STATE OF NORTH CAROLINA

COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DHR16194

FRED G VOGLER PETITIONER, V. N C DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC HEALTH RESPONDENT.	**FINAL DECISION**

A contested case hearing was heard in this matter on November 27, 2013, at the Guilford County Courthouse, in High Point, North Carolina, before the honorable J. Randall May, Administrative Law Judge. Petitioner Fred G. Vogler appeared pro se. Respondent N.C. Department of Health and Human Services was represented at hearing by John P. Barkley, Assistant Attorney General.

Judge May explained that Petitioner has the burden of proof in this matter, but informed Petitioner that since Petitioner is pro se and unaccustomed to the hearing process, Judge May would request that the Respondent put on its evidence first unless the Petitioner wanted to put on his evidence first. Mr. Vogler stated that he wished to put on his evidence first and Judge May permitted him to proceed.

ISSUE

Did the Respondent properly deny Petitioner's application for an improvement permit for the property he subsequently purchased on Angell Road in Davie County, North Carolina?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of witnesses and the evidence, the undersigned makes the following:

FINDINGS OF FACT

1. On May 14, 2013, Petitioner applied to the Davie County Health Department (hereinafter DCHD) for an improvement permit for an on-site wastewater system to serve a three bedroom residence on property on approximately three acres of land on Angell Road (hereinafter "the site"), located in Davie County, North Carolina. At the time of the application, Petitioner did not own the property, but was planning to buy the property from the owner at the time, Mr. Jerry Couch with Believers Church.

2. On July 8, 2013, Mr. Andrew Daywalt, an environmental health specialist with DCHD, did some borings on the site in order to conduct an evaluation of the site to determine the site's suitability for installation of a wastewater system in accordance with state wastewater laws and rules, N.C.G.S. 130A-333 et seq. and 15A NCAC 18A Section .1900.

3. Mr. Daywalt determined that evaluation of the site required pits to be dug on the property to properly conduct the evaluation in accordance with the state wastewater laws and rules. Mr. Daywalt returned to the site on July 12, 2013, and directed where 9 pits were to be dug across the site. Mr. Daywalt evaluated the pits across the site and determined the site was unsuitable for a wastewater system.

4. Mr. Daywalt found that the soils had unsuitable soil structure, unsuitable mineralogy, unsuitable soil wetness condition, and unsuitable soil depth on the site. Mr. Daywalt used the observation method specified in the state wastewater rules to conduct his evaluation and make his determinations of unsuitable conditions on the site.

5. Mr. Daywalt also found fill material in the pits. Suitable fill material must be either soil Group 1 or Soil Group 2; this material was Group 4; therefore, the fill material was classified as unsuitable.

6. In evaluating the pits, Mr. Daywalt also found soil colors of chroma two or less on the Munsell color chart, indicating an unsuitable soil wetness condition, at less than 24 inches from the soil surface. The presence of a soil wetness condition at that level is in violation of 15A NCAC 18A .1942 and classified unsuitable. He also found mottling in the borings that indicated an unsuitable soil wetness condition. He explained that the soil wetness condition prevented proper oxygenation of the soils, and this prevents treatment of the effluent in the soils. Treatment of the effluent is a major component in the proper functioning of a wastewater system.

7. Mr. Daywalt also found that the soils on the property were shallow to rock in violation of 15A NCAC 18A .1943. Therefore, the site was classified unsuitable as to soil depth.

8. Based on his evaluation, Mr. Daywalt determined that the site was classified as unsuitable due to an unsuitable soil wetness condition; the unsuitable fill material; the unsuitable soil characteristics; and unsuitable soil depth to rock on the site.

9. Mr. Daywalt could not find any modified or alternative system that could be used on the site to change the classification from unsuitable to Provisionally Suitable or Suitable. Mr. Daywalt looked at pits across all three acres of the property and could not find sufficient suitable areas of soil to change the classification from unsuitable on any location on the site.

10. By letter dated July 30, 2013, Mr. Daywalt notified Petitioner of his findings that the site was unsuitable and that the request for an improvement permit was denied. The letter also advised the Petitioner of his right to an informal review of this decision and of his formal appeal rights. (Respondent's Exhibit 3)

11. The regional soil scientist with the On-Site Water Protection Branch in the Department of Health and Human Services (DHHS), Mr. Kevin Neal, also testified. Mr. Neal has an extensive background in working with on-site wastewater systems and the evaluation of sites for such systems, including a B.S. degree in Soil Science, a Master's degree in Plant and Soil Science, and over 20 years of experience in the working with wastewater issues in both local health departments and with the State On-Site Wastewater program. (Respondent's Exhibit 4) Without objection, Mr. Neal was qualified as an expert in the evaluation of sites for the installation of on-site wastewater systems and would be permitted to give expert testimony within his area of expertise.

12. Mr. Neal conducted a second opinion evaluation of the Angell Road site. He also determined that there was an unsuitable soil wetness condition, shallow depth to rock, unsuitable soil characteristics, and unsuitable fill material.

13. Mr. Neal also found fill material that was unsuitable.

14. Mr. Neal found soil colors of chroma 2 or less at less than 14 inches from the ground surface, which is also unsuitable. Therefore, the site was classified as unsuitable due to the soil wetness condition.

15. Mr. Neal testified that he did find a small area of soil that was suitable for a drip irrigation wastewater system; however, there was not sufficient area of such soils for such a system or the required repair area for the system. Therefore, despite the fact that there were three acres of soil, there was not enough suitable or provisionally suitable soil on the site to install an on-site wastewater system in accordance with the state wastewater laws and rules.

16. Mr. Neal testified that in his expert opinion, the site was classified as unsuitable due to the soil wetness condition; the insufficient soil depth to rock; the unsuitable soil characteristics; the unsuitable fill material; and the insufficient space of suitable or provisionally suitable soils on the site for installation of a wastewater system. He also found no modified, alternative, experimental, or innovative systems that could work on the site.

17. Mr. Neal also testified that in his expert opinion if a wastewater system were installed on the site that the system would fail.

18. At the close of the Respondent's evidence, Respondent's Exhibits 1 through 5 were admitted into evidence.

19. The Petitioner in his petition and in his testimony questioned the "observation method" used by the local health department and by the state in conducting evaluations of the property. Petitioner argued that the percolation, or so called "perc", test was more reliable and should be used instead. He argued that the method used by the local health department and the state was too subjective and that the perc test is still used in other states. Petitioner provided an article that he found on the internet touting the virtues of the perc test, but he had no scientific evidence or expert testimony to support these contentions. He also had data based on "perc" tests that he conducted himself on the property. He admitted on the stand that he has no experience or expertise in soil science or in conducting such tests; and even by his own tests, two of the three tests showed the site was unsuitable for soil wetness. The Petitioner also stated that he bought the property after he was aware that the site had been determined to be unsuitable and that the request for an improvement permit was being denied.

    Mr. Neal also testified as to the requirements in the rules regarding the process used to conduct an evaluation. He testified that the rules specify the procedures referred to as the observation method. These are the rules adopted by the Commission for Public Health (formerly the Commission for Health Services) that health departments and regional soil scientists with DHHS are required to apply in enforcing state wastewater laws and rules. Mr. Neal testified that the perc test was used by health departments in North Carolina prior to 1982 when the state rules first went into effect statewide. These rules replaced the perc test with the observation method that was based on scientific evidence and research conducted by North Carolina State University and other scientific organizations, which proved the observation method to be more accurate. The experience with the perc test also showed that it was inaccurate much of the time and should not be relied on. Mr. Neal also testified that while some states still use the perc test, the majority do not. He testified that even if some people believe that the perc test can be effective, he and local health department staff are required to follow the methods set out in the rules adopted by the Commission for Public Health. To use the perc test instead of the observation method, the rules of the Commission would have to be amended following all required administrative procedures such as public notice, public hearings, and a hearing and vote before the Commission. Unless such action is taken, the perc test cannot be used as a substitute for the method spelled out in the rules.

CONCLUSIONS OF LAW

1. 15A NCAC 18A .1947 states that "(a)ll of the criteria in rules .1940 through .1946 of this Section shall be determined to be SUITABLE, PROVISIONALLY SUITABLE, or UNSUITABLE, as indicated. If all criteria are classified the same, that classification shall prevail. Where there is a variation in classification of the several criteria, the most

limiting uncorrectable characteristics shall be used to determine the overall site classification."

2. 15A NCAC 18A .1949 covers the sewage flow rate for design units for different types of dwelling and establishments. This section also covers when and how an adjusted designs system may be granted by the local health department.

3. 15A NCAC 18A .1943 states in part that "(s)oil depths to saprolite, rock or parent material greater than 48 inches shall be considered SUITABLE as to soil depth. Soil depths to saprolite, rock, or parent material between 36 inches to 48 inches shall be considered provisionally suitable as to soil depth. Soil depths to saprolite, rock or parent material less than 36 inches shall be classified UNSUITABLE as to soil depth."

4. 15A NCAC 18A.1945 (a) states in part "Sites shall have sufficient available space to permit the installation and proper functioning of ground absorption sewage treatment and disposal systems, based upon the square footage of nitrification field required for the long-term acceptance rate determined in accordance with these Rules."

5. 15A NCAC 18A .1942(c) states in part that "(s)ites where soil wetness conditions are less than 36 inches below the naturally occurring soil surface shall be considered UNSUITABLE with respect to soil wetness."

6. 15A NCAC 18A .1957(b)(1) states in part "Fill systems may be installed on sites where at least the first 18 inches below the naturally occurring soil surface consists of soil that is suitable or provisionally suitable with respect to soil structure and clay mineralogy, and where organic soils, restrictive horizons, saprolite or rock are not encountered. Further, no soil wetness condition shall exist within the first 12 inches below the naturally occurring soil surface and a groundwater lowering device shall not be used to meet this requirement" and .1957(b)(2) states in part "(s)ubstantiating data are provided by the lot owner ... indicating that the fill material was placed on the site prior to July, 1977" and the fill material placed on the site prior to July 1, 1977 shall have sand or loamy sand (Group I) for a depth of at least 24 inches below the existing ground surface".

7. Despite the fact that Petitioners desired an on-site wastewater system for only a one-bedroom residence, 15A NCAC 18A .1949 clearly sets the minimum design flow for a residence at 240 gpd, which is a design flow for a minimum of two bedrooms. Respondent is prohibited by its rules from issuing an improvement permit for a residence for a flow of less 240 gpd even if the request is for only one-bedroom. Petitioners data concerning water usage for the existing building also cannot be considered for a residence under Rule .1949. Even if it could, the data does not reflect was water usage would be once the apartment was added to the flow for the building. Therefore, the site was properly evaluated for a two bedroom residence based on a minimum design flow of 240 gpd.

8. The scientific evidence and expert testimony presented supported the conclusion that the soils on the site were chroma 2 or less at a depth of less than 36 inches from the naturally

occurring soil surface, indicating an unsuitable soil wetness condition on the site in violation of 15A NCAC 18A .1942. Therefore, the site was properly classified as UNSUITABLE.

9. The scientific evidence and expert testimony presented supported the conclusion that there was fill material on the site above the natural ground surface was Group 3 soil, in violation of 15A NCAC 18A .1957(b). Therefore, the site was properly classified as UNSUITABLE.

10. The scientific evidence and expert testimony presented supported the conclusion that there was insufficient space of Suitable or Provisionally Suitable soils on the site, even though there was three acres of space there simply was not enough space of suitable or provisionally suitable soil, and was therefore in violation of 15A NCAC 18A .1945. Moreover, the facts show that no Suitable or Provisionally Suitable soils were found on the site at all. Therefore, the site was properly classified as UNSUITABLE.

11. The scientific evidence and expert testimony presented supported the conclusion that the soil depth to rock on the site was less than 36 inches, in violation of 15A NCAC 18A .1943. Therefore, the site was properly classified as UNSUITABLE.

12. The facts in the case support a conclusion that no modified, alternative experimental or innovative system could be used that would allow the site to be reclassified as PROVISIONALLY SUITABLE in accordance with 15A NCAC 18A .1956, .1957 or .1969.

13. Substantial and overwhelming evidence was presented to support Respondent's action in classifying the site as UNSUITABLE and denying the request for issuance of an improvement permit for the site.

14. The Respondent's decision to classify the site as UNSUITABLE and deny an improvement permit was made pursuant to proper procedure and was neither arbitrary nor capricious.

15. Petitioner presented no compelling evidence to overcome Respondent's evidence, and particularly the testimony from Respondent's expert witnesses, to show that the Respondent's denial of the improvement permit was incorrect or improper. Petitioner's argument was largely formulated on the premise that the "observation method" used by the local health department and by the state is unreliable and that the "perc" test should be used to evaluate the site. Petitioner has not provided credible scientific evidence to support this proposition. Mr. Neal, recognized by the court as an expert on the evaluation of on-site wastewater systems, without objection by Petitioner, refuted Petitioner's proposition and provided credible and convincing testimony that the observation method is scientifically supported and that the perc system was abandoned in North Carolina as unreliable. More importantly, our system of laws and rules in North Carolina gives authority to the General Assembly to establish laws governing on-site wastewater systems. These laws give the authority and the duty to the Commission for Public Health

to adopt rules governing the evaluation and permitting of on-site wastewater systems. The Commission has adopted such rules in 15A NCAC 18A Section .1900. As Mr. Neal testified, the Commission adopted rules as far back as 1982 adopting the observation method as the required means for local health departments and DHHS to evaluate sites for on-site wastewater systems. These rules do not provide for the use of the perc test as an acceptable means of evaluating a site. Therefore, as Mr. Neal testified, the observation method must be used to conduct such evaluations unless and until those procedures are changed by amendments to the state wastewater rules. This requires a rigorous administrative process involving public notices; public hearing; review by the Commission for Public Health; adoption of rule changes; review by the Rules Review Commission; and possibly by the General Assembly. In short, this is a long and detailed process and no rules can be changed without going through the administrative process. The application of this process to this case means that the observation method is the mandated regulatory process for the evaluation of sites for wastewater systems in North Carolina, and it cannot be replaced by another method without going through the proper administrative rulemaking process. Therefore, the health department and Mr. Neal were following the procedure they are required by law and rule to follow, and I must give deference to the agency when it is following its own rules and procedures. According to Respondent's expert, Mr. Neal, they followed proper procedure and in doing so the evidence shows that the site was unsuitable pursuant to the wastewater laws and rules. The perc test, whether valid in other states or not, is not the required, or even allowed, evaluation method for lots in North Carolina. I must rule based on the laws and rules of this state. Based on those laws and rules and the evidence presented by Respondent, I must find that the Respondent has followed the proper procedures and properly determined that your property is unsuitable under those laws and rules for an improvement permit. Petitioner has failed to provide sufficient evidence to carry his burden of proof, and Respondent's actions in this matter denying the improvement permit is affirmed.

16. Deference is given to policy and methodology used by the agency in concluding that the Petitioner's site is unsuitable pursuant to North Carolina wastewater laws and regulations.

FINAL DECISION

The Respondent's decision to classify the Petitioner's site as unsuitable and deny issuance of an improvement permit for the site is AFFIRMED.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the

contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 14th day of March, 2014.

J. Randall May
Administrative Law Judge