

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Application of William H. Miller for a Variance From Minn. R. 47.25.4450, Subpart 2, item E, Relating to the Installation of an Individual Subsurface Sewage Treatment System (ISTS) Within 65 feet of an Existing Sensitive Water-Supply Well

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Raymond Krause on March 7, 2012, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101. The OAH record closed on March 7, 2012, the parties having agreed that no post-hearing submissions were required.

Jocelyn F. Olson, Assistant Attorney General, Office of the Attorney General, appeared on behalf of the Minnesota Department of Health (Department). William H. Miller appeared for himself without counsel. The following witnesses testified: Ed Schneider, Hydrologist from the Minnesota Department of Health; Mark Johnson, Minnesota Department of Health; and William H. Miller, who testified on his own behalf.

**STATEMENT OF ISSUES**

1. Whether the Department properly denied the Applicant's application for a variance from Minn. R. 47.25.4450, subp. 2E, in order to allow the Applicant to construct an ISTS closer than 100 feet from a sensitive water-supply well (the Subject Well).
2. Whether the Department's issuance of a Forgivable Penalty Order to the Applicant was proper.

Based upon all proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. On September 14, 2011, the Department received a request for a variance from the "septic setback from a well." The grounds for the variance request were that the "small lot size makes it impossible to meet the 100 [feet] well setback for the new

septic system” and that the existing well had been in use for more than 40 years with no problem related to contamination.<sup>1</sup>

2. On September 21, 2011, the Department conducted an inspection of the site and determined that the Subject Well identified in the variance application is a sensitive well because it was constructed prior to the effective date of the 1974 Water Well Construction Code. The present well has less than the minimum 15 feet of casing and it is less than 35 feet from the historic high water level of a stream; is less than 50 feet from an unused well; and is less than 50 feet from an existing buried ISTS of unknown materials and construction and which has not been pressure tested. As a result, the Subject Well is located and constructed in a manner that makes it highly vulnerable to near-surface contamination and, because of its location is not accessible for installation of a protective liner.<sup>2</sup>

3. The Department staff also determined that the site conditions on the Applicant’s property would allow him to construct an ISTS and new drinking water well on the property that would comply with the minimum separation distance requirement.<sup>3</sup>

4. On October 4, 2011, the Department denied the Applicant’s variance request and notified the Applicant of his right to request a contested case hearing.<sup>4</sup>

5. On October 17, 2011, the Applicant requested a contested case hearing pursuant to Minn. R. 4717.7050, subp. 2.<sup>5</sup>

6. On October 20, 2011, the Department received information that the Applicant had installed the proposed ISTS system on his property.<sup>6</sup>

7. On October 21, 2011, the Department conducted a follow-up inspection and determined that the Applicant installed a septic tank 47 feet away from the Subject Well, and the drainage bed for the system is located approximately 50 feet from that well.<sup>7</sup>

8. The Department did provide Applicant with alternatives to his variance request. The alternatives suggested were that the Applicant could seal the existing drilled well and unused dug well, then proceed with the installation of the proposed ISTS, or the Applicant could identify an alternative location for the mound that is at least 100 feet from the Subject Well, or he could install an ISTS holding tank (if permitted by the county) at least 50 feet from the Subject Well.<sup>8</sup>

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<sup>1</sup> Ex. 1, p. 1.

<sup>2</sup> Testimony of Ed Schneider.

<sup>3</sup> Test. of E. Schneider.

<sup>4</sup> Ex 2, p. 1.

<sup>5</sup> Ex. 2, p. 3.

<sup>6</sup> Test. of E. Schneider.

<sup>7</sup> Test. of E. Schneider.

<sup>8</sup> Ex. 8, p. 8.

9. The Applicant obtained an estimate for a 260' well and water system with a total of \$10,582.00.<sup>9</sup>

10. The Applicant has been granted a life estate for the property, is presently unemployed, and is receiving social security benefits to meet his basic daily needs.<sup>10</sup>

11. On January 24, 2012, the Department issued a Forgivable Administrative Penalty Order ("APO") to the Applicant based on its determination that the Applicant had installed the proposed ISTS system on his property without a variance.<sup>11</sup>

12. The APO assessed a forgivable civil penalty in the amount of \$1,000 for violation of Minn. R. 4725.4450, subp. 1D; Minn. Stat. § 103 I.206, subd. 6(a). The \$1,000 civil penalty is forgivable if the Applicant takes corrective action as described in the APO.<sup>12</sup>

13. The Commissioner has authority to assess monetary penalties for violations of statutes or rules. The maximum amount of a penalty is \$10,000 for each violator for all violations, identified in an inspection. Penalties may be forgiven if the violation(s) is corrected according to corrective actions specified within the forgivable administrative penalty order.<sup>13</sup>

14. On February 1, 2012, the Department received a request from the Applicant to review the APO issued against him.<sup>14</sup>

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law judge and the Department of Health have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 144.99.

2. The Notice and Order for Hearing was proper and the Department has complied with all relevant substantive and procedural requirements of law or rule.

3. The Applicant has the burden of proving by a preponderance of the evidence that the Department should have granted him a variance.

4. Minn. Stat. § 103 I .205, subd. 6(a) provides: "A person may not place, construct, or install an actual or potential source of contamination any closer to a well

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<sup>9</sup> Ex. C, p. 1.

<sup>10</sup> Test. of William H. Miller and Ex. F, p. 1.

<sup>11</sup> Test. of Mark Johnson.

<sup>12</sup> Test. of M. Johnson.

<sup>13</sup> Minn. Stat. §§ 144.989 to 144.993.

<sup>14</sup> Test. of M. Johnson.

than the isolation distances prescribed by the commissioner by rule unless a variance has been prescribed by rule.”

5. Minn. R. 4725.4450, subp. 1 states: "A contamination source must not be placed, constructed, or installed any closer to a water-supply well than the distances in this part."

6. Minn. R. 4725.4450, subp. 2E, requires a minimum separation of 100 feet between an absorption area of a soil dispersal system and a sensitive water-supply well.

7. A "sensitive water-supply well" is defined as a "water-supply well with less than 50 feet of watertight casing where the casing does not penetrate a confining layer or multiple layers of confining materials with an aggregate thickness of ten feet or more."<sup>15</sup>

8. That the Applicant failed to meet his burden of showing, by a preponderance of the evidence, that the Department should have granted him a variance.

9. The Subject Well lacks characteristics that are required by Minn. R. 4725.

10. Pursuant to Minn. Stat. § 144.991, subd. 5(c), the Administrative Law Judge may not recommend a change in the proposed penalty amount unless the Administrative Law Judge determines that, based on the factors in Minn. Stat. § 144.991, subd. 1, the amount of the penalty is unreasonable.

11. In determining the amount of a penalty under the Commissioner may consider:

- (1) The willfulness of the violation;
- (2) The gravity of the violation;
- (3) The history of past violations;
- (4) The number of violations;
- (5) The economic benefit gained by the person committing the violation;
- (6) Other factors specifically identified in the order.<sup>16</sup>

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<sup>15</sup> Minn. R. 4725.0100, subp. 43a (2010).

<sup>16</sup> Minn. Stat. § 144.991, subd. 1.

12. The hearing in this matter was not requested solely for the purposes of delay nor was the hearing request frivolous.

13. The \$1,000 penalty set by the Department is reasonable when considering all of the statutory factors.

The memorandum that follows explains the reasons for these conclusions and the Administrative Law Judge therefore incorporates the memorandum into these conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Commissioner of the Department of Health affirm the Department's denial of the Applicant's application for a variance from Minn. R. 4725.4450, subp. 2E and,

That the Commissioner of the Department of Health affirm the Administrative Penalty Order issued to Applicant.

Dated: April 3, 2012

s/Raymond R. Krause

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RAYMOND R. KRAUSE  
Chief Administrative Law Judge

Reported: Digitally recorded

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this recommended decision to file exceptions and present argument to the Commissioner. Parties should contact Edward Ehlinger, P.O. Box 64975, St. Paul, Minnesota 55164-0975.

## **MEMORANDUM**

The Applicant failed to prove, by a preponderance of the evidence, that the Department should have granted him a variance, which would allow him to construct an ISTS mound approximately 65 feet from the Subject Well.

Pursuant to Minn. R. 4717.7050, subp. 1, the Department must deny an application for a variance if the criteria in Minn. R. 4717.7010 are not met. The criteria of Minn. R. 4717.7010, subp.1 are:

- A. The variance was requested in the manner prescribed by part 4717.7000;
- B. The variance will have no potential adverse effect on public health, safety or the environment;
- C. The alternative measures to be taken, if any, are equivalent or superior to those prescribed in the rule; and
- D. Strict compliance with the rule will impose an undue burden on the applicant.

### **Variance Request Format**

In determining whether to grant the Applicant's variance request, the Department contends that the Applicant's variance request was not in a manner prescribed by Minn. R. 4717.7000. The Applicant failed to include information about isolation distances from possible contamination sources as part of the Applicant's variance application. This is required by Minn. R. 4717.7050, subp. 1. The Applicant also did not provide information on what alternative measures would be taken to ensure comparable safety. Thus, the variance request did not meet the requirements of Minn. R. 4717.7000.

### **Adverse Effects**

The Department investigated the location of the Subject Well, as part of its investigation into the Applicant's variance request. The Department determined that the Subject Well is located beneath a small porch landing, two feet from the house and six inches from the roof overhang. The Subject Well is approximately 16 feet from the historic high water level of a small stream. There is a 15 foot deep unused dug well located approximately four feet west of the drilled well. The Subject Well was also evaluated by two well contractors for possible insertion of a small-diameter liner casing to a depth of 50 feet or more. Both contractors determined that the Subject Well is not accessible for a liner.

As a result, the Department concluded that the variance could have possible adverse effects on public health, safety, or the environment, because there was nothing to ensure that the Subject Well would remain free of contamination when it could not be sealed in at least 50 feet of watertight casing and it would not penetrate confining

material such as clay, with an aggregate thickness of 10 feet or more. Ed Schneider, a hydrologist for the Department, opined that the potential for harm from near-surface contamination is too great. Thus, granting a variance to place a contaminant source near the Subject Well has a potential adverse effect on public health, safety, or the environment.

### **Alternative Measures**

The Applicant's application for a variance did not demonstrate that there were any alternative measures that were equivalent to or superior to those prescribed in the rule. The Applicant's variance application only stated that the "well has been in use for 40+ years with no contamination, new septic to installed down slope from well." Mr. Schneider explained that historical water analysis results are not predictive of future performance because the water analysis results only provide a measure of the water supply at the time the water sample was collected. Water tests, however, do not provide a similar degree of protection as the minimum construction requirements or location. As a result, the Department concluded that there were no proposed alternatives that were equivalent to or superior than those required by the rule.

### **Undue Burden**

The Applicant was able to show that strict compliance with the rule would pose an undue burden on him financially. The Administrative Law Judge recognizes that the alternatives provided by the Department could prove costly for the Applicant based on Exhibit C, which estimates the cost of a new well and water system to be in the amount of \$10,582.00. The Applicant only has a life estate, and he is presently unemployed, and receiving social security. As a result, it would pose an undue burden for Applicant to have to pay for the installation of a complying replacement well that would meet the minimum requirements of Minnesota Rules, Chapter 4725. The Applicant has, however, met only one of the criteria for a variance. That alone is not enough to find that the Department erred in not granting the variance.

### **Future Effect**

Finally, a variance, if granted, "shall have only future effect".<sup>17</sup> This means that a variance "must be applied for and granted prior to commencing the activity for which the variance was requested".<sup>18</sup> There is no dispute that the Applicant installed the proposed ISTS system on his property after he was notified that his variance request was denied on October 4, 2011. On October 21, 2011, the Department staff conducted a follow-up inspection and determined that the Applicant had installed a septic tank 47 feet away from the Subject Well, and it was determined that the drainage bed for the system is located approximately 50 feet from that well. The Subject Well's construction was not one of the alternatives suggested by the Department.<sup>19</sup> Applicant testified that

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<sup>17</sup> Minn. R. 4725.0410

<sup>18</sup> Minn. R. 4725.0410, subp. 1D

<sup>19</sup> See Finding No.8.

he did not believe they were economically viable alternatives, therefore, he installed his proposed ISTS mound approximately 65 feet from the Subject Well prior to obtaining a variance.

### **The Administrative Penalty Order**

Minn. Stat. § 144.991 requires an administrative penalty be determined by considering six factors: the willfulness of the violation, the gravity of the violation, the history of past violations, the number of violations, the economic benefit gained by the violator and other factors as justice may require.

In this case, the Applicant did not contest that the violation was willful.

Minn. Stat. § 144.991 states that gravity includes “damage to humans, animals, air, water, land, or other natural resources of the state.” The Applicant points out that there was no actual harm to the public health or the environment due to the violation. While this is true, the potential harm is appropriately considered in regard to gravity since the requirements of a variance are a means of preventing future harm to the environment or public health. The Department has clearly articulated the relationship between the approval of a variance to public safety and the need to uniformly enforce the rule as a deterrent. Even considering that no actual harm has occurred, the Department has established a moderate potential for harm.

The Applicant has only this one violation and has not had any prior violations.

The Applicant did not gain any economic benefit in not complying with the requirements of Minn. R. 4725.4450, subp. 2E.

There were no other factors that needed to be determined in calculating the amount of the administrative penalty or the reasonableness of the penalty.

Thus, in considering all of the statutory factors, the Administrative Law Judge agrees with the Department’s determination that the Applicant’s violation was not a serious violation, is, therefore, forgivable.

Considering each of the six statutory factors, the Administrative Law Judge also concludes that the amount of the penalty assessed by the Department is reasonable.

**R. R. K.**