

The Board finds:

That the Secretary, in making his decision, was entitled to rely upon the recommendations of his staff, including those of the Hearing Officer, Mr. Parikh. The evidence before Mr. Parikh regarding the sufficiency of the

proposed sewage disposal system was in conflict but was sufficient to support his conclusion that the proposed system, with certain safeguards, was adequate under DNREC regulations. Mr. Parikh testified that he considered all the evidence before him, and in reviewing this evidence the Board finds that Mr. Parikh's conclusions were substantially based on the evidence before him. Therefore, the Board concludes that neither the Secretary nor Mr. Parikh erred in finding that the proposed sewage disposal system was adequate under DNREC regulations.

The Hearing Officer concluded that 7 Del. C. §60032, which required all percolation testers to be certified, is not self-implementing but requires the adoption of implementing regulations before such certification could be required. The Board agrees with the Hearing Officers' conclusions it is obvious that Mr. Hindman could not have had the percolation tests done by a "certified" tester when the Department had no procedures for such certification until January 4, 1985.

The Secretary found that the flow guideline of 150 gallons per day used by DNREC in calculating the acreage density required for the proposed system was valid although it was not contained in the regulations in effect at the time the application was made because those guidelines did not "adequately cover activities such as the one proposed by the applicant." The Board does not agree with the Friends of Herring Creek that use of this 150 gallon per day flow

guideline constituted an impermissible mixing of "old" and "new" regulations by DNREC based on the evidence before him, the Secretary could reasonably conclude that the "old" regulations did not contain a specific guideline for the type of use proposed and thus, could use a flow estimate not contained in those guidelines but derived from other reasonable sources.

Based on the evidence before it, the Board finds that the possibility of a condominium form of ownership, if such is ultimately adopted by the Angola Beach Trailer Camp, will not prevent DNREC from being able to monitor the functioning of the sewage disposal system. The evidence indicates that no matter what form of ownership is ultimately adopted, there will still be a single body responsible for complying with DNREC requirements.

The Board finds that the alleged conflict of interest cause by Mr. Brotherton's employment by the DNREC and, subsequently, by the applicant was not such as to require reversal. It is not the role of the Board to judge the propriety of Mr. Brotherton's actions. The only matter of concern to the Board is whether the Secretary was precluded from making a fair and unbiased decision because of Mr. Brotherton's involvement. The record contains absolutely no evidence which would lead the Board to draw such a conclusion.

DETERMINATION

The Board affirms the Secretary's Order.

