

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-2946  
 )  
 PAUL WARE, a/k/a PAUL )  
 MONTGOMERY-WARE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding and hearing before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on October 13, 2004, in Lakeland, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Roland Reis, Esquire  
Polk County Health Department  
1290 Golfview Avenue, Fourth Floor  
Bartow, Florida 33830-6740

For Respondent: No appearance

STATEMENT OF THE ISSUE

At issue in this proceeding is whether a citation and imposition of a \$1,500.00 fine for installing a septic tank without a permit was properly imposed on Respondent, Paul Ware,

a/k/a Paul Montgomery-Ware, by Petitioner, the Department of Health, Polk County Health Department (the "Department").

PRELIMINARY STATEMENT

This cause arose on July 1, 2004, when the Department served a citation on Respondent for failure to obtain a permit before installing an on-site sewage treatment and disposal system ("OSTD system"), commonly called a septic tank system, in violation of Subsections 381.0065(4) and 386.041(1)(b), Florida Statutes (2003), and Florida Administrative Code Rule 64E-6.003(1). The citation assessed a fine and ordered Respondent to pay \$1,500.00 for the cited violations. The citation further informed Respondent of his rights to a hearing pursuant to Chapter 120, Florida Statutes (2003). Respondent indicated that he did not accept the Department's intended action, and the Department forwarded the case to the Division of Administrative Hearings on August 17, 2004. The matter was set for hearing on October 13, 2004.

On September 1, 2004, Respondent filed a "Petition for Voluntary Dismissal," which was denied by Order dated September 28, 2004. On October 7, 2004, Respondent filed a pleading titled, "Notice and Demand In Re: Order," in which Respondent raised constitutional issues beyond the scope of this administrative proceeding and further challenged the style of

the case, which at the time characterized Mr. Ware as the Petitioner.

The final hearing was convened as scheduled. The Department was present and prepared to proceed. Respondent did not appear. The hearing was delayed for 20 minutes to afford Respondent an opportunity to appear. At the outset of the hearing, the undersigned declined to address the constitutional issues raised in Respondent's "Notice and Demand," but granted Respondent's motion to change the style of the case to reflect the actual posture of the parties. At the hearing, the Department proffered the testimony of Susan Patlyek, an environmental specialist with the Department, and William A. Walker, Respondent's neighbor and a witness to the construction of the septic system in question. The Department's Exhibits 1 through 7 were proffered at the hearing.

Respondent never appeared during the course of the hearing. On October 15, 2004, the undersigned issued an Order to Show Cause, providing Respondent ten days in which to explain his absence from the hearing. On October 28, 2004, Respondent filed a reply that reasserted his constitutional issues, but otherwise failed to explain his absence from the hearing. The Department's proffered testimony and exhibits are, therefore, ADMITTED. Subsequent to the hearing, the Department elected to

submit a Proposed Recommended Order which has been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Respondent is the owner of three contiguous lots in Polk County (Bevington Manor, PB 20 PG 47, Lots 100 through 102), purchased via tax deed recorded on October 21, 2003. Respondent's lots are surrounded by property owned by Irma Walker, whose son, William Walker, testified at the hearing.

2. Respondent apparently intended to develop his lots as a commercial enterprise and had erected a Quonset-type structure on the property. From his mother's adjoining property, Mr. Walker regularly observed Respondent's activities. Mr. Walker testified that Respondent was using his property to operate a motorcycle repair shop.

3. On June 4, 2004, Mr. Walker observed Respondent using a backhoe on his property. Mr. Walker testified that Respondent was installing a septic tank. Mr. Walker told his mother, who then initiated inquiries as to whether Respondent had a permit to install a septic tank. When her inquiries met with a negative response, Ms. Walker called in a complaint to the Department.

4. On June 7, 2004, the Department sent environmental specialist Susan Patlyek to the site. Ms. Patlyek observed infiltrator chambers on the site. Infiltrator chambers are used

only in connection with OSTD systems. Ms. Patlyek also observed a recently excavated area and a rented backhoe, commonly used to dig out areas for septic tank installation. It was obvious to Ms. Patlyek that a septic tank and drainfield had been installed on Respondent's property, though no permit had been issued by the Department allowing installation of an OSTD system.

5. Installation of an OSTD system without a permit constitutes a sanitary nuisance. The Department sent a letter to Respondent dated June 8, 2004, advising him of the need to abate the nuisance by obtaining a permit. With the letter, the Department enclosed a blank application form that Respondent could have completed and returned to the Department's permitting office.

6. Respondent replied by contending that the Department lacked jurisdiction over activities on his land and suggested that the Department initiate court action. Respondent also returned the application form in its original blank form.

7. The Department then issued Respondent a citation for violations of Subsection 381.0065(4), Florida Statutes (2003), and Florida Administrative Code Rule 64E-6.003(1), constructing an OSTD system without a permit; and for a violation of Subsection 386.041(1)(b), Florida Statutes (2003), maintaining a sanitary nuisance. The citation provides for a \$1,500.00 fine.

8. The Department's citation also informed Respondent of his right to a hearing pursuant to Chapter 120, Florida Statutes (2003). Respondent contends that the relegation of this matter to an administrative forum is unconstitutional.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004). Respondent's constitutional claims as to the jurisdiction of this tribunal are beyond the scope of this proceeding. Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153, 157 (Fla. 1982) (circuit court, not administrative tribunal, is the proper forum to adjudicate facial constitutionality of a statute). Department of Revenue v. Young American Builders, 330 So. 2d 864, 865 (Fla. 1st DCA 1976).

10. The Department has the authority granted by Section 381.0065, Florida Statutes (2003), to issue permits, inspect sites, issue citations, and impose fines for violations of adopted rules, which govern OSTD systems and their installation and operation.

11. Subsection 381.0065(4), Florida Statutes (2003), provides as follows, in relevant part:

A person may not construct, repair, modify, abandon, or operate an onsite sewage treatment and disposal system without first obtaining a permit approved by the department. . . .

12. Florida Administrative Code Rule 64E-6.003(1) states in part:

No portion of an onsite sewage treatment and disposal system shall be installed, repaired, altered, modified, abandoned or replaced until an 'onsite sewage treatment and disposal system construction permit' has been issued on Form DH4016. . . .

13. Subsection 386.041(1)(b), Florida Statutes (2003), provides as follows:

(1) The following conditions existing, permitted, maintained, kept, or caused by any individual, municipal organization, or corporation, governmental or private, shall constitute prima facie evidence of maintaining a nuisance injurious to health:

\* \* \*

(b) Improperly built or maintained septic tanks, water closets, or privies. . . .

14. A person or property owner who occupies a dwelling which has an illegal, un-permitted connection or suffers a dwelling on the permitted premises to be served by a sewage system, or portion thereof, which is not properly permitted and approved, is subject to an Order of Correction and a fine in accordance with Subsection 381.0065(5), Florida Statutes (2003). The fine may not exceed \$500.00 for each violation. Each day of

a violation constitutes a separate violation for which a citation may be issued. In the instant situation, the Department issued a single citation and, therefore, may impose only a \$500.00 fine.

RECOMMENDATION

RECOMMENDED that Petitioner, the Department of Health, Polk County Health Department, enter a final order imposing a \$500.00 fine for the violations described in the above Findings of Fact and Conclusions of Law.

DONE AND ENTERED this 30th day of November, 2004, in Tallahassee, Leon County, Florida.

*Lawrence P. Stevenson*

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LAWRENCE P. STEVENSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of November, 2004.

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.