

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS AND)	
RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 00-4323
)	
LITTO'S APARTMENTS,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on December 18, 2000, in Avon Park, Florida.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Division of Hotels and Restaurants
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Did the Respondent commit the offenses alleged in the Administrative Complaint Following Emergency Closure and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

By an Administrative Complaint Following Emergency Closure dated April 7, 2000, and filed with the Division of Administrative Hearings (Division) on October 19, 2000, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Department) is seeking to revoke, suspend, or otherwise discipline Respondent's license as a public lodging establishment, license number 38-00104-H.

As grounds therefor, the Department alleges that Respondent violated: (a) Rule 61C-1.004(9)(a), Florida Administrative Code, and NFPA 10, Standard for Portable Fire Extinguishers, in that a fire extinguisher was missing on the north side of apartments; (b) Rule 61C-1.004(5), Florida Administrative Code, in that there were no smoke detectors in apartments 1, 3, and 8; (c) Rule 61C-1.004(1)(a), Florida Administrative Code, in that the water supply was located less than 75 feet from septic tank and drain field; (d) Chapter 5, Section 5-403.11, (1997) Food Code, U.S. Public Health Service, in that the septic tank did not meet Health Department requirements; and (e) Section 509.221(1), Florida Statutes, in that there was an open septic tank with exposed raw sewage located on Respondent's premises and a septic blow out on Respondent's premises with raw sewage being dumped on the ground.

By letter dated October 19, 2000, the Department referred this matter to the Division for the assignment of an Administrative Law Judge and for the conduct of a formal hearing. At the hearing, the Department presented the testimony of Richard Barnhart and Ed Madden. The Department's Exhibits 1 through 6 were admitted in evidence. Rule 61C-1.004, Florida Administrative Code, National Fire Protection Association, Inc. (NFPA) 10, Standard for Portable Fire Extinguishers (1998), Rule 5-403.11, Food Code, U.S. Public Health Service, and Section 509.221, Florida Statutes, were officially recognized. Respondent did not appear at the hearing. Subsequent to the hearing, an Order to Show Cause was issued allowing Respondent an opportunity to show cause why he failed to appear at the hearing. Respondent's copy of the order was returned by the U. S. Postal Service as being "undeliverable as addressed/unable to forward." An order concluding the hearing and setting a time for proposed recommended orders to be filed with the Division was issued. Subsequently, the Respondent's copy of the Order was returned by the US Postal Service as being "undeliverable as addressed/unable to forward."

A Transcript of this proceeding was filed with the Division on January 4, 2001. The department timely filed its

Proposed Recommended Order. The Respondent did not file a proposed recommended order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Department is the agency of the State of Florida charged with the responsibility of licensing and regulating public lodging establishments.

2. At all times pertinent to this proceeding, Respondent was a licensed public lodging establishment as that term is defined in Section 509.013(4)(a), Florida Statutes, license number 38-00194-H, located at 1720 US Highway 27, Avon Park, Florida.

3. At all times pertinent to this proceeding, Richard Barnhart was employed by the Department as a Sanitation and Safety Specialist.

4. At all times pertinent to this proceeding, Ed Madden was employed by the Department as a Sanitation and Safety Supervisor.

5. On March 10, 2000, Barnhart performed a routine inspection of Respondent's public lodging establishment (Litto's Apartments) and observed two safety violations which were classified as violations of critical concern. A

violation classified as of critical concern is required to be corrected immediately. The safety violations observed by Barnhart were: (a) fire extinguisher missing on north side of Units 1 and 2 which resulted in some of the apartments located in Units 1 and 2 not having a fire extinguisher available within a maximum distance of 75 feet; and (b) no smoke detectors in apartments 1, 3, and 8.

6. On March 10, 2000, Barnhart prepared a Lodging Inspection Report advising Respondent of, among other things, the safety violations that had to be corrected by March 18, 2000. Eugene Riggs, Respondent's Apartment Manager, acknowledged receipt of the inspection report listing the violations and the date for correction of the violations of critical concern.

7. On March 21, 2000, Barnhart performed a Call Back/Re-Inspection of Litto's Apartments and observed the same safety violations that were observed on March 10, 2000.

8. On March 21, 2000, Barnhart prepared a Call Back/Re-Inspection Report advising Respondent that the violations observed on March 10, 2000, had not been corrected. This report advised Respondent that the report should be considered a warning and that Respondent would be issued a Notice to Show Cause why sanctions should not be assessed against

Respondent's license. Eugene Riggs acknowledged receipt of a copy of the Call Back/Re-Inspection Report.

9. During a routine inspection conducted on March 21, 2000, Barnhart observed that: (a) the apartments' water supply was less than 75 feet from a septic tank and drain field, a sanitation violation of critical concern not observed on March 10, 2000; (b) there was raw sewage in an open septic tank on the premises, a sanitation violation of critical concern not observed on March 10, 2000; and (c) a septic tank had been disconnected resulting in raw sewage being dumped on the ground, a sanitation violation of critical concern not observed on March 10, 2000.

10. Barnhart prepared a Lodging Inspection Report listing the violations observed during his routine inspection on March 21, 2000. Eugene Riggs acknowledged receipt of a copy of this report which, among other things, advised Respondent of the deadline of March 28, 2000, for correcting the additional violations observed on March 21, 2000, and the deadline of March 21, 2000, for correcting the violation observed on March 10, 2000, and not corrected by March 21, 2000.

11. On March 28, 2000, Barnhart performed a Call Back/Re-Inspection of Litto's Apartments and observed that the violations observed on March 10, 2000, and March 21, 2000, had

not been corrected. Barnhart prepared a Call Back/Re-Inspection Report on March 28, 2000, advising Respondent that the violations had not been corrected and that a Notice to Show Cause why sanctions should not be assessed against Respondent's license would be issued.

12. On April 7, 2000, Barnhart and Supervisor Madden conducted a joint routine inspection of Litto's Apartments and observed that the violations of March 10, 2000, March 21, 2000, and March 28, 2000, had not been corrected. On April 7, 2000, a Lodging inspection Report was prepared advising Respondent that the violations noted on March 10, 2000, March 21, 2000, and March 28, 2000, had not been corrected.

13. Based on the testimony of Richard Barnhart and Ed Madden, whose testimonies I find to be credible, there is sufficient evidence to show that: (a) a fire extinguisher was missing from the north side of the Units 1 and 2 which resulted in some of the apartments in Units 1 and 2 not having a fire extinguisher available within a maximum distance of 75 feet at the time of the inspection on March 10, 2000, and no fire extinguisher had been installed on the north side of Units 1 and 2 at time of the inspection on April 7, 2000, or during the intervening time; (b) smoke detectors were not installed in apartments 1, 3, and 8 at the time of the inspections on March 10, 2000, and smoke detector had not been

installed in apartments 1, 3, and 8 at the time of the inspection on April 7, 2000, or during the intervening time; (c) at the time of the March 21, 2000, inspection, there was raw sewage in an open septic tank and sewage on the ground due to a septic tank blowout which had not been corrected at the time of the inspection on April 7, 2000, or during the intervening time; and (d) the water supply was located less than 75 feet from septic tank and drain field at the time of the inspection on March 21, 2000, which had not been corrected at the time of the inspection on April 7, 2000, or during the intervening time.

14. Respondent's failure to have sufficient fire extinguishers properly located on its premises and Respondent's failure to correct this violation resulted in a significant threat to the public safety and welfare in that the residents were not properly protected from the danger of fire.

15. Respondent's failure to provide smoke detectors in all of the apartments resulted in a significant threat to the public safety and welfare in that the residents were not being properly protected from the danger of fire.

16. Respondent's failure to correct the contaminated water supply, correct the situation concerning the raw sewage being dumped on the ground, and to correct the situation where

raw sewage was being left in an open septic tank resulted in a significant threat to the public health, safety, and welfare in that not only were the tenants being subjected to those unsanitary conditions but the general public as well.

17. An Order of Emergency Suspension of License and Closure was issued by Respondent and signed by Gary Tillman, District Administrator, having been delegated this authority by the Director of Hotels and Restaurants. The Order of Emergency Suspension of License and Closure is dated March 7, 2000. However, this appears to be scrivener's error in that the order alleges violation that are alleged to have occurred on March 10, 21, 28, 2000, and April 7, 2000. Also, the Certificate of Service is dated April 7, 2000. The Order of Emergency Suspension of License and Closure was still in effect on December 18, 2000, the date of the hearing.

CONCLUSIONS OF LAW

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

18. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal, Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The Department has the burden of proof in this proceeding. To meet its burden, the

Department must establish facts upon which its allegations are based by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932, 933 (Fla. 1996); and Section 120.57(1)(h), Florida Statutes (2000).

19. Sections 509.261(1)(a)and(c), and (2), Florida Statutes, provide in pertinent part as follows:

(1) Any public lodging establishment or public food service establishment that has operated or is operating in violation of this chapter or the rules of the division. . . may be subject by the division to:
(a) Fines not to exceed \$1,000 per offense;

* * *

(c) The suspension, revocation, or refusal of a license issued pursuant to this chapter.

(2) For purposes of this section, the division may regard as a separate offense each day or portion of a day on which an establishment is operated in violation of a "critical law or rule" as that term is defined by rule. (Emphasis furnished.)

20. Rule 61C-1.0021(2), Florida Administrative Code, provides in pertinent part as follows:

(2) Violations of critical laws or rules are those violations determined by the division to pose a significant threat to the public health, safety, or welfare. . .

22. Rules 61C-1.004(1)(d)(5)and (9)(a), Florida Administrative Code, provide in pertinent part as follows:

The following general requirements and standards shall be met by all public

lodging and public food service establishments:

(1) Water, plumbing and waste - Except as specifically provided in these rules, standards for water, plumbing and waste shall be governed by Chapter 5, Food Code, herein adopted by reference. For purposes of this section, the term "food establishment" as referenced in the Food Code shall apply to all public lodging and public food establishments as defined in Chapter 509, FS.

* * *

(d) Sewage shall be disposed of in a public sewerage system or other approved sewerage system in accordance with the provisions of Chapter 64E-6 or 62-601, FAC, herein adopted by reference, whichever is applicable. . . .

* * *

(5) All safety, protection and prevention equipment must be installed, approved, maintained and used in accordance with Chapter 509, FS, and the National Fire Protection Association Life Safety Code Chapter 101, as adopted by the Division of State Fire Marshal in Chapter 4A-3, FAC.

* * *

(9) Fire safety equipment.

(a) Fire Extinguisher Installation - Fire Extinguishers shall be installed in accordance with NFPA 10, Standard for Portable Fire Extinguishers, herein adopted by reference.

23. The Department has met its burden to show that Respondent: (a) failed to maintain a sufficient number of fire extinguishers around the apartments so that each apartment would have no more than a maximum travel distance of 75 feet to reach a

fire extinguisher in case of fire in accordance with NFPA-10, Section 3-2.1; (b) failed to maintain smoke detectors in apartments 1, 3, and 8 as required by Chapter 101, NFPA Life Safety Code, Section 19-3.4.4.1; (c) violated Rule 61C-1.004(1)(a), Florida Administrative code, in that the water supply was located less than 75 feet from the septic tank and drain field as required by Rule 64E-6.005(1)(a), Florida Administrative Code; and (d) violated Section 509.221(1), Florida Statutes, Rule 61C-1.004(1)(d), Florida Administrative Code, and Chapter 5, Section 5-403.11, Food Code (1997), U.S. Public Health Service, in that the individual sewage system was not being maintained and operated in accordance law.

RECOMMENDATION

Having considered the serious nature of the offenses committed by the Respondent, that Respondent is presently under an Order of Emergency Suspension of License and Closure for these same offenses, and that the Department is requesting that only an administrative fine be imposed against Respondent, it is recommended that the Department enter a final order finding that Respondent committed the offenses alleged in the Administrative Complaint Following Emergency

Closure and imposing an administrative fine of \$1,200.00 as requested by the Department.

DONE AND ENTERED this 15th of February, 2001, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of February, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.