

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MAY I. BOBBITT, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 99-3584  
 )  
 ALLEN C. D. SCOTT, II and )  
 DEPARTMENT OF HEALTH, )  
 )  
 Respondents. )  
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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 22, 2000, in St. Augustine, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Kimball Bobbitt, pro se  
41 Zamora Street  
St. Augustine, Florida 32095

For Respondent Allen C. D. Scott, II:

Allen C. D. Scott, II, Esquire  
101 Orange Street  
St. Augustine, Florida 32084

For Respondent Department of Health:

Charlene J. Petersen, Esquire  
Department of Health  
420 Fentress Boulevard  
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

The issue in this case is whether a variance for a reduced setback from Petitioner's well to Respondent Allen C.D. Scott, II's (Scott) septic system should be granted by the Department of Health.

PRELIMINARY STATEMENT

Respondent, Allen C.D. Scott, II, applied for a variance from Respondent, Department of Health (DOH), requesting that the required setbacks from a drinking water well and an irrigation well on Petitioner's property from a proposed site for a septic system on Respondent Scott's property be reduced. Petitioner and neighbor, May I. Bobbitt, requested an administrative hearing to refute the Department's action of granting the variance. Petitioner's request was forwarded to the Division of Administrative Hearings.

At the hearing Petitioner offered the testimony of two witnesses, but did not offer any exhibits into evidence. Respondent, DOH offered the testimony of four witnesses and offered twelve exhibits into evidence. Respondent Allen C.D. Scott, II testified in his own behalf and offered nine exhibits into evidence.

After the hearing, Petitioner and Respondent, DOH, filed proposed recommended orders on April 5, 2000, and April 6, 2000, respectively. Respondent Scott indicated he concurred in the

Department's proposed recommended order on April 11, 2000. Petitioner Bobbitt filed a Motion to Strike Respondent's proposed recommended order on April 20, 2000. The Motion to Strike is denied. Respondent Scott filed a response to the Motion to Strike on May 5, 2000, with several attachments from the files of the Division of Administrative Hearings regarding an earlier case over the same septic tank system. Petitioner Bobbitt filed a reply to Scott's response to the Motion to Strike on May 15, 2000. The proposed recommended orders and the various motions, responses and replies have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Allen C.D. Scott, II, owns property designated as Lot 13, Block 11, Vilano Beach Subdivision, 40 Viejo Street in St. Johns County, Florida. Mr. Scott's property is undeveloped, except for a drinking water well located in the northwest quadrant of his property. The well was installed within the past year. There are residential homes on the north, south, and west sides of the property. The beach is on the east of the property. The property is 50 feet wide and 125 feet deep.

2. The property is not served by a public or private utility; thus, Mr. Scott must provide his own drinking water well and septic system.

3. Mr. Scott purchased the property from Alexander A. Morese, Jr. Mr. Scott was Morese's attorney of record for issues concerning this property and the proposed septic tank system.

4. The neighboring property to the north of Mr. Scott's property is owned by Petitioner, May Bobbitt. Petitioner has two wells on her property. A fairly recently-installed drinking water well and an irrigation well.

5. The irrigation well, is located 30 feet from a site on Mr. Scott's property proposed for an on-site septic system. The location of the proposed septic tank is less than the required setback from a septic system to an irrigation well of 50 feet.

6. The potable drinking water well is 225 feet deep, pit-cased and terminates in the Floridan aquifer. It is within 65 feet of Ms. Bobbitt's septic tank system and is located 50 feet from the proposed site of Mr. Scott's septic system. The location of the proposed septic tank is less than the required setback from a potable drinking water well to a septic system of 75 feet.

7. The initial permit for Ms. Bobbitt's drinking water well was denied based on its proximity to her septic tank. Ms. Bobbitt challenged the denial in an informal proceeding before DOH (DOH case number 97-023H). Mr. Morese played some role in that proceeding.

8. In the meantime, the initial septic tank permit application filed by Mr. Morese was denied by DOH based on the location of Ms. Bobbitt's drinking water well. Mr. Morese appealed the denial to the DOAH Case No. 98-3283.

9. Sometime in late 1997, DOH granted Ms. Bobbitt a variance for a 65-foot setback distance from her drinking water well to her septic system. The variance resulted after settlement of the administrative actions involving May Bobbitt and Mr. Morese's permitting her well and Mr. Morese's septic tank. The variance was granted because the construction of the well prevents contamination of the well from the septic system. Both cases were separately terminated.

10. On November 5, 1997, Mr. Morese applied to DOH for a variance to reduce the setback distances from Petitioner's two wells to Mr. Morese's proposed septic system. Since Mr. Morese's property was 50 feet wide and Mr. Morese desired to build a two-bedroom home on the property, there was limited area available to construct the septic system. The proposed septic system is located in the only area available for such a system and is the same location proposed by Respondent Scott.

11. A sign was posted on Mr. Morese's property notifying Ms. Bobbitt of Mr. Morese's variance request.

12. The variance committee recommended approval of the Morese variance with specific provisos at their December 1997,

meeting. Dr. Richard Hunter, Department of Health Deputy State Health Officer, approved the variance with provisos by letter to Mr. Morese on December 17, 1997. The letter stated the approval as follows:

1. The onsite sewage treatment and disposal system shall be set back from the irrigation well on lot 14 by the maximum distance attainable but not less than 30 feet when installed.

2. The onsite sewage treatment and disposal system shall be set back from the drinking water supply well on lot 14 by the maximum distance attainable but not less than 50 feet when installed.

3. The onsite sewage treatment and disposal system drainfield elevation shall be based on a seasonal high water table no lower than 12 inches below existing grade based on William G. Harb's report of November 13, 1997.

13. The variance approval was not challenged by Petitioner or any other neighbor. The variance was granted for a period of one year from the date of Dr. Hunter's letter.

14. As indicated, Allen C.D. Scott, II, purchased the property from Mr. Morese.

15. When Mr. Scott purchased the property from Mr. Morese, the variance was transferred to Mr. Scott.

16. After Mr. Scott purchased the property, he hired an engineer to assist him in securing a Department of Environmental

Protection (DEP) coastal construction control permit. The permit was finally issued on May 13, 1999.

17. The variance granted Mr. Morese and subsequently transferred to Mr. Scott expired December 18, 1998. Thus, by the time Mr. Scott obtained his DEP permit to put fill on his property in order to construct his septic system, the variance for reduced setbacks from Petitioner's wells had expired.

18. On June 14, 1999, Mr. Scott applied to DOH for a variance to reduce the required setbacks from Petitioner's irrigation and drinking water wells to his proposed septic system. Mr. Scott's variance application requested the exact same setbacks that Mr. Morese had been granted in December 1997.

19. For the same reasons the variance review committee recommended approval of the Morese the committee recommended approval of the Scott variance. Dr. Sharon Heber, Director of Environmental Health, DOH, granted the variance by letter on July 2, 1999. The letter contained the same provisions as Mr. Morese received in December 1997.

20. The evidence demonstrated that the requested variance would not adversely impact anyone's health or degrade ground or surface waters. Moreover, the evidence showed that the variance met all other Department criteria for an onsite sewage disposal system.

21. Don Hallman, professional engineer, testified that the pit casing of Ms. Bobbitt's well provides an additional layer of protection from contamination sources. He further explained that Petitioner's deep well was cased in a consolidated formation which furnished protection from surface and lateral contaminants. Mike Turner testified that he has permitted and/or had experience with two thousand or more wells in his job with the St. Johns Water Management District. He stated unequivocally that Ms. Bobbitt's deep, pit-cased well was in no more danger from contamination from Scott's septic system, 50 feet away, than it is from the 65-foot reduced setback distance to her own septic system. Given these facts, Respondent is entitled to a variance for his proposed septic tank system.

#### CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over this subject matter and the parties to this action pursuant to Section 120.57(1), Florida Statutes.

23. The duties and powers of the Department of Health as they relate to septic tank variances are set forth in Section 381.0065(3)(d), Florida Statutes. Section 381.0065(3)(d), Florida Statutes, states that the Department shall "(g)rant variances in hardship cases under the conditions prescribed in this section and rules adopted under this section."



24. Section 381.0065(4)(h)1., Florida Statutes, provides for hardship variances for on-site sewage treatment and disposal systems. The applicable sections state:

(h)1. The department may grant variances in hardship cases which may be less restrictive than the provisions specified in this section . . . . A variance may not be granted under this section until the department is satisfied that:

- a. The hardship was not caused intentionally by the action of the applicant;
- b. No reasonable alternative, taking into consideration factors such as cost, exists for the treatment of the sewage; and
- c. The discharge from the onsite sewage treatment and disposal system will not adversely affect the health of the applicant or the public or significantly degrade the groundwater or surface waters.

25. Florida law concerning setbacks of septic systems from wells is found in Sections 381.0065(4)(e)1. and 4., Florida Statutes, and Rules 64E-6.005(1)(a) and (d), Florida Administrative Code. These sections require that septic systems will not be placed closer than 75 feet from a private potable well and 50 feet from a nonpotable well.

26. In this case, Respondent's need for a variance was not created by him given this is the only viable location for a septic system. There is no significant danger to health and no significant danger of pollution. Therefore, Respondent is entitled to the variance.

27. DOH in its proposed recommended order asked that attorney's fees and costs be granted based on a frivolous action by Petitioner. The evidence did not establish that this case was frivolous or improper, given that the Ms. Bobbitt never formally participated in Mr. Morese's earlier case and it was unclear to what extent she participated or understood any settlement which may have occurred. Therefore attorney's fees and costs are denied.

RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED:

That the variance should be granted by the Department of Health and Petitioner's challenge dismissed.

DONE AND ENTERED this 8th day of June, 2000, in Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of June, 2000.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.