

STATE OF NORTH CAROLINA  
COUNTY OF ASHE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11EHR14390

<p>EDWARD DALE PARKER,  Petitioner,  v.  NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,  Respondent.</p>	<p style="text-align: center;"><b>DECISION</b></p>
---	--

This matter was heard before Beecher R. Gray, administrative law judge, (“ALJ”) on November 8, 2012, in the Wilkes County Courthouse, Wilkesboro, North Carolina. Petitioner, Edward Dale Parker, was represented by Chelsea B. Garrett, attorney at law, and Respondent, North Carolina Department of Health and Human Services (“DHHS”) was represented by John P. Barkley, assistant attorney general.<sup>1</sup> Both parties stipulated to proper notice of hearing.

### EXHIBITS

Petitioner’s Exhibits (“P. Exs.”) 1-9 and Respondent’s Exhibits (“R. Exs.”) 1-6 were admitted into evidence without objection.

### ISSUE

Whether Respondent’s action in suspending Petitioner’s improvement permit and construction authorization for installation of an on-site wastewater system on Lots 157 and 158, Lauren Lane of Mountain View Estates, Phase I, in Ashe County (the “Lots” or “Property”) was proper.

Based upon the evidence presented at trial, the exhibits admitted and other relevant documents in the record, the Undersigned makes the following:

---

<sup>1</sup> The Environmental Health Section that deals with on-site wastewater permits and authorizations previously was located in the Department of Environment and Natural Resources but has been transferred to DHHS

## FINDINGS OF FACT

1. On November 22, 2004, Petitioner applied to the Appalachian District Health Department (“ADHD”) for an improvement permit for an on-site wastewater system to serve a proposed 4-bedroom home on the Lots. (R. Ex. 1)
2. Petitioner received verbal approval for a 4-bedroom “conventional” system prior to closing on the purchase of the Lots in December 2004.
3. On March 18, 2005, an environmental health specialist (“EHS”) with ADHD issued an improvement permit for a 10-inch Large Diameter Pipe (“LDP”) on-site wastewater system for a 4-bedroom home (which is a type of “conventional” system) to be located on the Property. (R. Ex. 2) The EHS who issued the permit no longer is with the ADHD.
4. On June 28, 2011, Jason Pierce, an EHS with ADHD, was contacted by Petitioner’s septic tank installer, Denton Hart. Mr. Hart informed Mr. Pierce that while Mr. Hart was attempting to install the wastewater system on the Property in accordance with the March 18, 2005 improvement permit and construction authorization, he ran into trouble with the installation because he had hit rock. Mr. Hart contacted Mr. Pierce to get permission to change the location of the wastewater system.
5. Mr. Pierce met Mr. Hart on the Property on June 28, 2011. Mr. Pierce observed that Mr. Hart had tried to install two trenches and had started a third trench, but the trenches were shallow to rock. Mr. Pierce observed that the majority of the upper two trenches was sitting on top of rock. The trenches had been dug to the correct depth, but he stated that the 10-inch pipe would not fit into the ground in much of the trenches because rock was too close to the surface. Mr. Pierce looked in areas where Mr. Hart attempted to dig trenches and did not find enough suitable soil at a proper depth for installation of the system under the wastewater laws and rules. Mr. Pierce also examined other areas where Mr. Hart dug pits for evaluation of the soils, including below the house designated for the repair area, but was unable to find sufficient suitable soils and soil depths. Mr. Pierce found the soils were very inconsistent. He would find a suitable soil in one pit but the pit beside it would be unsuitable. Mr. Pierce determined that it was necessary to contact his supervisor, Andrew Blethen, as he did not believe there was an area with enough suitable soils to install the LDP wastewater system described in the permit.
6. Mr. Pierce contacted Mr. Blethen, who came to the site the afternoon of June 28, 2011. Mr. Pierce showed Mr. Blethen the permit for the LDP system and explained what he had found on the site. Mr. Pierce and Mr. Blethen asked the Mr. Hart to dig test pits on additional areas on the site to attempt to find suitable soils. Mr. Blethen evaluated a number of pits on the Lots. He found that the site was characterized by shallow depths to rock anywhere from as shallow as 6-7inches to a couple of pits that actually were 3 feet deep. Mr. Blethen found the soils on the site to be very inconsistent. The trenches failed to meet the depths needed for the permitted LDP system. Mr. Blethen determined that the trenches dug by Mr. Hart were dug within the permitted area shown on the plan attached to the 2005 improvement permit, but that they could not be used because of the

shallow depths and inconsistency of the soils. There was not enough usable trench identified at that time for them to be a viable option. Mr. Blethen and Mr. Pierce looked for other options on the lot, but continued to find very inconsistent soil depths to rock, saprolite, and weathered rock. Mr. Blethen found that there were not enough suitable pits to be able to install the LDP system. He explained that only a few suitable pits out of 10 or more pits was not enough for installation of a system, as several adjacent suitable pits are required for system installation. A suitable pit adjacent to an unsuitable pit may be insufficient for system installation unless alternatives are found, such as solid pipe across unsuitable areas, under Respondent's Rule .1948. Ultimately, Respondent's agents were unable to find enough suitable areas to meet the wastewater laws and rules.

7. Mr. Blethen called Alan McKinney, environmental health program specialist with ADHD for the on-site wastewater program, and explained the problem they had encountered on the site. At the contested case hearing, Alan McKinney was tendered and accepted, without objection, as an expert in the evaluation and permitting of on-site wastewater systems. Mr. Blethen asked Mr. McKinney to meet him on the site. On June 29, 2011, Mr. Blethen, Mr. McKinney, Mr. Hart, and Petitioner's job supervisor met on the site to look at the trenches and test pits. Mr. McKinney and Mr. Blethen first looked at the septic system area and the trenches Mr. Hart attempted to install in accordance with the improvement permit and construction authorization. Mr. McKinney explained that when trying to install a wastewater system, one of the most important things that the health department is looking for is the treatment zone below the trench bottom, because that is critical to the disposal and treatment of wastewater. With Petitioner's property, because of shallow depth to rock encountered when trenches were being excavated, there was not sufficient depth to provide an adequate treatment zone below the trench bottom. Mr. Blethen and Mr. McKinney then tried to move to areas beyond the trenches to locate sufficient suitable area for installation of the LDP system. Mr. McKinney also found very inconsistent depths on the property. He found that the majority of the pits did not have the necessary 12 inches above rock, although a few had sufficient or greater than sufficient depth. Overall, the depths were shallower than required to install the system, and there were not enough areas with sufficient depth to allow installation of the system in accordance with the wastewater rules. They evaluated the majority of the approximately 40 pits that had been dug on the Lots, but ultimately variability of soil depths on the Lots made it too difficult to find sufficient suitable soil for the system. Mr. McKinney testified that this was the most variable site that he ever had evaluated. He described the pits on the Lots as consistently inconsistent. Mr. Blethen and Mr. McKinney finally determined that the septic system could not be installed as permitted because of shallow depth to rock and less than one foot of naturally-occurring soil between the trench bottom and rock, as required by 15A NCAC 18A .1955.
8. Based on this evidence, the 10-inch LDP system for a 4-bedroom home on the Lots which originally was approved by the Appalachian District Health Department in December 2004 and permitted in 2005 could not be installed in compliance with the State wastewater laws and rules.
9. Mr. Blethen and Mr. McKinney discussed additional options with Petitioner. They did

find sufficient area for installation of a drip irrigation wastewater system, which could be installed shallower and in a smaller area. They informed Petitioner of this option. Petitioner investigated this option and determined that it would be too expensive both for the drip system itself and ongoing annual maintenance requirements. Mr. Blethen and Mr. McKinney told Petitioner that he could hire a licensed soil scientist to evaluate the site and possibly submit a proposal for something other than what ADHD proposed.

10. Petitioner hired Licensed Soil Scientist Andrea Lemon to examine the site. She examined Petitioner's site and prepared a report which Petitioner provided to Respondent. After receiving the report from Soil Scientist Lemon, ADHD also asked the regional soil scientist from the State agency, Karen Wallace, to evaluate the site. Soil Scientist Wallace evaluated the site on September 29, 2011. Soil Scientist Wallace evaluated the site and reviewed the report from Soil Scientist Lemon, prior to going to the site. Soil Scientist Wallace is a Licensed Soil Scientist and has a master's degree in soil science from NC State University. At the contested case hearing, Soil Scientist Wallace was tendered and accepted, without objection, as an expert in soil science and evaluation of sites for on-site wastewater systems. Soil Scientist Wallace spent most of her time at the site evaluating pits on the site. She also found a great deal of variability from pit to pit. She found varying depths to rock from 6-8 inches up to 19-20 inches, but overall she found the soils were too variable to install the LDP system as permitted or the system proposed by Soil Scientist Lemon. She found different depths than Soil Scientist Lemon in a number of pits, with Soil Scientist Wallace finding depths shallower to rock than what Soil Scientist Lemon had found. She found saprolite at shallower depths than Soil Scientist Lemon found. Soil Scientist Wallace ultimately concluded that the depths to rock she found were too shallow for installation of the LDP as permitted, and there were not enough adjacent areas with suitable soils and soil depths. She noted that an additional problem was that the site was on a slope, which would require additional soil depth to overcome the slope. Soil Scientist Wallace stated that the wastewater rules require that you go by the most limiting factors on the site in classifying it as to suitability. In this case, the shallow depths were a more limiting factor that had to be applied. Soil Scientist Wallace returned to the site in November 2011 with two other regional soil scientists, Gene Young and Kevin Neal. The other regional soil scientists did find depths on some of the pits that were different from the depths measured by Soil Scientist Wallace, including one pit where they differed as much as 7 inches in their measurements. After discussion with Soil Scientist Wallace, however, it was agreed among the soil scientists (except Soil Scientist Lemon, who was not present) that there were not any findings that were significantly different than Soil Scientist Wallace's. The regional specialists, however, agreed that the site was provisionally suitable for a pretreatment drip irrigation system. Soil Scientist Wallace's expert opinion was that Petitioner's property was classified unsuitable for permitting of an LDP system because of shallow depths to rock. It was her expert opinion that Soil Scientist Lemon's proposal was not an acceptable alternative for the site because too many of the pits in the proposed system area were unsuitable for the proposed modified LDP.
11. Petitioner's soil scientist, Andrea Lemon, proposed a different system utilizing a modified LDP. At the contested case hearing, Soil Scientist Lemon was tendered and

accepted, without objection, as an expert in evaluation of soils and sites and design of wastewater systems. Soil Scientist Lemon made different findings as to depth than Mr. Pierce, Mr. Blethen, Mr. McKinney, and Soil Scientist Wallace. Soil Scientist Lemon's position was that since a permit previously had been issued for an LDP system, the original permit should be honored with modifications to make it perform better. After meeting at the site in September 2011, the ADHD suggested that Soil Scientist Lemon re-examine the issues at the site and come up with another report, which Soil Scientist Lemon did at Petitioner's expense. During her testimony, Soil Scientist Lemon conceded that the site was unsuitable for a conventional system. She conceded that her proposal was a "compromise" system, but stated that her opinion was that it met the intent of the wastewater rules. She testified that in her expert opinion her modifications to the LDP system would enable it to function better.

12. After reviewing the soil conditions at the property, ADHD determined that the soil conditions at the property did not support the original improvement permit issue by the ADHD and that it must suspend Petitioner's improvement permit and construction authorization issued on March 18, 2005. Mr. Blethen testified that ADHD chose suspension rather than revocation because suspension allowed for the possibility that other options might be found and could be utilized without having to revoke the permit and construction authorization. By letter dated November 10, 2011, ADHD notified Petitioner in writing that the septic system could not be installed as permitted because of shallow depth to rock and less than one foot of naturally-occurring soil between the trench bottom and rock, in violation of 15A NCAC 18A .1955, and that ADHD therefore intended to suspend the original permit within 30 days of the date of the letter. (R. Ex. 4)
13. After the issuance of the suspension letter, Mr. Blethen advised Petitioner that filing an appeal would allow the parties time to consider their options for a system. However, after Petitioner hired Soil Scientist Lemon to evaluate the soil conditions at the property and consider what alternatives there may be for honoring the original permit, and after Soil Scientist Lemon prepared a report and proposal (all at Petitioner's expense), ADHD decided that Soil Scientist Lemon's proposal to install a modified LDP system could not be approved based upon its findings regarding the soil conditions on Petitioner's property set forth above.
14. As of November 3, 2011, Petitioner's construction of his home on the Property substantially was complete. The exterior was finished, but Petitioner was waiting to install flooring as he did not want the cold weather to cause damage if power to the house was cut off. Petitioner had been paying for three months of power bills at that point and has continued to pay for power through the date of this Decision.
15. Based on findings above, ADHD determined that the original improvement permit and construction authorization, first given verbally in December 2004 and then in writing in March 2005, was not supported by suitable soil conditions. Therefore, the LDP (conventional) septic system could not be installed as permitted because of shallow depth to rock and less than one foot of naturally-occurring soil between the trench bottom and rock, as required by 15A NCAC 18A .1955. ADHD therefore determined that soil and

site conditions on the Property were unsuitable according to applicable laws and rules for the system originally permitted for the site, and the system designated on the permit could not be installed in compliance with the wastewater laws and rules. There was a factual basis for Respondent's action in issuing an intent to suspend the original improvement permit and construction authorization.

16. 15A NCAC 18A .1947 states that "(a)ll of the criteria in rules .1940 through .1946 of this Section shall be determined to be SUITABLE, PROVISIONALLY SUITABLE, or UNSUITABLE, as indicated. If all criteria are classified the same, that classification shall prevail. Where there is a variation in classification of the several criteria, the most limiting uncorrectable characteristics shall be used to determine the overall site classification."
17. 15A NCAC 18A .1955(m) states in part that "(n)itrification trenches shall be installed with at least one foot of naturally occurring soil between the trench bottom and saprolite, rock or any soil horizon unsuitable as to structure, clay mineralogy or wetness."
18. Under the provisions of G.S. 130A-23 and G.S. 130A-335(f), the Department may suspend or revoke an on-site wastewater permit for failure of the wastewater system to satisfy the on-site wastewater laws, rules or permit conditions. When the Department finds there is a violation of the applicable laws, rules or permit conditions, the Department may suspend or revoke the wastewater permit.
19. Respondent's rule at 15A NCAC 18A .1948(d) provides:
  - d) A site classified as UNSUITABLE may be used for a ground absorption sewage treatment and disposal system specifically identified in Rules .1955, .1956, or .1957 of this Section or a system approved under Rule .1969 if written documentation, including engineering, hydrogeologic, geologic or soil studies, indicates to the local health department that the proposed system can be expected to function satisfactorily. Such sites shall be reclassified as PROVISIONALLY SUITABLE if the local health department determines that the substantiating data indicate that:
    - 1) a ground absorption system can be installed so that the effluent will be non-pathogenic, non-infectious, nontoxic, and non-hazardous;
    - 2) the effluent will not contaminate groundwater or surface water; and
    - 3) the effluent will not be exposed on the ground surface or be discharged to surface waters where it could come in contact with people, animals, or vectors.

The State shall review the substantiating data if requested by the local health department.

## CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. The scientific evidence presented supported Respondent's finding that the soil depths found on the Property generally were very shallow to rock, with some pits ranging from 5 inches to 9 inches, some pits which were less than 12 inches, and a few which were almost 3 feet deep. While there were pits with suitable soil depths, the soil depths were variable and inconsistent from pit to pit. The evidence shows that there were not enough pits with suitable soils adjacent to one another to provide sufficient area of suitable soil for the installation of an LDP system as originally permitted by ADHD EHS. The only pits that possibly could have been classified Suitable or Provisionally Suitable were surrounded by areas of shallow soil depths to rock that were Unsuitable, and therefore could not be reclassified. The classification is based on the most limiting uncorrectable characteristics; in this case, the most limiting factor is the shallow depth to rock. The remaining pits, (there were no findings of fact above referencing augerings or soil probes) showed that the site properly was re-classified by ADHD as Unsuitable, because the soils on the site were shallow to rock and of insufficient depth below the trench bottom to provide a sufficient treatment zone to treat wastewater effluent. The shallow depth to rock below the trench bottom does not meet the requirements of 15A NCAC 18A .1955(m). Therefore, the site properly was classified as UNSUITABLE.
3. The scientific evidence presented supported the conclusion that because of the lack of suitable soil on the site, there was insufficient available space on the site to permit the installation and proper functioning of an on-site wastewater system and repair area in violation of 15A NCAC 18A .1945. Therefore, the site properly was classified as UNSUITABLE.
4. The scientific evidence presented also supported the conclusion that the originally-permitted 10-inch LDP wastewater system could not meet requirements of the state wastewater laws and rules and properly could not be installed on the site because of shallow depth to rock in violation of 15A NCAC 18A .1955(m). The rules do not provide for permitting and installation of a system that only partially complies with the wastewater laws and rules.
5. The facts in the case support a conclusion that no modified, alternative, experimental, or innovative system was identified which could be used that would allow the site to be reclassified as PROVISIONALLY SUITABLE in accordance with 15A NCAC 18A .1956, .1957 or .1969, with the exception of the drip irrigation wastewater system and repair that ADHD and Soil Scientist Wallace believed could be installed on Petitioner's property.
6. Substantial evidence was presented to support Respondent's action in determining that the site is UNSUITABLE for the installation of the original or modified LDP system and taking the action to suspend the Petitioner's March 18, 2005 improvement permit and construction authorization for the Property.

7. The Respondent's decision to re-classify the site as UNSUITABLE, despite Respondent's original classification of the site as SUITABLE, and suspend the improvement permit and construction authorization for the Property was made under proper procedure and neither was arbitrary nor capricious.
8. The evidence produced in this hearing supports Respondent's action in suspending the March 18, 2005, improvement permit and construction authorization for the Property.
9. The parties are encouraged to continue to pursue other options for the site, and to work cooperatively towards a resolution of this matter. The improvement permit and authorization to construct were paid for by Petitioner and relied upon by him during the construction of his home on the site at considerable expense. Petitioner, acting on good faith reliance in the accuracy and fidelity of Respondent and its agents, may have to consider pursuing a tort claim in the North Carolina Industrial Commission if Respondent and Petitioner cannot achieve a reasonable settlement by further work under Respondent's Rule at 15A NCAC 18A .1948(d). From the evidence produced at hearing and the documents of record, there has been insufficient effort toward resolution of this case under the provisions of Rule .1948(d).

### **DECISION**

Based upon the above findings of fact and conclusions of law, I find that Respondent's decision to suspend Petitioner's March 18, 2005, improvement permit and construction authorization for the Property is supported by the evidence and is AFFIRMED.

### **NOTICE**

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services, Division of Public Health.

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36, the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.



This the 22nd day of June, 2013.

---

Beecher R. Gray  
Administrative Law Judge