

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

DAVID PFEIFFER &	:	
AMEL INTERNATIONAL TRADE LTD.,	:	
Appellants	:	
	:	
vs.	:	No. 11-3104
	:	
BOROUGH COUNCIL OF BOROUGH OF	:	
JIM THORPE,	:	
Respondent	:	

Joseph G. Zerbe, Esquire	Counsel for Appellants
James R. Nanovic, Esquire	Counsel for Respondent

MEMORANDUM OPINION

Serfass, J. - December 28, 2012

Here before the Court is the appeal of David Peiffer¹ and Amel International Trade, Ltd. from a decision of the Jim Thorpe Borough Council affirming revocation of an on-lot sewage disposal system permit. David Peiffer is the principal of Amel International Trade, Ltd. On July 19, 2011, Mr. Peiffer and Amel International Trade, Ltd. (hereinafter referred to as "Appellants") obtained approval of an on-lot sewage disposal system permit for a certain parcel of real estate situated in the Borough of Jim Thorpe (hereinafter referred to as the "Borough"). The Borough's Sewage Enforcement Officer revoked the sewage permit on August 28, 2011 and that revocation was

¹ Although the matter is captioned with the spelling "Pfeiffer," Appellant's last name is "Peiffer."

subsequently appealed to the Jim Thorpe Borough Council (hereinafter the "Borough Council"). A written decision in support of the revocation was issued by the Borough Council on December 3, 2011. Appellants have appealed the Borough Council's decision to revoke the on-lot sewage disposal system permit to this Court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants have an ownership interest in a parcel of real estate identified as Lot 52A, located on Hill Road in the Borough of Jim Thorpe, Carbon County, Pennsylvania (hereinafter referred to as the "Lot")². As part of a larger development plan that included erecting a new structure on the Lot, Appellants entered into discussions with the Borough during the years 2008 through 2011 regarding the availability of public sewer access from the Borough to the Lot. Two options discussed during the course of these negotiations were the possibility of using a system of pumps and holding tanks and the construction of an extension of the existing Borough sewer lines to connect the Lot to the Borough's central sewage system. When the use of pumps and holding tanks on the Lot was determined to be infeasible, Appellants actively pursued extension of the municipal sewer

² We note that, at page 20 of the notes of testimony in this matter, Rosemary Peiffer, mother of Appellant, David Peiffer, has indicated that she is a joint owner of the Lot with her son. However, the deed evidencing ownership of the Lot has not been offered into evidence and, therefore, is not part of the record before this Court.

lines. On or about May 4, 2010, the Borough Engineer, Entech Engineering, Inc., forwarded a letter to Appellants stating that Entech would recommend approval of the sewer extension to the Borough Council and that this presentation would occur at the May 13, 2010 council meeting. At that public meeting, a motion was made and approved "to accept and approve the sewage extension services and development agreement with Rosemary Peiffer, 52 Hill Road. That they comply and install the sewer line to spec and put the road back to spec, and include that they have a bond in place - 18 months."

In accordance with the action of the Borough Council, a Development Improvement Agreement and Maintenance Agreement was forwarded to Appellants via letter from the Borough on July 29, 2010. As a result of Appellants' dissatisfaction with the proposed Agreements, the Borough Manager prepared and submitted a separate Agreement to the Appellants. Due to a disagreement over the Borough's requirement that Appellants post a bond for the construction required by extension of the municipal sewer lines, no Agreement was ever executed, the matter was not brought back to the Borough Council and no further progress was made in the effort to connect the Lot to the central sewage system.

On or about February 7, 2011, Appellants' counsel, Joseph G. Zerbe, Esquire, sent an email to Borough Solicitor James R.

Nanovic, Esquire, suggesting that holding tanks might be a viable alternative. On February 8, 2011, Solicitor Nanovic sent a return email to Attorney Zerbe stating that he did not believe holding tanks were permissible under DEP guidelines and indicating his belief that Appellants' only options for obtaining sewer services on the Lot were the aforementioned connection to Borough central sewage or the installation of an on-lot sewer system. Via letter dated March 1, 2011, Attorney Zerbe responded to Solicitor Nanovic's email stating that Appellants were interested in an on-lot sewage system and inquiring as to the likelihood that an on-lot system would be approved for the Lot. On March 3, 2011, Solicitor Nanovic wrote that he "ha[d] no idea" whether such approval would be granted, and provided contact information for the Borough's Sewage Enforcement Officer, William Brior.

On April 26, 2011, Appellants submitted an application to the Borough for an on-lot sewage disposal system. As part of the application process, Appellants performed percolation tests on the Lot and submitted a design for the proposed sewage system. On July 19, 2011, the Sewage Enforcement Officer approved an on-lot sewage permit. The approval indicated that the permit was issued subject to revocation for the reasons set

forth in Section 7 (b) (6) of the Pennsylvania Sewage Facilities Act³ (hereinafter referred to as the "Act").

Wesley Johnson, the Borough Manager, became aware of the on-lot sewage disposal system permit for the subject parcel after the permit had been issued, at which time he indicated to Sewage Enforcement Officer Brior that the issuance of the permit was in error due to the fact that the Lot is located in the middle of the Borough and thus qualifies to be serviced by the Borough's central sewage system, a fact of which the Sewage Enforcement Officer had been unaware and which he had not personally investigated. Based on this conversation with the Borough Manager, the Sewage Enforcement Officer issued a letter dated August 28, 2011 in which he stated to Appellants that he was revoking the on-lot sewage disposal system permit. In that letter, the Sewage Enforcement Officer stated that the reason for the permit revocation was the fact that representatives of Appellants had provided false information to the Borough; specifically, that they had informed the Borough that central sewage service was unavailable to the Lot because the Lot was located outside the service area of the Jim Thorpe Municipal Authority. By the time Appellants received the revocation letter, they had already begun the process of soliciting and

³ 35 Pa. Stat. Ann. § 750.7

accepting bids and acquiring permits, materials and plans to commence development of the on-lot sewage system.

On September 7, 2011, Appellants gave notice of their intent to appeal the decision via a letter to the Sewage Enforcement Officer. The Borough Council heard the matter on October 31, 2011, following which hearing a written decision was issued in support of the revocation of Appellants' on-lot sewage disposal system permit. That decision is the subject of Appellants' appeal to this Court, which was filed on December 29, 2011.

DISCUSSION

Appellants have articulated four (4) issues on appeal; to wit, that the Borough, in its revocation of Appellants' on-lot sewage disposal system permit, committed manifest abuses of discretion and/or errors of law as follows:

1. By ignoring the applicable regulations, including those set forth in 25 Pa. Code § 72.41 (l-m) requiring the Sewage Enforcement Officer to make his own determination as to whether central Borough sewer service was available to the Lot;
2. By failing to apply the guidelines set forth in the Pennsylvania Department of Environmental Protection Municipal Guidance Document 362-2208-002 Statement of Policy giving the Borough seven (7) days to respond to

the Sewage Enforcement Officer's notification of the application for a permit;

3. By finding the Sewage Enforcement Officer's testimony credible; and
4. By ignoring a vast majority of the evidence presented by both parties.

We will address each of these issues in turn hereinafter.

1. The Independent Determination of the Sewage Enforcement Officer

Appellants argue that the Borough was in violation of the following provisions of the Pennsylvania Administrative Code:

(l) Prior to issuing a permit, the sewage enforcement officer shall conduct personally, observe or otherwise confirm in a manner approved by the Department all tests used to determine the suitability of a site for an individual or community on lot sewage system[.]

(m) Prior to issuing a permit, the sewage enforcement officer shall confirm that the application is complete and that the proposed system design is in compliance with the requirements of the act and this part.

25 Pa. Code § 72.41.

The position of the Borough is that Appellants' permit was revoked because, in the course of the application process, representatives of Appellants provided false information to the Borough pertaining to the availability of central Borough sewer to the Lot - specifically, because they indicated that the Lot was not served by central sewer. Because the permit should not

and would not have been approved by the Borough if the availability of central sewer service was known to the Sewage Enforcement Officer, and because it was the receipt of false information and not a failure by the Sewage Enforcement Officer to investigate which gave rise to issuance of the permit in error, the Borough argues that it did not run afoul of these requirements.

The Pennsylvania Sewage Facilities Act provides that when "information material to the issuance of the permit has been falsified [...] the permit shall be revoked." 35 Pa. Stat. Ann. § 750.7 (b)(6)(iii). Further, pursuant to Chapter 72 of the Pennsylvania Administrative Code, dealing with the administration of sewage facility permits, a permit shall be revoked "When information relevant to the issuance of the permit has been falsified." 25 Pa. Code § 72.28 (a)(3).

According to Sewage Enforcement Officer Brior, Mr. Patrick Walsh and Mr. Terrill McLean, representatives of Appellants with respect to the permit application process, indicated to the Borough that central sewer service was not available to the Lot. The Sewage Enforcement Officer relied on this information in granting the permit, and was not aware that central sewer service was available to the Lot until he was so informed by the Borough Manager. Upon confirmation by the Borough of the fact that, contrary to the information the Sewage Enforcement Officer

had received from Appellants' representatives, central sewer was in fact available to the Lot, the permit was revoked pursuant to the aforesaid provisions of the Sewage Facilities Act and Administrative Code.

Appellants argue that it was incumbent upon the Borough, through its Sewage Enforcement Officer, to investigate by "all possible means" the availability of central sewer to the Lot. We do not agree. It is undisputed that the Sewage Enforcement Officer bore the responsibility of conducting, observing or *confirming* that tests of the suitability of the Lot had been carried out in conformance with the law, and of *confirming* that Appellants' application was complete and that its proposed system design was in compliance with the Act. What is less clear is the extent to which the Sewage Enforcement Officer was entitled to rely upon the statements made to him by Appellants' representatives in arriving at these conclusions. We can find no support in the law for the proposition that the Sewage Enforcement Officer is required to explore every conceivable means of independent investigation before determining that an application is suitable. To the contrary, the Pennsylvania Sewage Facilities Act contemplates the likelihood that a municipality will occasionally grant a permit under circumstances in which, with accurate information, it would not do so. We interpret the provision of 35 P.S. § 750.7

(b)(6)(iii), providing for the revocation of a permit that is granted based on false information, to indicate that a municipality is expected, to some extent, to rely on information from outside sources in making its determination, and to remedy any errors upon discovery of the false information. The Borough's reliance on statements by Appellants' representatives and subsequent revocation of the permit was in keeping with such an expectation. In other words, we view this case as precisely the kind of scenario to which § 750.7 was intended to apply.

The Borough, through its Sewage Enforcement Officer, determined that the information it had received had been falsified within the meaning of the applicable regulations as set forth in the Pennsylvania Administrative Code. Because the information received by the Sewage Enforcement Officer (that municipal sewer service was not available to the Lot) was indisputably false, the Borough was well within its authority to make that determination. Appellants provided incorrect information to the Sewage Enforcement Officer, misleading him to the conclusion that the subject parcel could not be serviced by the central borough sewage system. Therefore, Appellants should not be permitted to benefit from their misrepresentation. Accordingly, we find no conflict between the Borough's decision and 25 Pa. Code § 72.41 (1-m), and no abuse of discretion nor error of law related thereto.

2. Municipal Guidance Document 362-2208-002 Statement of Policy

Appellants argue next that the Borough failed to adhere to the guidelines set forth in the Pennsylvania Department of Environmental Protection Municipal Guidance Document 362-2208-002 Statement of Policy, to wit, the requirement in Section II B which gives a municipality seven (7) days to respond to a form letter which must be forwarded to local and county agencies by the Sewage Enforcement Officer upon his decision to issue a permit. Upon the expiration of the seven (7) day period, and no response having been issued by the municipality, the Statement of Policy indicates that the lack of response will be considered assent to the issuance of the permit.

Appellants urge this Court to consider this policy as binding on the Borough in accordance with the "binding norm" test, and to find, as a result, that because the Borough did not object to the permit within seven (7) days, it waived its right to subsequently find an error in the issuance thereof. The Statement of Policy is, by its own terms, not intended to have such force. The "Disclaimer" on the first page of the Statement of Policy provides as follows:

The policies and procedures outlined in this guidance are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent of the part of DEP to give the rules in these policies that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

(Appellant's Exhibit 12, p. i).

Appellants argue that notwithstanding this disclaimer, what is set forth in the Statement of Policy is not a policy but an unpromulgated regulation, which does have the force of law. The question of whether a statement of policy is an unpromulgated regulation is a question of law. Manor v. Dept. of Pub. Welfare, 796 A.2d 1020, 1026 (Pa. Commw. Ct. 2002). The way in which a regulatory agency characterizes its own guidelines is not dispositive of the issue. Eastwood Nursing & Rehab. Ctr. v. Dept. of Pub. Welfare, 910 A.2d 134, 146 (Pa. Commw. Ct. 2006) (citing R.M. v. Pennsylvania Hous. Fin. Agency of Com., 740 A.2d 302, 307 (Pa. Commw. Ct. 1999)). The "binding norm" test is used in the Commonwealth of Pennsylvania to resolve the question, and if a particular policy pronouncement is determined to be a "binding norm," this means that the agency is bound by the statement until the agency repeals it. Dep't of Env'tl. Res. v. Rushton Min. Co., 591 A.2d 1168, 1173 (Pa. Commw. Ct. 1991).

Because the Borough of Jim Thorpe is not the agency that promulgated the Statement of Policy introduced by Appellants, it is unnecessary for our purposes to make a determination as to

whether or not that statement constitutes a binding norm. Assuming that it was a binding norm, it would be binding on the Department of Environmental Protection, not on the Borough, and the Borough's failure to object to the issuance of Appellants' permit in accordance with that Statement of Policy is immaterial. There is no need for this Court to determine whether the Borough adhered to the guidelines set forth in that document, because such failure would not constitute a reversible error of law.

We will consider Appellants' remaining issues on appeal in tandem.

3. Credibility Determinations and Sufficiency of the Evidence

Finally, Appellants argue that the Borough erred in finding credible the Sewage Enforcement Officer's testimony that he had received false information. According to Appellants, the record is replete with evidence that contradicts and calls into question the credibility of that testimony, and the decision of the Borough Council should be overturned on those grounds. We are constrained by Pennsylvania law to leave the Borough's credibility determinations undisturbed, and to find that, as a result, the Borough's decision was based on sufficient evidence.

Because a complete record was made at the agency level in this case, our review on appeal is limited to a determination of

whether Appellants' constitutional rights were violated, whether the Borough's decision was in accordance with the law and did not violate any rules of practice or procedure and whether all necessary findings of fact were supported by substantial evidence. 2 Pa. Cons. Stat. Ann. § 754. In making these determinations, we are not permitted to reweigh the evidence or judge the credibility of the witnesses before the Borough. Tandon v. State Bd. of Med., 705 A.2d 1338, 1343 (Pa. Commw. Ct. 1997). The reviewing agency is the ultimate factfinder, and where that body's findings are based on credibility determinations, those findings are conclusive and the Court is bound to accept them in subsequent appellate review. Andras v. Wyalusing Borough, 796 A.2d 1047, 1049 (Pa. Commw. Ct. 2002).

We find no violation of Appellants' constitutional rights and no violation of the applicable rules of practice and procedure by the Borough. Because the credibility of the Sewage Enforcement Officer's testimony was squarely within the province of the Borough as the ultimate factfinder, and because the Borough found credible his testimony that he based his decision, in part, on the false information he had received from Appellants, the record clearly supports the Borough's determination that the sewage permit should be revoked. We have no authority to find that the evidence should have been weighed differently, and Appellants' arguments to that effect must fail.

CONCLUSION

For the reasons set forth hereinabove, we affirm the Borough's revocation of Appellants' on-lot sewage disposal system permit, and therefore deny the appeal of the Borough's written decision.

BY THE COURT:

Steven R. Serfass, J.

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ORDER OF COURT

AND NOW, to wit, this 28th day of December, 2012, upon consideration of the "Notice of Appeal" filed by Appellants, David Peiffer and Amel International Trade, Ltd., the briefs of counsel and the record in this matter as certified by Elizabeth Ahner, Council President of Appellee, Borough Council of the Borough of Jim Thorpe, and following oral argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby **ORDERED and DECREED** that the decision of the Borough Council of the Borough of Jim Thorpe is **AFFIRMED** and the appeal of Appellants, David Peiffer and Amel International Trade, Ltd., is **DENIED** accordingly.

BY THE COURT:

Steven R. Serfass, J.