STATE OF FLORIDA
DEPARTMENT OF HEALTH

Daniel M. Sevick,
Petitioner,

vs.

Department of Health, Bureau of Onsite Sewage Program,
Respondent,

and

No Mounds Systems of Florida, Inc., and **Save Our Suwannee, Inc.;**
Intervenors.
_____/

Rendition no.: DOH-09-0399-FOF-HST
DOAH case no.: 08-2552
Dixie County

FINAL ORDER

This proceeding is before the Department of Health (Department); the Administrative Law Judge's recommended order of February 16, 2009 having been filed. This is an adjudicatory proceeding conducted pursuant to sections 120.569 & 120.57 Florida Statutes. The proceeding was initiated by the "Petition for Administrative Hearing" (hereinafter the Petition) filed August 16, 2007. The Petition challenged the denial of an application for a permit authorizing an onsite sewage treatment and disposal system (hereinafter OSTDS) within the ten year flood plain of the Suwannee River.[1] Notification of the denial decision was given by the Department's letter dated July 23, 2007.

[1] The interpretation of the special statutory requirements applicable to the Suwannee and Aucilla River floodplains is a dispositive issue in this proceeding. See, ***Onsite sewage treatment and disposal systems; regulation,*** section 381.0065(4)(t), Florida Statutes.

The Administrative Law Judge recommends that the application for a permit be denied. Joint exceptions to the recommended order have been filed by the Petitioner and the Intervenor, No Mound Systems, (hereinafter referred to as the Petitioners). The Department of Health and the Intervenor, Save Our Suwannee, each filed a response to the joint exceptions.

In considering the exceptions to an Administrative Law Judge's findings of fact the general rule of deference is that an agency may reject or modify a finding of fact only if a challenged finding is not supported by competent, substantial evidence. Section 120.57(1)(l), Florida Statutes. It is the role of the Administrative Law Judge as fact finder to weigh conflicting evidence, to resolve conflicts in the evidence, to judge the credibility of witnesses, and to draw permissible inferences from the evidence. Correlatively, an agency has no authority to reweigh the evidence. *See e.g.* *Heifetz v. Dept. of Bus. Regulation*, 475 So.2d 1277, 1281, (Fla. 1st DCA 1985). The Administrative Law Judge's findings of fact are entitled to as much weight and respect as the verdict of a jury. *See* *Gruman v. Department of Revenue*, 379 So.2d 1313, 1316 (Fla. 2nd DCA 1980).

The joint exceptions are arranged under headings **Exception 1** sequentially through **Exception 21**. Although the Petitioners challenge the findings of fact adverse to their position, they have not maintained that the challenged findings are not supported by competent substantial evidence. Instead, the Petitioners seek to avoid the prohibition against re-weighing of the evidence by asserting that as a matter of law their expert evidence

must be taken as conclusively proving their case because the testimony of their experts was not contradicted.

The Administrative Law Judge (hereinafter the ALJ) went to great lengths to articulate why he found the Petitioners' expert evidence conclusory and lacking probative value. See the recommended order at paragraphs 17, 18, 21 through 27, 29, and 67 through 69.

As recently as April 2008 the First District Court of Appeal expressed unequivocally that a jury is free to weigh the credibility of uncontradicted expert testimony as follows:

> **A jury is free to weigh the credibility of expert witnesses as it does any other witness, and reject even uncontradicted testimony.**[Citations omitted.] **Likewise, a jury is entitled to weigh the credibility of a medical expert and a lay witness, reject the expert testimony and base its verdict solely on conflicting lay testimony, or reject the plaintiff's claim entirely.**[Citations omitted.]

Grainger v. Wald, 987 So.2d 42, 43 (Fla. 1st DCA 2008). Exceptions numbered 1 through 17 rely on the Petitioners' assertion that the ALJ's ability to weigh the evidence is trumped by their uncontradicted expert testimony. The Petitioner's assertion is rejected as contrary to law. The exceptions are denied as the challenged findings are supported by competent substantial evidence.

Exception 18 alludes to the Petitioners' disagreement with the Department of Health's interpretation of the section 381.0065(4)(t), Florida Statutes. The Petitioner's maintain that if their No Mounds OSTDS system functions as designed, it is not subject to flooding because pressurized air prevents the system's drain field from being saturated by flood waters. Thus, they use the underwater "diving

bell"[2] as an analogy to explain how a No Mounds system is intended to work and why its location in the flood plain does not run afoul of the statute. The ALJ found the Department's objective interpretation of the statute, that an application to locate an OSTDS within the 10 year flood plain of the Suwannee River cannot be approved, is correct and fully consistent with the Legislature's intent to protect the public health and prevent degradation of this State's groundwater and surface waters.[3] Exception 18 is denied.

Exception 19 challenges paragraphs 56, 57, and 68 through 69 of the conclusions of law as mere reiterations of previously challenged findings of fact. As previously noted, the challenged findings of fact are supported by competent substantial evidence; therefore, the exception is denied.

Exception 20 challenges paragraph 64 of the conclusions of law. Paragraph 64 is part of the ALJ's analysis of the Petitioner's disagreement with the Department of Health's interpretation of section 381.0065(4)(t), Florida Statutes. The exception is denied.

Finally, exception 21 challenges paragraph 49 for not articulating a factual distinction between the **location** of a septic tank drain field within the ten-year flood plain and **exposure** of the drain field to flood waters. This, again, is an allusion to the Petitioner's "diving bell" interpretation of section 381.0065(4)(t), Florida Statutes, which is rejected by the ALJ and the Department of Health. Additionally, in paragraph 57 the ALJ concluded that even

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[2] For references to the diving bell analogy see paragraphs 7, 11, 12, and 22.

[3] See paragraphs 55 and 65 of the recommended order.

if the Petitioners' interpretation were correct, the preponderant evidence shows the proposed drain field's absorptive surface could be flooded in a flood event. The exception is denied.

Having carefully considered the recommended order, the exceptions, and the responses to the exceptions, I concur with the recommended order. The recommended order is therefore adopted and incorporated by reference.

Based on the foregoing, the application of the Petitioner, Daniel M. Sevick, for a permit to construct and operate an on-site sewage treatment and disposal system within the 10 year flood plain of the Suwannee River is denied.

DONE and **ORDERED** this 1 day of April 2009 in Tallahassee, Leon County, Florida.

Ana M. Viamonte Ros, M.D., M.P.H.
State Surgeon General

By: Jean L. Kline
Jean L. Kline, R.N., B.S.N., M.P.H.
Deputy Secretary for Health

NOTICE

A PARTY ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. A REVIEW PROCEEDING IS GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. A REVIEW PROCEEDING IS COMMENCED BY FILING A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A COPY ACCOMPANIED BY THE FILING FEE WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE MUST BE FILED WITHIN 30 DAYS OF THE FILING DATE OF THIS FINAL ORDER.

Copy furnished to each of the following:

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing FINAL ORDER has been served by ordinary mail via the United States Postal Service, inter-office mail, or by hand delivery to each of the above-named persons this 2nd day of April 2009.

R. Samuel Power, Agency Clerk
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