

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Petitioner,)
)
vs.) Case No. 08-5528
)
WILLIAM GOING,)
)
Respondent.)
_____)

RECOMMENDED ORDER

The final hearing in this case was held on February 6, 2009, by video teleconference, at sites in Tallahassee and Tampa, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner Southwest Florida Water Management District:

Adrienne Ellen Vining, Esquire
Southwest Florida Water Management District
2379 Broad Street
Brooksville, Florida 36404-6899

For Respondent William Going:

Charles Going, Qualified Representative
c/o William Going
4645 86th Avenue North
Pinellas Park, Florida 33782-5714

STATEMENT OF THE ISSUE

The issue to be decided is whether William Going failed to obtain a permit before installing water wells in Palm Harbor, Pinellas County, Florida, as required by the statutes and rules administered by the District under Chapter 373, Florida Statutes (2007)¹, and, if so, whether the District's proposed penalties are reasonable and appropriate.

PRELIMINARY STATEMENT

On or about August 15, 2008, Petitioner Southwest Florida Water Management District (District) issued an Administrative Complaint and Order (Complaint) pursuant to Sections 373.119 and 373.333, Florida Statutes, against Respondent William Going. The Complaint charged Respondent with violating Section 373.313(1), Florida Statutes, and Florida Administrative Code Rule 40D-3.041(1), for failing to obtain a well construction permit before constructing certain water wells. On September 24, 2008, the District received a request for hearing from Respondent, which the District dismissed for failing to be in prescribed form. The District granted Respondent leave to re-file an amended request for hearing, which Respondent filed on October 21, 2008. The District then referred the matter to DOAH to conduct an evidentiary hearing and to issue a recommended order.

At the hearing, the parties' Joint Exhibits 1 through 16 were accepted into evidence. The District presented the testimony of Susan Althoff, Sonia Beau, and William Permenter, who was accepted as an expert in water well construction. Respondent's request to have his son, Charles Going, act as his representative at the hearing was granted. Respondent testified on his own behalf. The District's request for official recognition of several statutes and rules applicable to water well construction and disciplinary action was granted.

A transcript of the hearing was filed with DOAH. Petitioner filed a proposed Recommended Order. No post-hearing writing was filed by Respondent.

FINDINGS OF FACT

1. The District is the regional agency charged with the power and duty to administer and enforce the provisions of Chapter 373, Part III, Florida Statutes, entitled "Regulation of Wells," and the rules the District has promulgated pursuant thereto in Florida Administrative Code Title 40D-3.

2. Respondent William Going is a licensed water well contractor, holding License No. 1564.

3. On June 1, 2007, the District received a complaint alleging that Respondent had constructed water wells at 5068 Kernwood Court in Palm Harbor without first obtaining a well construction permit from the District.

4. A subsequent inspection by the District disclosed that six "sand point" irrigation wells had been constructed at the Palm Harbor property, which is the residence of Stephen and Susan Althoff.

5. The District had no record of a permit application for the wells and no well construction permit had been issued to Respondent to construct the wells at the Althoff property.

6. Respondent admits that he constructed the wells at the Althoff property on June 1, 2007, and that he did so without first obtaining a well construction permit for the work.

7. The District maintains a website where water well contractors can apply for water construction permits by filling out an on-line application. The District's software program can automatically issue the permit if the information submitted by the applicant meets certain programmed parameters.

8. Respondent testified that his wife attempted to access the website and to apply for the permit to construct the wells at the Althoff property, but she was unable to do so because she is not familiar with computers.

9. Neither Respondent, nor his wife, telephoned the District to speak to the District's permitting staff before the work was commenced at the Althoff property.

10. Section 373.313(1), Florida Statutes, provides that in any geographic area where the Department of Environmental

Protection (DEP) determines that prior permission to construct a water well would cause "undue hardship," prior permission will not be required. Respondent made reference to this statute, but he did not show that the Althoff property is within a geographic area where DEP has declared that prior permission is not required for the construction of water wells. William Permenter, the District's Field Technician Supervisor, has been regulating water well construction for many years, but is unaware of any such areas being designated.

11. Respondent contends that if he had waited to obtain a permit before constructing wells at the Althoff property, it would have created a hardship for him because (1) water well construction in Pinellas County is very competitive and he probably would have lost the Althoff job if he had not done the work immediately; and (2) he would have paid the wages of his helper without a benefit (to Respondent).

12. Section 337.326, Florida Statutes, establishes a procedure to seek an exemption from District rules to avoid an undue hardship. Respondent did not request an exemption from the District regarding the water wells constructed at the Althoff property.

13. The competitive disadvantage that a water well contractor might face in waiting a day (or hours) to obtain a permit is not an undue hardship.

14. Respondent's potential loss in having to pay an employee for "down time" is not an undue hardship.

15. On June 12, 2007, Respondent submitted an application to the District for a well construction permit for the wells at the Althoff property and the District issued Respondent a permit the following day.

16. The Pinellas County Licensing Board issued a citation against Respondent pursuant to Section 489.127(5), Florida Statutes. The citation issued by the Board pertained to the same water wells that are the subject of the District's enforcement case. A hearing was held before a Special Master designated by the Board and was prosecuted by a County employee. The Special Master issued a final order dismissing the case against Respondent.

17. On or about August 15, 2008, the District issued its Complaint against Respondent, which seeks an administrative fine of \$500 and the assessment of five points against Respondent's water well contractor license. These penalties are consistent with the disciplinary guidelines that have been adopted by rule by the District.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the parties to and the subject matter of this case under Sections 120.569, 120.57(1), and 120.65(7), Florida Statutes. Pursuant to Section 120.65(7),

Florida Statutes, DOAH and the District have entered into a contract for administrative law judges to conduct hearings for the District.

19. If the District has reason to believe a violation of the laws that it administers has occurred, it may file a complaint against the alleged violator. See § 373.119, Fla. Stat.

20. The enforcement proceeding initiated against Respondent by the Pinellas County Licensing Board was the action of a different governmental entity, was based on different statutory authority, and pertained to the violation of different laws. Therefore, the Board's final action is not binding on the District. The District's enforcement action does not cause Respondent to be tried twice for the same offense.

21. The District has the burden to prove by a preponderance of the evidence that Respondent has violated the law as alleged in the Complaint. See St. Johns River Water Management District v. Modern, Inc., 784 So. 2d 464 (Fla. 1st DCA 2001).

22. Section 373.313(1), Florida Statutes, requires prior permission from the District for the construction of any water well.² Respondent violated this statute when he constructed the irrigation wells at the Althoff property without first obtaining a permit.

23. Florida Administrative Code Rule 40D-3.041(1) requires that a permit be obtained from the District prior to the construction, repair, modification, or abandonment of any water well. Respondent violated this rule when he constructed the irrigation wells at the Althoff property without first obtaining a permit.

24. Respondent did not present evidence sufficient to establish mitigating factors that would justify the reduction of the proposed penalties.

25. The District's proposed disciplinary action is fair and reasonable under the circumstances.

RECOMMENDATION

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

RECOMMENDED that the District issue a Final Order that imposes the penalties set forth in its Administrative Complaint and Order, dated August 15, 2008.

DONE AND ENTERED this 11th day of March, 2009, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of March, 2009.

ENDNOTES

^{1/} All references to the Florida Statutes are to the 2007 codification.

^{2/} This section refers to the "department," but the water management districts are authorized to exercise any power authorized to be exercised by the Department of Environmental Protection. See § 373.308(2), Fla. Stat.

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.