

STATE OF NORTH CAROLINA
COUNTY OF PENDER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 EHR 02843

BRIAN T JACKSON, ROSEMARY JACKSON,))
))
Petitioners,))
))
v.))
))
N.C. DEPARTMENT OF HEALTH AND))
HUMAN SERVICES, ENVIRONMENTAL))
HEALTH SECTION, DOUG MCVEY AND/OR))
HARRY LEWIS,))
))
Respondent,))

**SUMMARY JUDGMENT FOR
RESPONDENT**

On December 8, 2014, before Administrative Law Judge Melissa Owens Lassiter in Bolivia, North Carolina. Respondent filed a Motion for Summary Judgment on December 12, 2014, and Petitioner filed its Response to such Motion on December 22, 2014.

APPEARANCES

For Petitioner: Charles Busby, Attorney at Law, PO Box 818, Hampstead, North Carolina 28443

For Respondent: Regina T. Cucurullo, Assistant Attorney General, N.C. Department of Justice, 9001 Mail Service Center, Raleigh, N.C. 27699-9001

ISSUES

1. Whether there are any genuine issues of material fact in this contested case, and if Respondent is entitled to Summary Judgment as a matter of law?

2. Whether Respondent substantially prejudiced Petitioners' rights, acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by rule or law when it denied Petitioners' request for a reissuance of their expired May 18, 1988 improvement permit pursuant to North Carolina Session Law 1997-443?

EXHIBITS RECEIVED INTO EVIDENCE

For Petitioner: None

For Respondent: Exhibit 1: Email from Walter Giese, agent and private soil scientist for the Petitioners (May 22, 2012)

Exhibit 2: Email from Walter Giese, agent and private soil scientist for the Petitioners (June 18, 2012)

Exhibit 3: Petitioners' Application for Improvement Permit And/OR Construction Authorization (November 2, 2009)

Exhibit 4: Improvement Permit Denial Letter from Harry Lewis (August 12, 2010)

Exhibit 5: Notice of Improvement Permit Denial from Douglas McVey (June 5, 2012)

Exhibit 6: Respondent's Soil/Site Evaluation of Petitioners' Property (June 4, 2012)

Exhibit 7: Regional Soil Scientist Site Report from Dwayne Graham (April 3, 2013)

WITNESSES

For Petitioners: Walter Giese

For Respondent: Douglas McVey, Dwayne Graham

FINDINGS OF FACT

1. Respondent is responsible for permitting subsurface, on-site wastewater systems pursuant to Article 11 of Chapter 130A of the North Carolina General Statutes and related laws and rules.

2. On May 13, 1988, the Pender County Health Department issued an improvement permit for lot number 286 in Belvedere Plantation, Hampstead, North Carolina for a three-bedroom single-family home requiring a system with a design waste flow of 360 per day. As evidenced by the language on the May 13, 1988 improvement permit for the lot number 286 in Belvedere Plantation, such permit did not constitute a warranty or a guarantee, and expired thirty-six months from the May 13, 1988 issuance date of such permit.

3. On November 2, 2009, Petitioners applied to the Pender County Health Department for a re-issuance of the improvement permit for their property. Petitioners currently own lot number 286 in Belvedere Plantation (hereinafter "Petitioners' property"), which does not contain any wetlands.

4. On August 10, 2010, the Pender County Health Department staff conducted a site evaluation of Petitioners' property in accordance with current on-site wastewater system permitting rules and laws.

5. On August 12, 2010, Mr. Harry Lewis, a registered environmental health specialist for Pender County Health Department, issued a letter to Petitioners denying their application for an improvement permit (hereinafter "August 2010 Denial").

6. Mr. Douglas McVey, then the Environmental Health Supervisor for Pender County Health Department, conducted a supervisory review of Mr. Lewis' site evaluation of Petitioners' property in accordance with current rules and laws.

7. In 2012, Petitioners' agent, Mr. Walter Giese, requested that the Petitioners' expired permit be reissued in accordance with Section 15.18 of the North Carolina Session Law 1997-443. Mr. Giese submitted the following information to Respondent with his request: 1) Petitioners' letter to the Pender County Health Department appointing Mr. Giese as their agent; (2) a copy of the Section 15.18; (3) a copy of Petitioners' expired permit; and (4) a copy of a letter from Mr. Steve Steinbeck dated November 18, 2008, regarding a property located in Carteret County that was unrelated to this hearing.

8. Mr. Giese acknowledged that he conducted a site evaluation of Petitioners' property based on current rules and laws by conducting soil borings regarding the soil criteria. Around February or March of 2014, Mr. Giese conducted his last site visit to the subject property. He noted there were no site alterations, and although there was some clearing to the property, the clearing did not alter the suitability of the property or the soil for the original permit. Mr. Giese did not provide his evaluation notes or any documents showing his findings to Respondent.

9. On June 5, 2012, Mr. McVey issued a Notice of Improvement Permit Denial to the Petitioners (hereinafter "June 2012 Denial"), denying Petitioners' application for an improvement permit for being unsuitable for the installation of a ground absorption sewage and disposal (septic) system based on the four factors of "unsuitable soil topography and/or landscape position, unsuitable soil wetness, presence of a restrictive horizon, and insufficient space for septic system and repair area."

10. On January 24, 2013, Mr. Dwayne Graham, a Regional Soil Scientist for Respondent State agency, conducted a State review of Petitioners' property. On April 3, 2013, Mr. Graham provided Mr. McVey his site evaluation report of Petitioners' property. Mr. Graham's report confirmed Mr. Lewis' and Mr. McVey's denial of Petitioners' application for an improvement permit. Mr. Graham opined that the testimony of Petitioners' agent on the day of the hearing did not change his mind that Petitioners' expired permit should not be reissued.

11. Petitioners still own lot number 286 in Belvedere Plantation.

12. Petitioners never installed an on-site wastewater system on the subject property.

CONCLUSIONS OF LAW

1. The N.C. Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. §150B-23 et seq., and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in this matter.

2. The standard of review for summary judgment is whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Kessing v. National Mortgage Corp.*, 278 NC 523, 180 SE2d 823 (1971) To entitle one to summary judgment, the movant must conclusively establish a legal bar to the nonmovant's claim or complete defense to that claim. *Virginia Elec. and Power Co. v. Tillett*, 80 NC App 383, 343 SE2d 188, cert. denied, 317 NC 715, 347 SE2d 457 (1986)

3. The burden of establishing a lack of any triable issue resides with the movant. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). The trial court must determine if there is a triable material issue of fact, viewing all evidence presented in the light most favorable to the nonmoving party. *Waddle v. Sparks*, 100 N.C. App. 129, 394 S.E.2d 683, (1990), aff'd in part and rev'd in part on other grounds, 331 N.C. 73, 414 S.E.2d 22 (1992). In a hearing on a motion for summary judgment, the nonmovant does not have to make out a prima-facie case automatically, but only has to refute any showing made that her case is fatally deficient. *Riddle v. Nelson*, 84 N.C.App.656, 353 S.E.2d 866 (1987).

4. Facts asserted by the party answering a summary judgment motion must be accepted as true. *Norfolk & Western Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E.2d 734 (1974). Moreover, if there is a question which can be resolved only by the weight of the evidence, summary judgment must be denied. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E.2d 190 (1980).

5. In this case, North Carolina Session Law 1997-443 was an appropriations act and is titled "The Current Operations and Capital Improvements Appropriations Act of 1997." Section 15.18 of North Carolina Session Law 1997-443 provided:

Notwithstanding the provisions of Article 11 of Chapter 130A of the General Statutes to the contrary, the Department of Environment, Health, and Natural Resources or the local health department shall issue an improvement permit and an authorization for wastewater system construction for any wastewater system that was the subject of an improvement permit issued by a local health department between July 1, 1982, and September 30, 1995, that expired prior to the installation of that wastewater system, upon a showing satisfactory to the Department or the local health department, respectively, that all of the following conditions are satisfied:

- (1) The site and soil conditions are unaltered.
- (2) The facility, design wastewater flow, and wastewater

characteristics are not increased since the expired permit was issued.

(3) A wastewater system can be installed that meets the permitting requirements in effect on the date the expired improvement permit was issued.

(4) The intended use has not changed.

(5) There is no current technology that can reasonably be expected to improve the performance of the system.

(6) But for the issuance of an authorization for wastewater system construction under this act, the proposed site cannot be developed for the purpose for which the expired permit was issued.

6. Section 35.2 of North Carolina Session Law 1997-443(hereinafter “Section 35.2”), which is titled “**MOST TEXT APPLIES ONLY TO 1997-99**”, applied to Section 15.18. Section 35.2 stated:

Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium.

N.C. Sess. Law 1997-443.

7. Because Section 35.2 limited the application of Section 15.18 to activities occurring during the 1997-99 fiscal biennium, and because Petitioners did not request a reissuance of their expired permit until 2012, Respondent is not authorized to re-issue Petitioners’ expired permit.

8. For the foregoing reason, there is no genuine issue of material fact, and Respondent is entitled to judgment as a matter of law.

SUMMARY JUDGMENT

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned **GRANTS** Respondent’s Motion for Summary Judgment, and **DISMISSES** Petitioners’ request for reissuance of an expired improvement permit pursuant to North Carolina Session Law 1997-443.

NOTICE

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 Wake County or in the Superior Court of the county in which the party resides. **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 03.012, 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 13th day of January, 2015.

Melissa Owens Lassiter
Administrative Law Judge