

Dortono v. Dep't of Environmental Protection

OATH Index No. 247/10 (Sept. 30, 2009)

Department's denials of variances were not an abuse of discretion where applicant did not show that the variances requested were the minimum necessary, did not propose adequate mitigation, and did not show a substantial hardship. Petitioner also submitted insufficient evidence to show that her permit applications complied with the Watershed Regulations.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
JACQUELINE DORTONO

Petitioner

- against -

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondent

REPORT AND RECOMMENDATION

INGRID ADDISON, *Administrative Law Judge*

Petitioner Jacqueline Dortono appeals, pursuant to section 18-28, title 15 of the Rules of the City of New York ("RCNY") ("Watershed Regulations"), from respondent's denial of an application for a variance from the rules governing subsurface sewage treatment systems in the watershed area that supplies drinking water to New York City and related permit. 15 RCNY §18-28. The Acting Commissioner of the Department of Environmental Protection ("Department") denied the variance and permit applications applications on June 22, 2009.

Petitioner filed this appeal on July 20, 2009, with an engineer's report that it submitted to the Department in support of its variance application. Respondent requested and was granted an extension until September 4, 2009 to file its answer. On September 9, 2009, I reopened the record to allow the Department to make a further submission, which was filed on September 11, 2009, at which time the record was closed.

For the reasons stated below, I conclude that the denial of the variance and related permit applications was not an abuse of discretion, and recommend that the Acting Commissioner's determination be affirmed.

ANALYSIS

Petitioner has owned the 1.166 acre lot, located in Dutchess County, New York, since 1961 (ALJ Ex. 1 at ¶ 6; Pet. Ex. A). The deed restricted the property's use to a single family residence until 1975, at which point the restriction expired (Pet. Ex. A). According to petitioner, shortly after purchase, a cabin was constructed on the property (ALJ Ex. 1 at ¶ 7). The cabin burned to the ground in 1975, and the property has remained undeveloped since then (ALJ Ex. 1 at ¶ 7). The property contains part of a New York State regulated freshwater wetland PQ-27, which includes a classified stream and an unnamed tributary (ALJ Ex. 1 at ¶¶ 11, 20). Both merge near the southern property line and flow into an off-site pond (Pet. Ex. F ¶ 2.0). To enhance its value, petitioner proposes to sell the lot with an approved building permit for a single family home (ALJ Ex. 1 at ¶ 19).

The Department notified petitioner on July 21, 2003, that the property falls within a designated New York City Watershed area (Pet. Ex. E). On November 21, 2006, the Dutchess County Department of Health ("DCDOH") informed petitioner that its proposal will meet the DCDOH's technical requirements for approval provided that petitioner obtained all permits from the New York State Department of Environmental Conservation ("NYSDEC") necessary to construct the improvements that were integral for the installation of a well and septic system (Pet. Ex. B). Petitioner claims that the entire property was classified as an NYSDEC wetland or falling within 100 feet of an adjacent wetland in late 2006 (ALJ Ex. 1 at ¶ 11). Petitioner filed an application with the Department on April 26, 2009, for a permit to build a residential three-bedroom house with a paved driveway, a new subsurface sewage disposal system ("septic system"), a new well, and imported fill which would cover a portion of the wetlands on the property (Pet. Ex. F).

An Engineering Report submitted with petitioner's application, and prepared by Spectra Engineering, Architecture and Surveying, P.C. ("Spectra Report" or "Report"), was attached to petitioner's application (Pet. Ex. F). According to the Report, the imported fill which will elevate the property, is also intended for the primary absorption area which, would cover .1757 acres of the wetlands.¹ Petitioner proposes to enlarge one of the wetlands on the property and 0.2135 acres of new wetland, in mitigation of the 0.19-0.2 acres of wetland that would be filled for the proposed home. Petitioner further proposes to pipe 275 linear feet of the Class B stream,

¹ Spectra Report, para. 7.5.

and 100 feet of the unnamed tributary. The Report notes that both the Department's and DCDOH's regulations require a setback of 100 feet from the two watercourses for elevated systems,² but claims that that requirement is reduced to 35 feet, per DCDOH's standards, where the water course has been culverted.³ In addition, a 1000-gallon septic tank will be installed, and at least 10 feet of raw sewage pipe will lead from the house to the septic tank.⁴ The house is proposed to be located within 10 feet of a non-piped section of the watercourse and wetland PQ-27. The Report indicates that because of the quantity of fill proposed, no portion of the septic system will be installed in the existing or original ground, and that the design eliminates any opportunity for ground water interference to the septic system, "the exposure of sewage to the surface of the ground, or the discharge of sewage to ground water."⁵ The Report states that because it has been classified as a continuation of State wetlands PQ-27, any use of the property, anywhere on the site, will fall within the 100 feet buffer area of designated state wetlands.⁶

The relevant Watershed Regulations for the "Protection from Contamination, Degradation and Pollution of the New York City Water Supply and its Sources," became effective on April 30, 1997. They provide that any person wishing to construct a new subsurface sewage treatment system must apply for approval and must meet the requirements of sections 18-38(a) and (b) of the regulations and the New York State Department of Health requirements under title 10 of the New York Codes, Rules and Regulations ("NYCRR"), Part 75 and Appendix 75-A (Lexis 2009), which are incorporated into the Watershed Regulations. *See* 10 NYCRR Part 75 and Appendix 75-A (Lexis 2009). Under section 18-38 of the Department's rules:

All new individual sewage treatment systems shall comply with the requirements of 10 NYCRR Part 75 and Appendix 75-A except where a local government or agency has enacted, or these rules and regulations specify, more stringent standards, in which case, the more stringent standards apply. 15 RCNY § 18-38 (a)(2).

No part of an absorption field for a new conventional individual subsurface sewage treatment...shall be located within the limiting

² The Spectra Report also indicates that the minimum limiting distances for raised systems per SEPTIC SYSTEM regulations is 250 feet. Spectra Report, para. 10.9.

³ Spectra Report, paras. 10.10, 11.3.

⁴ Spectra Report, para. 4.5.

⁵ Spectra Report, para. 11.5.

⁶ Spectra Report, para. 7.9.

distance of 100 feet of a watercourse or wetland.... 15 RCNY § 18-38 (a)(5).

Proposed sites with soil percolation rates faster than 3 minutes per inch or slower than 60 minutes per inch shall not be approved by the Department for locating a subsurface sewage treatment system. 15 RCNY § 18-38 (b)(6).

Incorporated into these rules is the requirement of a 10-foot minimum separation distance between the property boundary and any portion of a sewage system. 10 NYCRR Appendix 75-A.4(b).

To obtain a building permit for the plan as proposed, on designated wetlands, petitioner sought the following variances and permits pursuant to section 18-61 of the Department's rules: (1) a variance from the requirements of section 18-38 (a)(5), to permit the absorption field of the septic system to be within 100 feet of wetlands; (2) a variance from section 18-38 (b)(6), to permit percolation rates greater than 60 minutes per inch; (3) a variance from section 18-38(a)(2), to permit a fill system within 10 feet of a property boundary; (4) a Subsurface Sewage Treatment System permit for an individual septic system to be built on the lot; (5) an Individual Residential Stormwater Permit ("IRSP") to construct a residence within the limiting distance of 100 feet of a wetland; and (6) a Crossing, Piping and Diversion Permit ("CPDP") to culvert the streams on the property.

An applicant for a variance must establish that: (1) the variance requested is the minimum necessary to allow the activity; (2) the activity proposed includes adequate mitigation measures which are at least as protective of the water supply as the standards set forth in the Watershed provisions; and (3) that compliance with the rules and regulations would create a substantial hardship due to site conditions and limitations. 15 RCNY §18-61(a)(1)(ii)-(iv). The requirements must all be met, and the burden of proof is the applicant's. 15 RCNY § 18-61(a)(4).

Petitioner submitted the Spectra Report to establish that it met these requirements. According to the Report, the proposed use of the property is the only gainful one under Dutchess County's zoning regulations. Petitioner claims that most new septic system designs propose up to a four-bedroom house, while petitioner's plans contemplate a three-bedroom. Petitioner suggests that her proposal was the minimum size house (in terms of bedroom count) that would be approved by DCDOH (Report ¶ 13.3). Petitioner also contends that alternative sewage

treatment measures had been explored, but rejected by the DCDOH (Report ¶ 13.3). Further, the distances from the septic system and house to the streams and wetlands are the minimum needed to achieve the requested variance, and the proposed acreage use was the minimum necessary to support the septic system design.⁷ Petitioner admits that mitigation measures are limited. Nonetheless, petitioner maintains that denial of her application would deprive her of any gainful use of the property, thereby causing substantial and unreasonable hardship and, in effect, tantamount to a taking of her property (ALJ Ex. 1 at ¶ 29).

Acting Commissioner Steven W. Lawitts denied petitioner's variance and permit requests on June 22, 2009, on ground that the proposed septic system failed to meet two of the most critical requirements of the Watershed Regulations that are intended to ensure that septic systems will not pose a threat to water quality. Specifically, Acting Commissioner Lawitts found that: (1) the proposed absorption area is within 25 feet of a watercourse and thus, would be immediately adjacent to a wetland; and (2) the soils are not suitable for a septic system, which functions by allowing wastewater to be absorbed into the ground where it would receive treatment (ALJ Ex. 2 at 14). Because percolation tests observed by Department representatives in September 2008 failed, subsurface treatment was unlikely. In addition, the fill pad would be located within 10 feet of the property line (Pet. Ex. D). Petitioner filed the instant appeal on July 20, 2009.

In regard to the variances, the issue to be determined on appeal is “[w]hether the Commissioner or the First Deputy Commissioner abused his or her discretion in denying a request for a variance.” 15 RCNY § 18-28(d)(3). The party seeking the variance bears the burden of proof. *See Guard Hill Farms Assocs. v. Dep’t of Environmental Protection*, OATH Index No. 1757/98 (Aug. 11, 1998). The courts have held that an agency’s interpretation of the statutes and regulations that it administers is entitled to deference, and must be upheld if reasonable. *ATM One, LLC v. NYS Division of Housing and Community Renewal*, 37 A.D.3d 714 (2d Dep’t 2007); *Carreras v. Dep’t of Education*, OATH Index No. 3032/09 (July 23, 2009). To prevail, petitioner must show that the agency’s determination was arbitrary and capricious and lacked a rational basis. *Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974); 15 RCNY § 18-28(e).

⁷ Spectra Report, para. 13.3

On appeal, petitioner reiterates that: (1) the requested variances are the minimum necessary to obtain relief; (2) the location of the septic system is the only feasible location on the property other than the area proposed for the single-family home; (3) mitigation for encroachment into the 100-foot limiting distance from a wetland has been offered; and, (4) the property is not economically viable, and has been rendered a potential liability through respondent's denial of the variance.

In its answer, the Department indicated that its decision was rendered after a careful consideration of petitioner's septic system application, permit applications, variance requests, and supporting documentation (ALJ Ex. 2 at 15). However, the Department addressed primarily the permits sought by petitioner, and whether petitioner's proposal satisfied the mitigation criterion for variances. Because the conditions for a variance to issue must all be satisfied, I found the Department's focus on what it considered to be petitioner's primary infringements of the Watershed Regulations to be appropriate.

Minimum Necessary

To show that she requested the minimum variance necessary, petitioner claims that there are no alternatives to the type, size, or location of the sewage system that she proposed (ALJ Ex. 1 at ¶¶ 25, 26). Petitioner presented evidence that due to overlapping jurisdictions and regulations, the septic system proposed is the only design that would be acceptable. In support of this position, petitioner produced an opinion letter from the DCDOH, dated May 23, 2007, which states that the DCDOH would not permit the use of an individual wastewater treatment plant (Pet. Ex. G). The letter also states that the Watershed Regulations do not permit the use of absorption bed or infiltrator designs. In addition, the Watershed Regulations do not permit the use of mound systems, galley systems, intermittent sand filters, or evapotranspiration/absorption systems. 15 RCNY § 18-38(b)(2). The Department does not dispute that the proposed septic system is the least intrusive type of sewage treatment system for the location.

Relying on the May 23, 2007 opinion letter from DCDOH, petitioner also asserts that a three-bedroom residence is the smallest permitted by the DCDOH, and that the DCDOH had indicated that it would not issue a permit for a two-bedroom residence (ALJ Ex. 1 at ¶ 25). Even though the Department did not address this argument in its answer, I note that the letter in question contained no such suggestion (Pet. Ex. G). Rather, because petitioner intended to offer the property for sale on the open market with an approved construction permit, the DCDOH's

letter speculated at possible problems, were the property sold to a home owner without his/her knowledge of the limited septic design, and who then wished to construct a larger residence. Under these specific circumstances, the DCDOH felt that limiting the septic system to a two-bedroom design would neither be practical nor wise, but did not suggest that it would disapprove a septic design for a two-bedroom residence. Indeed, the letter indicated that there have been occasions in the past where the DCDOH has approved a two-bedroom septic design.

Petitioner also asserts that the location of the septic system within 100 feet of a watercourse and wetland PQ-27 is the only feasible one on the property other than the proposed site of the residence (ALJ Ex. 1 at ¶ 26). In support of this argument, petitioner maintains that favorable soil conditions comply with the Department's percolation ranges in section 18-38 (b)(6) of the Department's rules (ALJ Ex. 1 at ¶ 26). That section requires percolation rates of not faster than three inches per minute, nor slower than 60 inches per minute. Petitioner claims that deep-hole tests conducted in July 2002 and August 2005, and two percolation tests done on the same day, showed that four out of the five tests indicated percolation rates between the acceptable range of three and sixty minutes per inch (Pet. Ex. F).

First, the 2002 tests fail to pinpoint the location on the property where they were conducted (Pet. Ex. F). Thus, submission of those tests is insufficient to support petitioner's argument that the site of the tests was the only location feasible for the septic system. Meanwhile, of the 2005 tests, only those with compliant results were indicated on the map of the property.⁸ In any event, the tests observed by the Department on September 10, 2008, trump the previous tests. The September 10 tests revealed standing water at a depth of 12 inches, where the top soil consisted of sandy loam, and 20 to 23 ½ inches, where the top soil consisted of "possible clay" (Resp. Ex. A). The percolation tests that day failed because of the standing water observed (ALJ Ex. 2, at 8). Thus, the soil composition does not support petitioner's claim that the proposed site is the only feasible location on the property for the sewage system.

Proposed Mitigation

Petitioner argues that its proposed fill system would mitigate the possible adverse impacts of locating the planned septic system within 100 feet of the watercourse or wetland because it

⁸ A hand-drawn map attached to the results indicates where the third test was conducted. A comparison of this map to the one reflecting the proposed plans appears to indicate that the third test, showing unacceptable percolation rates, was done where petitioner proposes to place the primary absorption area. However, since the hand-drawn map is not a scaled map, and does not pinpoint its exact location in reference to the entire property, it is difficult to determine what it is actually intended to reflect. Therefore, I found it inconclusive as to the locations of the tests.

would elevate the property up to 11 feet, and thus ensure that effluent is treated and absorbed before reaching any wetland or watercourse (ALJ Ex. 1 at ¶ 27). The depth of the fill would also prevent the groundwater from penetrating upward into the absorption trench (ALJ Ex. 1 at ¶ 27). Petitioner points to her proposal to enlarge one of the wetlands on the property and create a total of 0.2135 acres of new wetland, as mitigation for the portion of wetland that would be filled (ALJ Ex. 1 at ¶ 28). Petitioner maintains that even though the proposed fill system is within 10 feet of the property line, no mitigation is necessary with respect thereto because that portion of property line abuts a public highway, and there are no deleterious or negative impacts associated with placing fill along this public boundary (ALJ Ex. 1 at ¶ 31).

On the contrary, the Department contends that the fill section for the primary absorption area directly abuts the property line, in violation of the Watershed Regulations which require a minimum separation of 10 feet of the septic system (partially consisting of the fill area) from the property line (ALJ Ex. 2 at 9). The Department notes that no mitigation has been proposed for the variance from the setback provisions for the fill system, and argues that, according to §18-61(a)(1)(iii) of the Watershed Regulations, absent such mitigation a variance can not be granted (ALJ Ex. 2 at 14).

Petitioner disputes that the soil is inadequate for the proposed use; and claims that the September 2008 results did not accurately measure the soil because Hurricane Ike caused the water table to rise 1.5 feet prior to the test, thereby distorting the results (ALJ Ex. 1 at ¶ 37). Petitioner contends that the 2002 and 2005 test results, which show adequate percolation rates, are more accurate, and that a variance would not be required if the Department would permit petitioner to schedule a new test (ALJ Ex. 1 at ¶ 37). In spite of the failed test results, petitioner also maintains that no mitigation is necessary for the percolation rate of the soil which falls outside the allowable range set by § 18-38(b)(6).

In response, the Department argues that it is entitled to rely on the September 2008 tests and that mitigation is necessary for the failing results. In finding the earlier tests unacceptable, the Department noted that they had not been witnessed by a Department representative, nor were they certified (ALJ Ex. 2 at 9). The Department explained that the soil composition is very important to protecting the water supply; because a septic system functions by permitting human waste to be treated as it filters through the soil through a combination of filtration, chemical reaction, biological action and other natural processes (ALJ Ex. 2 at 7). If the soil is incapable of

absorbing the wastewater and providing adequate treatment, it poses a major threat to ground and surface waters (ALJ Ex. 2 at 7-8).

I find petitioner's attribution of the failed percolation results in September 2008 to extreme weather conditions to be unavailing. First, petitioner presented no evidence of extreme weather conditions on the day in question. However, even if weather conditions were indeed extreme, the Department may still rely upon those test results. According to the New York State Department of Health Regulations, "treatment systems shall be designed to reflect the most severe conditions encountered. If the percolation test results are inconsistent with field determined soil conditions, additional percolation tests must be conducted and the more restrictive tests must be the factor for the system design." 10 NYCRR Appx. 75-A, § 75-A.4(d)(2), incorporated into the Watershed Regulations by 15 RCNY § 18-38(a)(2). A hurricane is certainly a severe condition which could lead to more restrictive results, and which must be factored into the treatment system design. Petitioner's argument that the tests were an anomaly does not address the risks posed by the low percolation rate in extreme conditions. Were such conditions to be replicated, the water quality would be at risk because, rather than being absorbed into the subsurface where it can be treated, the wastewater is more likely to flood the wetlands, and result in the contamination of drinking water. Thus, absent mitigation for the low percolation rate of the soil, petitioner has not shown that the proposed plans are as protective of the water supply as the provisions of the Watershed Regulations.

Petitioner also argues that culverting the two streams on the property further mitigates any adverse impacts of the septic system because, in addition to isolating the streams from any possible effluent, such action will eliminate the current pollution source of illegal dumping to which the property is currently subject. The Department maintains that, while the Watershed Regulations permit it to approve permits for the "creation of an impervious surface, such as a culvert, needed as an integral component of diversion or piping of a watercourse," within the limiting distances proposed by petitioner, such approval is only granted where the Department determines impervious surfaces (as it describes the culvert) would not adversely impact the water quality (ALJ Ex. 2 at 9). The Department opined that unaltered watercourses provide a benefit to water supply, while piping streams impairs their biological and biochemical processes (ALJ Ex. 2 at 10). Moreover, piping the watercourse would not eliminate the threat that the septic system poses to the water quality since the surrounding wetlands would likely maintain a hydrological

presence on the site (ALJ Ex. 2 at 15). Thus, the Department found petitioner's proposals to culvert the two streams and to install piping to be inadequate.

The Department also found petitioner's position that her proposal will result in the discontinuance of illegal dumping to be speculative at best (ALJ Ex. 2 at 15). I agree. There is nothing to suggest that illegal dumping will cease upon the realization of petitioner's proposals. Moreover, I find the illegal dumping to be unrelated to the potential water quality problems that the installation of a septic system in poorly-draining soil is likely to create.

Substantial Hardship

Petitioner argues that without the variances, a residence cannot be erected on the property, which is located entirely in a wetland or falls within 100 feet of an adjacent wetland area. According to the Spectra Report, petitioner is constrained by the zoning laws of the Town of East Fishkill to the proposed residential use because the property falls within an area zoned for single-family residential use (Report 36). She maintains, therefore, that the proposed plan represents the only economically feasible use of the property, and asserts, denial of the site plans translates into an inability to use the property for any beneficial purposes, thereby rendering it not only worthless, but a potential liability (ALJ Ex. 1 at ¶¶14, 29).

To show substantial hardship, an applicant seeking a variance must "describe those physical conditions on the subject parcel that make compliance with a particular regulation difficult – or impossible – and thereby explain the perceived need for a variance." *Nilsson v. Dep't of Environmental Protection*, 8 N.Y.3d 398, 404 (2007). While the denial of a variance that renders a property "unusable" or "unsalable" may constitute a substantial hardship, the inability to maximize the return on an investment does not. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Smith v. Dep't of Environmental Protection*, OATH Index No. 673/08 at 5 (Dec. 28, 2007); *Frackman v. Dep't of Environmental Protection*, OATH Index No. 1228/03 & 1229/03 at 4 (Oct. 1, 2003); *Carreras v. Dep't of Environmental Protection*, OATH Index No. 1529/05 at 7 (June 2, 2005). Thus, a claim of substantial hardship must be supported by a showing of the feasibility or unfeasibility of alternate uses of the parcel. *Carreras*, OATH 3032/09 at 5.

This tribunal has previously held that an inability to build on a parcel is insufficient to demonstrate substantial hardship. For example, in *Buckskin Realty, Inc. v. Department of Environmental Protection*, the petitioner sought a variance to build a residence on a lot in his

subdivision. OATH Index No. 216/04 (Dec. 30, 2003). Petitioner claimed that without the variance, no construction would be permitted on the property, and asserted that this constituted a substantial hardship. *Id.* at 8. Administrative Law Judge Faye Lewis found that “even if petitioner’s contentions regarding adverse economic impact were credited, all that would be established is that the project was less financially lucrative than what was concluded by the Deputy Commissioner. Petitioner still would not have established substantial hardship, due to its failure to make any showing regarding the feasibility or infeasibility of alternate uses of the parcel.” *Id.* at 10; *see also Frackman*, OATH 1228/03 & 1229/03. Likewise in *Smith*, the petitioner sought to build a house on a subdivision of his property which he would sell to raise money for his retirement. OATH 673/08. In the petition, Mr. Smith described his inability to sell the property without the variance. Administrative Law Judge Alessandra Zorngiotti noted that “[p]etitioner’s claimed inability to maximize economic return on his investment is insufficient to demonstrate substantial hardship where, as here, petitioner made no showing that the parcel could not be used for other, albeit less profitable uses.” *Id.* at 5. Thus, substantial hardship based on the inability to build a residence must be supported by evidence that other uses of the property are unfeasible.

The evidence presented by petitioner is insufficient show that other uses of the property are unfeasible. While petitioner noted that the property is zoned residential, she did not indicate the specific zoning district within which the property lies. East Fishkill has seven different residential-zoned districts. East Fishkill Town Zoning Code § 194-4. The permitted uses are determined by the zoning district classification, but notably, not all districts are confined to strict residential uses. Some permit farming, greenhouses, and nurseries. East Fishkill Town Zoning Code § 194b. Moreover, not all of the permitted uses necessitate a septic system to be built on the property. East Fishkill Town Zoning Code § 194b. Thus, without more, petitioner’s stand-alone assertion that the Department’s denial of her variance and permit applications creates a substantial hardship fails.

Because petitioner has failed to establish that its proposed plan represents the minimum variance necessary from the Watershed Regulations, offers mitigation that is as protective of the water supply as the watershed regulations, and would lead to a substantial hardship if not granted, she has not met the requirements necessary for the Department’s grant of a variance. 15

RCNY § 18-61(a)(1)(ii)-(iv). As such, the Department's denial of her variance application was not arbitrary or capricious.

Petitioner's permit applications were also appropriately denied. In that regard, the issue to be determined on appeal is "[w]hether the regulated activity proposed by the petitioner will be in compliance with the requirements of [the watershed] rules and regulations." 15 RCNY §18-28(d)(1). Petitioner bears the burden of proving compliance based on a preponderance of the evidence. 15 RCNY §18-28(e).

To obtain a permit for a septic system, petitioner must show compliance with §18-38 of the Watershed Regulations. As previously discussed, the proposed septic system does not comply with the required percolation rates in section 18-38 (b)(6), the required distance from the wetlands set by 18-38(a)(5), or the required distance from the property set by 10 NYCRR Appendix 75-A and incorporated into the Watershed Regulations by 18-38(a)(2). Petitioner herself acknowledges that her proposed septic system does not comply with the Watershed Regulations (Petition ¶ 30).

Individual Residential Stormwater Permit ("IRSP") requires that petitioner's plan meet the requirements laid out in section 18-39(e) of the Watershed Regulations. Under that section petitioner must submit: (1) a plan of the proposed individual residence or driveway; (2) a plan or map identifying the location of any watercourses, wetlands, reservoirs, streams, or lakes on or adjacent to the property; (3) a plan showing the approximate site disturbance; (4) a description and depiction of the proposed erosion controls sufficient to prevent sedimentation of the receiving watercourse or wetland during construction; a schedule for construction; and (5) a depiction and description of the proposed best management practices designed to filter, detain, or filtrate runoff from the residence or driveway to mitigate any post-construction increase in pollutant loading to the receiving or perennial stream.

Petitioner has not met the requirements for an IRSP. The Department argues that petitioner has not submitted a proposal on best management practices. Petitioner contends that the Stormwater Pollution Prevention Plan ("SWPP") that she submitted addresses the best management practices required by the regulations (ALJ Ex. 1 at ¶ 47; Pet. Ex. F). In fact, while petitioner's SWPP discusses erosion and sediment controls during construction, as well as the construction sequence, the only reference to post-construction practices contained in the report is a statement that the future owner shall maintain the culvert system and have it inspected annually

(Pet. Ex. F). Petitioner acknowledges that the best management practices are only “partially described in the referenced SWPP report” (Report ¶ 12.4.2(d)). Moreover, while the Report articulates that “additional measures would include the prevention of debris and the unwanted discharge of pollutant-laden waters and siltation to the water and wetland areas by the occupying home owner(s),” it does not describe how these measures would be implemented or enforced. Rather, it merely notes that “enforcement can be a concern, but it is not an issue which the current property owners, the Dortonos, can resolve” (Report ¶ 12.4.2(d)). Thus, petitioner does not adequately address the management of post-construction increases in pollutant loading due to run-off from the proposed residence. Accordingly, her proposal fails to meet the requirement of section 18-39(e)(2) of the Watershed Regulations for the approval of an IRSP, which was appropriately denied.

Likewise, I find that petitioner’s application for a Crossing, Piping or Diversion Permit (“CPDP”) was properly denied because it did not comply with section 18-39 of the Watershed Regulations. Under that section, culverts are prohibited within 100 feet of a watercourse or wetland, but may be permitted “if the Department determines that such impervious surface will not have an adverse impact on water quality” and the culvert is an integral component of a diversion or piping of a watercourse. § 18-39(a)(2)(vi).

The Department maintains that, in general, piping has an adverse impact on streams because it impairs their biological and biochemical processes. It could not determine whether petitioner’s proposal would have an adverse impact because petitioner had not supplied an in-depth analysis of the potential biological, hydrological or hydraulic impacts associated with it (ALJ Ex. 2 at 10). Petitioner’s contention that the proposed development will mitigate any adverse impacts that culverting the stream will have by ending the illegal dumping is unpersuasive. The Report acknowledges that culverting the stream will cause the loss of some stream benefits, but offers nothing more than a statement that such loss will be minimal and insignificant (Report ¶ 10.15). Thus, without more, I find that the CPDP application was appropriately denied.

In sum, the Department is charged with the significant responsibility of protecting the City’s water quality, which it does through its use of skilled water quality scientists, engineers and inspectors “who are familiar with the causes and effects of water pollution, the geography of the City’s watershed, and the methods pollution can be minimized or eliminated” (ALJ Ex. 2 at

7). It is a burden which, no doubt, it takes extremely seriously, through its stringent application of the Watershed Regulations. Thus, I am compelled by its position that improperly sited or designed septic systems, especially those placed in very close proximity to water bodies or in soils not conducive to the adequate treatment of waste, are inherently threatening to ground and surface waters (ALJ Ex. 2 at 7-8). Accordingly, I do not find that the Department's denial of petitioner's variance applications and permits to be an abuse of its discretion.

FINDINGS AND CONCLUSIONS

1. The Department did not abuse its discretion in denying petitioner's application for a variance from 15 RCNY § 18-38(b)(6), which requires soil percolation rates faster than 60 minutes per inch at the location of a septic system.
2. The Department did not abuse its discretion in denying petitioner's application for a variance from 15 RCNY § 18-38(a)(5) which prohibits absorption fields for a septic system to be located within 100 feet of a watercourse or wetland.
3. The Department did not abuse its discretion in denying petitioner's application for a variance from 10 NYCRR Appendix 75-A, incorporated by 15 RCNY § 18-38(a)(2), which prohibits fill systems within 10 feet of the property line.
4. Petitioner did not meet the requirements of §18-38 of the Watershed Regulations, for a septic system permit approval.
5. Petitioner did not meet the requirements of section 18-39(e) of the Watershed Regulations, for an IRSP approval.
6. Petitioner did not meet the requirements of section 18-39(a)(2)(vi) of the Watershed Regulations, for a CPDP approval.

RECOMMENDATION

I recommend that the Department's Acting Commissioner's denial of petitioner's variances and permits be upheld.

Ingrid Addison
Administrative Law Judge

September 30, 2009

SUBMITTED TO:

STEVEN W. LAWITTS
Acting Commissioner

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