STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-0695
	)	
ANTHONY MASSARO,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard on May 23, 2000, in Bunnell, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charlene J. Petersen, Esquire
Department of Health
400 Fentress Boulevard
Daytona Beach, Florida 32114

For Respondent: Dr. Anthony Massaro, pro se
3402 North Oceanside Boulevard
Flagler Beach, Florida 32136

STATEMENT OF THE ISSUE

The issue is whether Respondent should be required to obtain a current operating permit for his aerobic treatment unit and have a $500.00 fine imposed for violating an agency rule for the reason cited in the Citation for Violation issued by Petitioner on December 1, 1999.

PRELIMINARY STATEMENT

This matter began on December 1, 1999, when Petitioner, Department of Health, on behalf of the Flagler County Health Department, issued a Citation for Violation charging that Respondent, Dr. Anthony Massaro, had violated Rule 64E-6.003(5)(c), Florida Administrative Code, by failing to obtain an annual operating permit for his aerobic treatment unit, as required by law. For this violation, the agency proposes to impose a fine of $500.00 and require Respondent to obtain a permit.

Respondent denied the allegation and requested a formal hearing under Section 120.569, Florida Statutes, to contest the charges. The matter was referred by Petitioner to the Division of Administrative Hearings on February 10, 2000, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated April 7, 2000, a final hearing was scheduled on May 23, 2000, in Bunnell, Florida. On May 22, 2000, the case was transferred from Administrative Law Judge Stephen F. Dean to the undersigned.

At the final hearing, Petitioner presented the testimony of Benjamin D. Juengst, formerly an environmental specialist I with the Flagler County Health Department. Also, it offered Petitioner's Exhibits 1-9. All exhibits were received in evidence. Respondent testified on his own behalf and presented the testimony of Anita Cholmondeley, an environmental supervisor

II with the Flagler County Health Department. Also, he offered Respondent's Exhibits 4-9, which were received in evidence. Finally, the undersigned took official recognition of Rules 64E-6.003(5)(c) and 64E-6.030(1)(m), Florida Administrative Code; Sections 381.0011(4), 381.006(7), 381.0065(2)(a), (2)(a)1., (4), and (5), 381.0655(1)(a), and 381.0066(1) and (2)(c), Florida Statutes (1999); and Section 3.03.05 of the Flagler County Land Development Code.

There is no transcript of the hearing. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner on June 9, 2000. On June 8, 2000, Respondent filed a letter with twenty attachments numbered as Petitioner's Exhibits A-G and I-U. Petitioner has stipulated to the introduction of those documents. Both filings have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this dispute, Petitioner, Department of Health (Department), has alleged that Respondent, Dr. Anthony Massaro, a retired public health physician, failed to obtain an annual operating permit for an aerobic treatment unit (ATU) located at his residence at 3402 North Oceanside Boulevard, Flagler Beach, Florida. The Flagler County Health Department (Health Department) is charged with the responsibility of issuing such

permits. That department is under the direction and control of Petitioner.

2. While Respondent readily admits that he failed to obtain a permit, he contends that he was misled by the Health Department when he first installed an ATU at his residence; the Health Department is not enforcing the law regarding ATUs and thus another system would be more appropriate; and the law, as he interprets it, allows him to install another type of on-site sewage disposal unit on his property.

3. Respondent purchased his property in Flagler County in 1997. The property is located in Ocean View Estates Subdivision (subdivision), which has an Urban Single-Family Residential District (R-1b) zoning classification under the Flagler County Land Development Code (Code). Section 3.03.05A of the Code requires that owners within the R-1b classification use "public or community water and sewer facilities," but makes an exception for "[s]mall R-1b subdivisions, fifty (50) lots or less, utilizing a public community water system," in which case residents "may utilize Class I aerobic onsite sewage disposal systems." Further, "[t]he use of individual onsite sewage disposal systems must be consistent with adopted county policies and standards."

4. Because the subdivision has 50 lots or less, and public or private sewer facilities were not available in the area, the subdivision's Plat Agreement recorded in 1995 provided that

"[i]ndividual aerobic onsite sewage disposal systems are to be permitted and constructed as each lot is developed."

5. Another type of onsite sewage disposal system is the anerobic system, which has a septic tank and larger drainfield, is far less expensive, but does not conform with "county policies and standards" in this locale. Thus, this type of system requires a variance from the zoning regulations before one can be installed in the subdivision. Even so, Respondent says "all" of his neighbors have installed such a system.

6. Because of the Plat Agreement, the zoning restriction, the difficulty in obtaining a variance, and the lack of a sewer line, Respondent had no choice except to use an ATU system for his residence. This meant that he had to apply for a permit from the Health Department. Once a permit is obtained and an ATU installed, the owner must renew his operating permit annually at a cost of $150.00, and he must enter into a maintenance agreement with a licensed contractor. The $150.00 fee is used to defray the costs incurred by the Health Department in making quarterly inspections and performing annual sampling and laboratory analysis of effluent.

7. The record does not reflect precisely when a sewer line became operational across the street from Respondent's property, but the sewer project was accepted "for service" in April 1998, or before Respondent's ATU was installed in August 1998. Had

Respondent known this, he would have obviously chosen that option rather than an ATU.

8. The evidence reflects that in November 1997 Respondent made application for an ATU with the Health Department, a permit was issued in December 1997, and the system was installed and approved in August and September 1998, respectively. In early April 1998, the Health Department was advised by the private utility company that it would accept new sewer connections in a service area that included Respondent's home. However, Health Department representatives made no mention of this to Respondent since they were under the impression that he desired to use the ATU option, they do not normally "counsel" applicants on onsite sewage disposal system options, and Respondent had made no inquiry. Disclosure of this fact would have saved Respondent considerable money (and grief) in the long run; unfortunately, however, while good public relations would dictate otherwise, the Health Department had no legal obligation to do anything other than process the pending application. Likewise, it has no obligation in law to now pay the costs for Respondent to hook up to the line because of its non-disclosure.

9. Respondent has now invested more than $5,000.00 in his ATU. This type of system is operated by a compressor in Respondent's garage, which must be run 24 hours per day, and is very noisy. Because of this, Respondent understandably wishes to change to an anerobic system, which has a traditional septic

tank, larger drainfield, no unsightly "mound" in the yard, no annual permits, and is far cheaper than an ATU. Also, it does not require a noisy motor to sustain operations. However, this type of system is prohibited by the Code except where a variance from Flagler County (County) has been obtained. It appears to be unlikely that Respondent can obtain a variance from the County.

10. Because Respondent's property is so low in relation to the sewer line, to achieve the proper gravity, he must install a lift station and pay a connection fee, both totaling $3,540.00, before hooking up to the sewer system. Given these costs, and the considerable investment he already has in an ATU, Respondent does not consider this to be a viable alternative.

11. Respondent pointed out that, despite the requirement that they do so, many ATU owners in the County are not running their systems 24-hours per day because of the noise from the compressor. He also pointed out that the Health Department has consistently found numerous violations of such systems during its inspections. He further asserted that while the $150.00 annual fee is to defray certain sampling and laboratory analysis costs associated with inspecting ATUs, the Health Department has done neither on his ATU. Finally, Respondent pointed out that prior to 1999 the regulations were enforced by sampling the compliance of a very small percentage of total ATU systems (ten percent), rather than all systems, in the County. Given these considerations, Respondent concludes that ATUs are the least

effective way to treat sewage, and that existing laws and regulations have not been enforced. Assuming these allegations to be true, and they were not seriously disputed, they are legitimate concerns. However, until the law is changed, they do not constitute a lawful basis for allowing Respondent to switch to an anerobic system.

12. Respondent further contended that under his interpretation of the general law, which was not fully understood by the undersigned, he is not required to use an ATU. But local zoning regulations clearly require that he do so, and until the state or local regulations are changed or waived, he cannot use an anerobic system.

13. Finally, Respondent has cooperated with the Department throughout this process. With his lengthy public health background, Respondent initiated this action with good intentions, seeking to point out the flaws in the ATU systems, and to remedy a problem which none of his neighbors apparently have. Given these considerations, a civil penalty should not be imposed.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

15. As the party which issued the charging document, Petitioner bears the burden of proving by a preponderance of the

evidence that the allegations in the Citation for Violation are true.

16. The Citation for Violation alleges that Respondent violated Section 381.0065(4), Florida Statutes (1999), by failing to obtain an annual operating permit for his ATU. The Citation further alleges that Respondent's conduct also violates Rule 64E-6.003(5)(c), Florida Administrative Code, which imposes the same requirement.

17. The evidence clearly shows that Respondent failed to obtain the permit, as required by law, and thus the charge in the Citation for Violation has been sustained.

18. In reaching the above conclusion, the undersigned has considered the many contentions raised by Respondent. Unfortunately, the relief which he requests is not available. First, at least from a public relations standpoint, the Health Department should have advised Respondent (and any other similarly situated homeowners) in April 1998 that a utility company had just been authorized to connect new sewer customers in Respondent's service area; however, it had no legal duty to do so. Likewise, there is no legal basis by which to order the Health Department to pay the costs for a connection to a sewer line at this time. Finally, the use of an anerobic system is currently prohibited by the Code; unless a variance is granted, such a system cannot be installed. Whether Respondent can make

out a good case for a variance is beyond the scope of this proceeding.

19. In light of the foregoing, Respondent should be required to obtain an annual operating permit for the current year. Given the circumstances presented here, a civil penalty is not warranted.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Health enter a final order sustaining the charge in the Citation for Violation and requiring that Respondent obtain an annual permit for his ATU. A civil penalty is not warranted.

DONE AND ENTERED this 20th day of June, 2000, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th 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.