

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWARD N. POLLACK,)
)
 Petitioner,)
)
 vs.) Case No. 00-0130
)
 DEPARTMENT OF HEALTH,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 11, 2000, in New Smyrna Beach, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Edward N. Pollack, pro se
3665 Darby Road
New Smyrna Beach, Florida 32168

For Respondent: 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 of four feet from Petitioner's well to a building pad treated with pesticide should be denied by the Department of Health.

PRELIMINARY STATEMENT

Petitioner Edward N. Pollack (Pollack), applied for a variance from Respondent Department of Health (DOH), to utilize a potable water well located four feet from a building pad which had been treated with pesticide. The variance was denied. Petitioner requested a formal administrative hearing on Respondent's denial.

At the formal hearing, Petitioner testified in his own behalf, presented the testimony of one witness and introduced three exhibits into evidence. Respondent presented the testimony of three witnesses and introduced three exhibits into evidence.

After the hearing, Respondent filed a Proposed Recommended Order on April 26, 2000. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner resides on property consisting of 7.5 acres at 3665 Darby Road, New Smyrna Beach, Volusia County, Florida. Since Petitioner receives no public utility service at his home, he has a septic system and potable drinking water well on his property. However, Petitioner's family does not drink the water from the well. The family purchases bottled water for drinking purposes. The well water is used for other household purposes, such as cleaning and bathing. There are other locations on

Petitioner's property for a well. The evidence demonstrated that Petitioner has or had alternative locations for the well.

2. Petitioner built a 1681 square foot barn utilizing an old concrete foundation from a previous barn. Petitioner's well is located in the southwest corner of the old barn's foundation and four feet from the new barn's foundation. The building plans for the barn, submitted to Volusia County, clearly indicated the location of Petitioner's well within four feet of the new barn's foundation. Even with this information Volusia County issued a building permit for the new barn. There were other locations for the barn on Petitioner's property which Petitioner would have utilized had he known of the setback requirements when he first permitted his barn.

3. Volusia County required the new barn's foundation to be elevated. In order to elevate the sub-floor for the new barn's foundation, Petitioner placed a layer of visqueen on the sub-floor, or old concrete floor of the old barn, then added a layer of sand and poured concrete on top of the sand layer. The sand layer is encased in concrete. The concrete encasement does not necessarily prevent leaks from above given the porous nature of concrete. Additionally, the condition of the old barn floor, i.e. whether it has cracks, is not known.

4. The Volusia County building code requires that the soil under a foundation be treated for termites. After Petitioner's

contractor added the sand layer, he spread one four-pound bag of 90 percent Sevin dust, a common garden pesticide, on top of the sand. The application rate was within normal application rates for the barn area. The Sevin dust was not applied with any pressure to force penetration into the soil. More than seven days later the contractor poured the new concrete foundation on the pesticide-treated sand layer.

5. The label on the Sevin dust package indicates that 10 percent Sevin dust may be applied to vegetables up to the day of harvest and in some instances 3 to 7 days before harvest, depending on the type of crop. However, the package does not indicate that a treated crop is edible for human consumption without first washing the crop or other processing of the crop. Therefore, a lack of danger from contamination has not been shown. Indeed, the evidence did not show that health would not be adversely affected by use of Petitioner's well given this major deviation from the setback requirements and the soil in the area.

6. A Volusia County building inspector informed Petitioner's contractor that the close proximity of Petitioner's potable well to the area treated with pesticide was a violation of state health codes and could not be approved because the well did not meet the requirement of having a 25-foot separation from soil treated with pesticide. The contractor informed Steve

Baur, a Department of Health employee, about the violation. The deviation of 21 feet from the 25-foot setback requirement is a major deviation.

7. Petitioner applied to DOH for a variance to allow him to utilize his potable drinking water well.

8. Petitioner's variance application was denied by the variance committee and Dr. Sharon Heber, Department of Health Environmental Health Director, for the following reasons:

1. Section 64E-8.009(2), F.A.C., allows the granting of variances to 'prevent excessive hardship only in cases involving a minor deviation from established standards when the hardship was not intentionally caused by the applicant, where no reasonable alternative exists, and where proper use of the system will not adversely affect public health.'

2. According to information supplied by the Volusia County Health Department, the treated slab is located 4 feet from the existing well. This is a major deviation from the established standards.

3. The well completion report for the existing well indicates coarse shell starting at 10 feet and continuing down to 60 feet. This material provides no filtration and/or confinement for the pesticide.

CONCLUSIONS OF LAW

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

10. Section 381.0062(6)(a), Florida Statutes, states that the department may "grant variances and exemptions from the rules promulgated under the provisions of this section through procedures set forth by the rule of the department."

11. Florida law concerning setbacks of potable wells from pesticide applications is found in Section 64E-8.002(b)1, Florida Administrative Code. The law requires that potable water wells must maintain a setback of 25 feet from a building foundation when the soil has been treated with a pesticide.

12. Section 64E-8.009, Florida Administrative Code, establishes the criteria for variances concerning drinking water systems. Section 64E-8.009, Florida Administrative Code, states in relevant part:

64E-8.009 Variances.

(1) The supplier may request a variance by completing Form DH 4094, and submitting a statement regarding hardship, any other information necessary for rendering a decision and all information required by subsection 64E-8.009(3). The burden of presenting pertinent and supportive facts shall be the responsibility of the applicant.

(2) Upon consideration of each application, and the recommendations of . . . the county health department, the Deputy State Health Officer or his designee has the authority to grant a variance, grant a provisional variance or deny the variance request. The Deputy State Health Officer or his designee will grant a variance to prevent excessive hardship only in cases involving minor deviation from established standards when the hardship was not caused intentionally by

the applicant, where no reasonable alternative exists, and where proper use of the system will not adversely affect public health. In making its decision, the department shall consider the factors in rule 64E-8.003(4). . . .

(3) For variances involving private water system replacement well, except those which are less than 50 feet from an OSTDS or 25 feet from a building foundation which has been chemically treated for pests, the applicable county health department administrator has the authority to grant a variance, grant a provisional variance, or deny the variance request

(4) The department shall consider:

(a) Historical water quality.

(b) Age and condition of system components and the likelihood it will continue to provide potable water.

(c) Size of cone of influence and protection of source from contamination.

(d) Amount of deviation from the standards.

(e) Type and degree of consumer exposure.

(f) Economic Hardship.

(g) Alternative potable water availability.

. . .

13. Section 64E-8.002(2)(b)1, Florida Administrative Code, states that there must be a separation of 25 feet from a potable water well to a building foundation when the soil has been chemically treated for pests. Section 64E-8.002(b)1., Florida Administrative Code, does not delineate which types of pesticide fall under this requirement. It applies to any pesticide used to treat the soil. Section 64E-8.002(2)(b)1., Florida Administrative Code, does not detail the methods of application of the pesticide which are applicable under the rule. It applies to any and all methods of application, hand-spreading or

spraying. Section 64E-8.002(2)(b)1., Florida Administrative Code, does not specify the types of soil to which this rule applies. The rule applies no matter what type of soil is present.

14. In this case, Petitioner owns several acres around his house and has sufficient unobstructed area available in which to install a new potable water well and meet all required setbacks. Petitioner's request for a reduced setback of 4 feet instead of 25 feet is a major deviation of the rule, not a minor deviation. Moreover, the system is so close to the pesticide-treated area that there is a significant threat to public health. Therefore, Petitioner is not entitled to a variance.

RECOMMENDATION

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

RECOMMENDED:

That the Department of Health enter a final order denying Petitioner's request for a variance.

DONE AND ENTERED this 14th day of June, 2000, in
Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2000.

COPIES FURNISHED:

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

Edward N. Pollack
3665 Darby Road
New Smyrna Beach, Florida 32168

Angela T. Hall, Agency Clerk
Department of Health
Bin A02
2020 Capital Circle, Southeast
Tallahassee, Florida 32399-1703

William Languet, General Counsel
Department of Health
Bin A02
2020 Capital Circle, Southeast
Tallahassee, Florida 32399-1701

Dr. Robert G. Brooks, Secretary
Department of Health
Bin A00
2020 Capital Circle, Southeast
Tallahassee, Florida 32399-1701

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.