
From: Siegel, Martin R. <MSiegel@barley.com>
Sent: Tuesday, December 26, 2023 8:58 AM
To: John Prevoznik
Cc: RKidwell@newmanwilliams.com
Subject: RE: M&M continued hearing Jan, 2, 2024 at 6:00pm

John,

I am following up with you after our discussion earlier this month regarding M&M Realty's appeal. You mentioned that the Board of Supervisors was considering issuing M&M permits to allow it to repair the malfunctioning on-lot systems upon "acceptance" of a sewage planning module by DEP. We appreciate the Board's willingness to consider options to expedite to granting of the repair/replacement permits. We are wary, however, of it doing so in a way that would provide DEP an opportunity to block the issuance of the permits. It is obvious that DEP has not been a good-faith partner in trying to resolve this matter.

Fortunately, the Sewage Facilities Act provides several avenues for the Township to issue the permits in a manner that are not dependent upon DEP action. You noted that the Board was considering basing its approach on Section 7(b)(4.1)(i) of the Sewage Facilities Act, 35 P.S. § 750. 7(b)(4.1)(i), which provides:

"A supplement or a revision for new land development or interim repairs to or the replacement of existing malfunctioning on-lot sewage systems shall not be denied solely on the basis of the failure of the municipality in which the new land development or system in need of repair or replacement is proposed to submit an update revision or special study or implement its plan as required by an order of the department or the rules and regulations of the department or because the update revision or special study is under review by the department."

You explained that you felt that this provision, however, potentially meant that the Township could only issue the permits if DEP had determined that a planning module was administratively complete and that DEP was reviewing it. Recognizing that it lacks precision and clarity, we believe that this provision allows otherwise. I will insert numbering in the provision in order to clarify that this provision includes a number of independent clauses and would allow the Township to issue the permits without DEP's active involvement:

"**1)** A supplement or **2)** a revision for new land development or **3)** interim repairs to or the replacement of existing malfunctioning on-lot sewage systems shall not be denied solely on the basis of the failure of the municipality in which the new land development or system in need of repair or replacement is proposed **a)** to submit an **i)** update revision or **ii)** special study or **iii)** implement its plan as required by an order of the department or the rules and regulations of the department or **b)** because the update revision or special study is under review by the department."

Our primary concern with what you suggested is that DEP would deem a planning module administratively incomplete because it lack a preliminary hydrogeologic survey. Because of this alleged deficiency, DEP could argue it was therefore not be "reviewing" the module. Thus, the Township would be blocked from issuing the repair permits. We believe, however, that the permits can be issued without direct DEP involvement pursuant to subsection 3(a)(i) in my marked up version. What M&M seeks is interim repairs/replacement of existing malfunctioning on-lot systems. Simply put, interim repairs or replacement of the malfunctioning systems shall not be denied because of the Township's failure to submit to DEP an update revision. The requirement that the update revision be "under review" by DEP is independent (note the use of

“or” before section b) and applies only to a situation where the DEP is reviewing a plan update that has actually been submitted by a municipality. Our position is consistent with the intent of the Act to have malfunctioning on-lot systems promptly repaired. It is also consistent with the Act’s intent not to have on-lot systems for **new** developments permitted by a municipality without prior planning approval by DEP.

We also suggest that once the Township approves and submits a planning module to DEP, it is “under review” by DEP, at least for purposes of Section 7(b)(4.1)(i) of the Sewage Facilities Act, 35 P.S. § 750. 7(b)(4.1)(i),. We suspect that DEP would be reticent to appeal a Board approval pursuant to section. When senior officials at the Department review this matter, we doubt they would want to argue that repairs would have to wait years while DEP plods through the planning process.

As we previously noted, there is at least one other provision of the Sewage Facilities Act that would allow the Township to issue the repair permits without prior approval or involvement by DEP. Section 7(b)(4.1) of the Act provides a general prohibition on the issuance of permits in the absence of planning. Section 7(b)(4.2), 35 P.S. § 750. 7(b)(4.2), however, sets forth several exemptions from this general prohibition. For example, Section 7(b)(4.2)(iv) allows a permit to be issued where the municipality “finds it necessary to issue permits for the abatement of pollution and/or the correction of health hazards.” We maintain that the regular pumping of the holding tanks on the property presents the risk of releases of raw sewage and thereby creates an avoidable health hazard. In addition, there is no guarantee that any subsequent property owner will be all diligent as M&M has been in pumping the holding tanks.

In summary, it is M&M’s position that the Township can issue the repair/replacement permits immediately without direct approval or involvement by DEP. To facilitate this Township action, M&M is willing to submit a planning module to the Township for its review and approval. While we doubt that DEP would appeal the Township’s issuance of the permits, we believe there is strong legal grounds to defend the Township’s action if there is such an appeal.

Please let me know if you would like to discuss this matter further.

Marty

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From: John Prevoznik <JPrevoznik@prevozniklaw.com>

Sent: Tuesday, December 5, 2023 6:52 PM

To: Siegel, Martin R. <MSiegel@barley.com>; Bruder, Paul J. <pjbruder@mette.com>

Subject: M&M continued hearing Jan, 2, 2024 at 6:00pm

The M&M hearing was continued To Jan. 2, 2024 at 6:00 pm Please provide your thoughts thanks.

Very truly yours,

John

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