

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-6062  
 )  
ALEX MACDONELL, JR., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

An administrative hearing was conducted in this case on January 27, 2010, by video teleconference at sites in Orlando and Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: W. Patrick Westerfield, Esquire  
Orange County Health Department  
6101 Lake Ellenor Drive  
Orlando, Florida 32809

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Whether Respondent illegally and without permit removed a drain field and now has an unapproved septic system on a structure intended for human occupancy, and if so, what is the appropriate correction and fine.

## PRELIMINARY STATEMENT

On September 25, 2009, the Department of Health (Petitioner) issued a citation to Alex MacDonell, Jr. (Respondent), alleging violations of Florida law and rules governing septic systems in Florida. By letter dated October 14, 2009, Respondent denied the alleged violations and timely requested an administrative hearing. Petitioner referred the case to the Division of Administrative Hearings (DOAH) on or about November 5, 2009.

At the administrative hearing in this matter held on January 27, 2010, the Department presented the testimony of two witnesses and offered 9 exhibits that were received into evidence as Exhibits 1 through 9. Respondent did not appear or participate in the administrative hearing.

The Proposed Recommended Order filed by Petitioner on March 23, 2010, has been considered in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

## FINDINGS OF FACT

1. On June 17, 2009, Department of Health employee Stephanie Daughtery was driving down Lake Erie Road in Groveland, Florida, past Respondent's residence located at 6345 Lake Erie Road, when she noticed the sand mound that had

held the septic system drain field for Respondent's home was no longer there.

2. Ms. Daughtery was familiar with the mound that had been located on Respondent's land because, in her capacity as Petitioner's employee, she had previously conducted a stabilization check on the mound.

3. A sand mound for Respondent's drain field was required under applicable law and regulations because, during the rainy season, the water table in the area of Respondent's home was ten inches "below grade," which means that the water level was just ten inches below ground level during the rainy season. Therefore, a sand mound was necessary for proper filtration of the raw sewage (effluent) entering the septic system.

4. A septic system without a proper drain field will allow effluent to escape and constitute a public health risk.

5. Upon returning to her office at the Lake County Health Department that same afternoon, Ms. Daughtery told her supervisor, Elias Christ, of her observation. One of Respondent's neighbors had already reported the situation involving the removal of Respondent's drain field to Mr. Christ.

6. The next day, one of Petitioner's inspectors, Daniel McColley, went out to Respondent's property and met with Respondent. Respondent told the inspector that the mound which had been removed was just a pile of dirt. Contrary to

Respondent's assertion, the mound that was removed had been part of the drain field for Respondent's septic system.

7. Respondent was responsible for the removal of the mound and drain field.

8. On June 22, 2009, Petitioner sent, by certified mail to Respondent, an Official Notice to Abate a Sanitary Nuisance, which advised:

On 06/18/2009 an onsite investigation disclosed that an approved drain field had been removed and either not replaced or replaced without a permit, which violates Chapter 386.041(1)(a)(b)(e)(f) of Florida Statutes.

You are hereby directed to contact this Department within 24 hours of this notice to discuss corrective action. A repair permit must be applied for and a system installed with Department approval.

9. Approximately a week to ten business days later, after Respondent had failed to apply for a permit, Petitioner again sent an inspector to inspect Respondent's septic system and found it to be still in nuisance condition, with no drain field.

10. In addition to being in an area with water just ten inches below grade during rainy season, Respondent's property is adjacent to a lake.

11. Since the sand mound was removed, there is no proper drain field and Respondent's septic system is a sanitary nuisance. As explained by Mr. Christ at the administrative

hearing, Respondent's septic system without a drain field is a threat to public health:

Because we have untreated sewage that we have no idea where its going to. He has - - he also has a lake behind his property, so we don't know if he's somehow plumbed it into dumping into the lake or if it's just dumping out on the ground.

12. Respondent told one or more of Petitioner's employees that he had connected his septic system to an old septic tank in an adjacent house on the property. He did not, however, obtain a permit to do so, and the old system was inadequate, without renovation, to handle the additional effluent.

13. In addition, although Respondent further claimed that a septic contractor had pumped out his old system, Respondent would not give the name of the alleged contractor.

14. On July 6, 2009, Petitioner sent, by certified and regular mail, a "Notice of Intended Action" to Respondent which advised:

You have not yet come to apply for a permit to replace this system you removed. Failure to do so will result in legal action and possible revocation of your CO and further Lake County Code Enforcement Action.

Please contact this office within 24 hours of receipt of this notice to discuss a corrective action plan at (352) 253-6130 or FAX (352) 253-6133.

If this sanitary nuisance is not abated and a proper septic tank repair permit applied for and work is completed in a satisfactory

manor, inspected by this department, you may be subject to fines up to \$500.00 per day authorized therein accordance with the authority outlined in Section 381.0065(5) Florida Statutes(F.S.). If you have further questions please call Elias Christ or Russ Melling at 352-253-6130.

15. Respondent came into the Lake County Health Department on July 22, 2009, and was given an application and a checklist for permitting the repair of his septic system. During that visit, Respondent told Mr. Christ that the cows had destroyed the mound. He also told Mr. Christ that he had been trying to sell his house and that the mound had been an eye-sore that was interfering with the sale. Later, in a telephone conversation with Mr. Christ, Respondent advised that he really did not have the money to replace the drain field, but he would be happy to have it replaced if the county would pay for it.

16. By September 25, 2009, Respondent still had not applied for a permit or repaired his septic system.

17. On September 25, 2009, Petitioner issued a Citation for Violation Onsite Sewage Program/Sanitary Nuisance to Respondent (Citation). Part 1 of the Citation alleges that Respondent is in violation of Section 386.041(a), (e), and (f), Florida Statutes, and Florida Administrative Code Rules 64E-6.001(2) and 64E-6003(1), on the grounds that Respondent "[h]as illegally and without any permits removed his drain field and

now [has] an unapproved system on a structure intended for human occupancy."

18. The Citation further provides:

The person named in this citation is hereby ordered to correct the violation(s) listed in Part 1 within 10 days [from] the service of this citation.

The person identified in this citation is hereby directed to pay a fine in the amount of \$500 plus \$100 per [day] additionally from receipt of this citation until the drain field is repaired legally for the violations listed in Part 1. Payment must be made to the LAKE County Health Department within 21 days of the receipt of this citation, or you may choose the option listed on Part 9.

19. Part 9 of the Citation provides for a request for an administrative hearing and warned Respondent that if he requested a hearing and then failed to appear to contest the citation, he would waive the right to contest the citation. By his signature dated October 1, 2009, in Part 9 of the Citation, Respondent requested an administrative hearing. This administrative hearing followed.

20. Respondent failed to attend or present any evidence at the final hearing. Prior to the hearing, Respondent indicated to Petitioner's counsel that he was not financially able to put the drain field back the way it was and that he did not see the point in appearing at the administrative hearing.

21. On the other hand, the evidence presented by Petitioner at the administrative hearing, as outlined in the findings above, clearly and convincingly demonstrated that Respondent removed a mound and drain field required by applicable law and regulations for his septic system, and that Respondent's septic system has not been repaired as required to comply with the law.

#### CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. See §§ 120.569, 120.57(1), 381.0065(5)(b)4., Fla. Stat. (2009).<sup>1/</sup>

23. The Department, as the party asserting the affirmative in this proceeding, has the burden of proof. See, e.g., Balino v. Dept. of Health & Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977). Because the Department is seeking to prove violations of a statute and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing evidence.

24. The Department and its agents have the authority to investigate and take action to abate conditions constituting a sanitary nuisance. In particular, Section 386.041, found in Part 1 of Chapter 386, Florida Statutes, provides:



(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:

- (a) Untreated or improperly treated human waste, garbage, offal, dead animals, or dangerous waste materials from manufacturing processes harmful to human or animal life and air pollutants, gases, and noisome odors which are harmful to human or animal life.
- (b) Improperly built or maintained septic tanks, water closets, or privies.
- (c) The keeping of diseased animals dangerous to human health.
- (d) Unclean or filthy places where animals are slaughtered.
- (e) The creation, maintenance, or causing of any condition capable of breeding flies, mosquitoes, or other arthropods capable of transmitting diseases, directly or indirectly to humans.
- (f) Any other condition determined to be a sanitary nuisance as defined in s. 386.01.

(2) The Department of Health, its agents and deputies, or local health authorities are authorized to investigate any condition or alleged nuisance in any city, town, or place within the state, and if such condition is determined to constitute a sanitary nuisance, they may take such action to abate the said nuisance condition in accordance with the provisions of this chapter.

25. Florida Administrative Code Rule 64E-6.001(2),  
provides:

(2) Structures used or intended for human occupancy, employment or service to the public and locations where people congregate, such as construction sites, fairs, and field locations for agricultural workers shall provide approved wastewater treatment and disposal systems. Except for

the provisions of Rule 64E-6.0101, F.A.C., permanent structures shall not rely upon the use of holding tanks and portable toilets for wastewater treatment and disposal.

26. Florida Administrative Code Rule 64E-6.003(1) provides in pertinent part:

(1) System Construction Permit - 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 DH 4016.

\* \* \*

27. Section 381.0065(5), Florida Statutes, provides in pertinent part:

(b)1. The department [of Health] may issue citations that may contain an order of correction or an order to pay a fine or both, for violations of ss. 391.0065 - 381.0067, part I of chapter 386, or part III of chapter 489 or the rules adopted by the department, when a violation of these sections or rules is enforceable by an administrative or civil remedy, or when a violation of these sections or rules is a misdemeanor of the second degree. A citation issued under ss. 381.065 - 381.0067, part I of chapter 386, or part III of chapter 489 constitutes a notice of proposed agency action.

2. A citation must be in writing and must describe the particular nature of the violation, including specific reference to the provisions of law or rule allegedly violated.

3. The fines imposed by a citation issued by the department may not exceed \$500 for

each violation. Each day the violation exists constitutes a separate violation for which a citation may be issued.

4. The department shall inform the recipient, by written notice pursuant to ss. 120.560 and 120.57, of the right to an administrative hearing to contest the citation within 21 days after the date the citation is received. The citation must contain a conspicuous statement that if the recipient fails to pay the fine within the time allowed, or fails to appear to contest the citation after having requested a hearing, the recipient has waived the recipient's right to contest the citation and must pay an amount up to the maximum fine.

\* \* \*

7. The department, pursuant to ss. 381.0065 - 381.0067, part I of chapter 386, or part III of chapter 489, shall deposit any fines it collects in the county health department trust fund for use in providing services specified in those sections.

\* \* \*

28. Despite Respondent's request for an administrative hearing and notice of the administrative hearing, Respondent failed to attend or offer any evidence rebutting the clear and convincing evidence offered by Petitioner in support of the Citation.

29. The evidence clearly demonstrated that Respondent was aware that he was required to maintain a sand mound for the septic tank for his residence, but did not. Despite warnings and an opportunity to reinstall a sand mound and drain field for

his residential septic system prior to the issuance of the Citation, Respondent failed to correct the problems.

30. In sum, the clear and convincing evidence submitted by the Petitioner in this case demonstrated that Respondent violated the provisions of Section 386.041(a),(e), and (f), Florida Statutes, and Florida Administrative Code Rules 64E-6.001(2) and 64E-6003(1), recited above, and that Respondent has allowed his septic system to remain out of compliance since he removed the mound and drain field.

#### RECOMMENDATION

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

RECOMMENDED that the Department of Health enter a Final Order finding that Respondent illegally and without permit removed a drain field and now has an unapproved septic system on a structure intended for human occupancy, and ordering Respondent to pay a fine in the amount of \$500.00 for deposit into the county health department trust fund, obtain a septic system repair permit, and effect repairs on his septic system to correct the violations of Section 386.041(a)(e)(f), Florida Statutes, and Florida Administrative Code Rules 64E-6.001(2) and 64E-6.003(1), within forty-five (45) days from the Final Order.

DONE AND ENTERED this 2nd day of April, 2010, in  
Tallahassee, Leon County, Florida.



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JAMES H. PETERSON, III  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of April, 2010.

ENDNOTE

<sup>1/</sup> Unless otherwise indicated, all references to the Florida  
Statutes are to the 2009 version.

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.