FILED
OFFICE OF ADMINISTRATIVE HEARINGS
07/23/2018 11:09 AM

STATE OF NORTH CAROLINA — IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF WATAUGA — 15 DHR 02731

COY AND SHELBY MILLER PETITIONER, V. APPALACHIAN DISTRICT HEALTH DEPARTMENT RESPONDENT.	**AMENDED FINAL DECISION ON REMAND FROM JUDICIAL REVIEW**

A contested case hearing was heard in this matter on November 10, 2015, and November 24, 2015, at the Watauga County Courthouse, in Boone, North Carolina, before J. Randall May, Administrative Law Judge. Nathan A. Miller appeared for petitioners, Coy and Shelby Miller. John P. Barkley and Regina T. Cucurullo, Assistant Attorneys General, appeared for Respondent, N.C. Department of Health and Human Services. A *Final Decision* was issued by the undersigned on March 30, 2016, which found that Respondent, justly and lawfully, denied Petitioners' request for a septic permit; that Respondent's actions did not harm Petitioners, or deny Petitioners a right to appeal any action taken by Respondent; and that Respondent followed N.C.G.S. §§ 130A-334 and 130A-336 by requiring Petitioners to obtain a permit to do work on their initial septic system. Petitioners filed a *Petition for Judicial Review* that was heard by the Honorable Mark E. Powell on September 25, 2017, in the Superior Court of Watauga County. This comes after the *Petition for Judicial Review* came styled as *Coy and Shelby Miller v. North Carolina Department of Health and Human Services, 16-CVS-219,* under Judge Powell's signature. However, for the Office of Administrative Hearings' purposes, the file remains captioned as *Coy and Shelby Miller v. Appalachian District Health Department, 15 DHR 02731.*

In his *Order on Petition for Judicial Review,* issued on April 12, 2018, (Attachment 1), Judge Powell ruled that, based upon the whole record test, substantial, competent, and material evidence in the Record supports the administrative law judge's *Final Decision* in all aspects, except Conclusion of Law paragraph 32. Judge Powell found Conclusion of Law paragraph 32 to be totally irrelevant to any issue to be decided, as there is no burden for the Petitioners to indicate a request or desire for notice of an application denial. Judge Powell upheld the *Final Decision* in all aspects, except Conclusion of Law 32; and remanded the case to the Office of Administrative Hearings and the administrative law judge for reconsideration of the decision without any reliance on Conclusion of Law paragraph 32.

The undersigned has thoroughly reviewed the *Final Decision* without reliance or consideration of Conclusion of Law paragraph 32; and has determined that the removal of Conclusion of Law paragraph 32 makes no difference to the decision affirming the actions of

Respondent. Therefore, the undersigned adopts the Findings of Fact and Conclusions of Law contained in the *Final Decision*, except for the removal of Conclusion of Law paragraph 32.

APPEARANCES

For Petitioners, Coy and Shelby Miller:

Nathan A. Miller, Esq.
Miller & Johnson, PLLC
P.O. Box 49
Boone, NC 28607

For Respondent, N.C. Department of Health and Human Services:

John P. Barkley, Assistant Attorney General
Health and Public Assistance
N. C. Dept. of Justice
P.O. Box 629
Raleigh, N.C. 27602

Regina T. Cucurullo, Assistant Attorney General
Health and Public Assistance
N. C. Dept. of Justice
P.O. Box 629
Raleigh, N.C. 27602

BURDEN OF PROOF

Petitioners bear the burden of proof in this matter.

ISSUES

The issues identified by Petitioners to be resolved in this matter are as follows:

1. Whether Respondent unjustly and unlawfully denied Petitioners' request for a septic permit.

2. Whether Respondent failed to adequately notify Petitioners of the denial and offer Petitioners the proper appeal procedures pursuant to N.C.G.S. § 130A-335(g).

3. Whether Respondent failed to follow N.C.G.S. § 130A-334 and N.C.G.S. § 130A-336 by requiring Petitioners to obtain a permit to do work on their original septic system.

FINDINGS OF FACT

1. On-site wastewater permitting and enforcement in Watauga County, North Carolina, is carried out by environmental health specialists in the Appalachian District Health Department (hereinafter "ADHD"), who act as authorized agents of North Carolina Department of Health and Human Services. (*See* Order on Pre-Trial Conference)

2. Petitioners have owned and lived in their Watauga County house for roughly 55 years. Their house used a cinderblock septic system, which was installed prior to the adoption of North Carolina statewide on-site wastewater laws and rules in 1977. (Trp*.,* pp. 14, 37, 29-30, 42)

3. When Petitioners' house was built, their lot was excavated to allow the construction of a basement, and the excavated dirt from the basement was spread out to level the property. Petitioners' original septic tank was installed adjacent to the basement stairs of their house, roughly fifteen to twenty feet from the house. (Trp., pp., 15, 18, 46, 97)

4. Petitioners' original septic system malfunctioned and as a result, Petitioners wanted to repair their system by installing a new system. (Trp., pp. 16, 42-3)

5. As testified by Petitioner Coy Miller, to remedy the problems he experienced with his original septic system, he used a backhoe to dig into the side of the septic tank, which caused at least eight blocks to fall off of the side of the septic tank. (Trp., p. 43)

Petitioners' Application

6. Petitioners wanted a permit to install a new wastewater system because their original system was over fifty years old and had ceased to function properly. It had backed-up and emitted a noxious odor. In order to do so, Petitioner Shelby Miller submitted an Application for Well and On-Site Wastewater Permits (hereinafter "Application") to ADHD. On the Application, Petitioner Shelby Miller identified that the purpose of the application was for a repair. In Section 4 of the Application, Petitioner Miller did not indicate a system preference. (Trp., pp. 17, 43; Respondent's Exhibit 1)

7. As testified by Mr. Miller, and supported by Respondent's testimony, Petitioner wanted to install a *new* wastewater system to replace his initial system; he did not want to use his initial system. (Trp., pp. 43, 191)

8. On March 18, 2014, the ADHD received the Application. (*See* Order on Pre-Trial Conference)

9. At the time of the Application, Petitioners only had one system (their original septic tank system) installed on their property. (Trp., p. 41)

March 24, 2014 Site Evaluation

10. On March 24, 2014, Jon Swaim and Aaron Winters, employees of ADHD and agents of Respondent, conducted a site visit of Petitioners' property. Mr. Miller was present during this site evaluation. (Trp., pp. 95, 199; Order on Pre-Trial Conference)

11. During the March 24, 2014 site visit to Petitioners' property, ADHD made observations that a large hole had been knocked into the side and top of the original septic tank. ADHD observed wastewater in the tank and on the gravel beside the tank. (Trp., pp. 95, 201)

12. During their evaluation, Mr. Swaim and Mr. Winters used augers to bore holes and sample the soil between the Petitioners' house and Aho Road, hereinafter referred to as "the front of Petitioners' property" or "front of the property". Although Mr. Swaim and Mr. Winters found the borings to be unsuitable because of the presence of fill material and soil wetness, either of these findings alone would have been enough to determine that the borings were unsuitable.

13. Petitioner Coy Miller testified that he had been informed by Mr. Winters that wastewater system regulations had changed over the past 20 to 25 years. He also testified that he was informed by ADHD that his property contained fill dirt and that he explained to ADHD that when his basement was dug that dirt was spread out to level the ground. (Trp., pp. 46, 65)

14. According to Respondent's testimony, dirt that is dug for a basement is considered fill material for purposes of permitting an on-site wastewater system in North Carolina. (Trp., pp. 128, 242)

15. During the March 24, 2014 site evaluation Mr. Miller was informed by Respondent that he could consider installing a pump system onto his property, locating it behind his house, but he did not want to consider that option. (Trp., p. 204) Petitioner was also informed that the front of his property was found to be unsuitable, but that he could have pits dug on his property to allow a further evaluation of the front of his property. After the March 24, 2014, Petitioner did in fact have pits dug by a backhoe on his property. (Trp., pp. 46, 204, 218)

April 2, 2014 Site Evaluation

16. On April 2, 2014, Mr. Swaim conducted an evaluation of the pits that had been dug in the front of Petitioners' property. During the evaluation of the pits, Mr. Miller was present. (Trp., p. 102; Order on Pre-Trial Conference)

17. Mr. Swaim determined that the pits were unsuitable because of the presence of fill material and soil wetness. Mr. Swaim informed Petitioner that the site was unsuitable in the front of Petitioners' property but that he could consider an off-site pump system. Petitioner told Mr. Swaim that he definitely did not want to look elsewhere to put the septic system. (Trp., pp. 105-6, 135)

18. On April 2, 2014, Petitioner had a phone conversation with Mr. Swaim after the site evaluation. During the phone conversation, Mr. Miller told Mr. Swaim that he did not want

to install a pump system and that he was going to take care of it himself. Mr. Swaim discussed with Petitioner whether Petitioners wanted a second opinion from his supervisor, Andrew Blethen. Petitioner informed Mr. Swaim that there was no need for a supervisor review if the supervisor was going to make the same finding. Petitioner did not request a supervisor review. Petitioner informed Mr. Swaim that "he had spoken to his attorney and that there was nothing that [ADHD] could do to keep him from doing what he wanted to on his own land." (Trp., pp. 47, 106, 107, 136)

19. The evidence supports that on April 2, 2014, Mr. Miller was informed that Mr. Swaim's supervisor could offer a second opinion as to whether Petitioners' property was suitable for a wastewater system. Petitioners did not testify that they requested a second opinion from a supervisor. The evidence also supports that Respondent did not receive a request for a supervisor review. (Trp., pp. 47, 106, 107, 136)

20. Although Petitioners did not request a second opinion by Mr. Blethen, the Environmental Health Supervisor at ADHD, Mr. Blethen did meet with Mr. Miller at ADHD sometime in April or May of 2014. During the meeting Petitioner did not request that a supervisor provide a second opinion of his property. Mr. Blethen testified that Petitioner requested that Respondent find a way to permit a repair in the front of Petitioners' property. Mr. Blethen testified that based on the evaluations of Petitioners' property, he told Petitioner that he could consider installing a pump system for an off-site area. Respondent offered testimony that permitting off-site system and repairs is not an uncommon practice. Mr. Blethen further testified that Petitioner was not interested in an off-site pump system, and was only interested in installing a new system in the front of the property. The parties were unable to reach a resolution during the meeting. (Trp., pp. 47, 106, 107, 136, 219)

21. On June 9, 2014, Mr. Swaim saw plastic chambers, which are used for wastewater drain fields, stacked in the front of Petitioners' property. As a result, that day Respondent issued a Notice of Violation to Petitioners in part because Respondent believed that Petitioners were attempting to repair their system without a permit. Petitioners were given until August 9, 2014 to obtain a permit for the repair of their system. The Notice of Violation contained ADHD's contact information and included a statement that informed the Petitioners that they could contact the ADHD office. (Trp., p. 107)

22. In defiance of Respondent's June 9, 2014 Notice of Violation, and during the timeframe that Petitioners were given to comply with said notice, Mr. Miller installed an illegal system in the front of his property, which Respondent had informed him was unsuitable for a wastewater system. Petitioner testified that the illegal system has been in use since July of 2014. (Trp., pp. 30,34, 50, 54-5)

23. Petitioners' son testified for Petitioners that the septic tank of the illegal system was installed directly beside the original septic tank. (Trp., pp. 29, 30)

July 28, 2014 Site Evaluation

24. On July 28, 2014, Mr. Blethen drove by Petitioners' property on his way to conduct a compliance inspection for another site and noticed that the front of Petitioners' property was disturbed. Mr. Blethen stopped at Petitioners' property and questioned Mr. Miller about the work that was being conducted. Petitioner admitted to installing an illegal system without a permit. Petitioner directed Mr. Blethen to leave his property and Mr. Blethen complied. (Trp., pp. 51, 220-23)

July 30, 2014 Site Evaluation

25. Because Petitioner did not want Mr. Blethen on his property, Mr. Blethen contacted Mr. Alan McKinney, Regional Soil Scientist for Respondent, to assist with Petitioners' property. (Trp., pp. 304, 272)

26. On July 30, 2014, Mr. McKinney and Mr. Joe Holder, ADHD Environmental Health Specialist, conducted a site evaluation of Petitioners' property to determine what permitting options were available. (Trp., p. 305; Order on Pre-Trial Conference) Despite Petitioners installation of an illegal system, ADHD continued to serve Petitioners by evaluating the illegal system to determine whether the system could be brought into compliance with the North Carolina laws and rules for on-site wastewater systems.

27. Mr. McKinney and Mr. Holder evaluated an area between the two illegal drainfield lines that Petitioner installed on the front of Petitioners' property. The auger boring contained fill material to four feet and chroma 2 or less at thirteen inches, indicating soil wetness. The borings did not contain Group One soils; specifically, the borings did not contain sand or sandy loam. Due to these findings, Mr. McKinney and Mr. Holder determined that the front of Petitioners' property was unsuitable for a wastewater system and determined that the illegal system that Petitioner installed could not be permitted. (Trp., pp. 349, 280, 274, 156)

28. Mr. McKinney testified that placing a system in an area that has a soil wetness condition diminishes the ability of the soil to treat and dispose of the resulting effluent. He further testified that fill material does not have the same natural porosity and the natural ability of soil to treat effluent. (Trp., pp. 275, 277)

29. Respondent never observed surfacing effluent around the illegal system, but testimony offered by Respondent suggested that if the illegal drain lines were installed as deep as six feet, then effluent could still end up in the groundwater without surfacing. Mr. McKinney testified that the illegal system was in fact discharging directly into the water table at thirteen inches between the two illegal drainlines. (Trp., pp. 143, 321)

30. During the July 30, 2014 site visit, Mr. Miller gave Mr. McKinney and Mr. Holder permission to evaluate a cattle lot that was on a separate piece of property that Petitioners owned. Before the evaluation of the cattle lot was completed, Petitioner directed Mr. McKinney and Mr. Holder to stop their evaluation and they complied. Petitioner informed Mr. McKinney and Mr. Holder that he did not want to consider a pump system, which would be needed if a system was installed in the cattle lot. (Trp., pp. 157-8, 278, 280, 339, 345)

31. After the expiration of the first Notice of Violation, ADHD issued a second Notice of Violation to Petitioners on August 11, 2014. The second Notice of Violation ordered Petitioners to disconnect their illegal septic system and obtain a repair permit. (Trp., p. 158)

32. In attempt to get Petitioners to comply with Respondent's Notice of Violation and to cease use of the illegal system that Petitioner had installed, Respondent pursued criminal penalties. Respondent's witnesses testified that pursuing criminal penalties is an available enforcement mechanism that is not uncommon for them to pursue when someone is non-compliant with North Carolina wastewater laws and rules.

February 11, 2015 Site Evaluation

33. On February 11, 2015, Mr. Blethen, Mr. Holder, Mr. McKinney, Petitioner and Petitioners' attorney, and ADHD's attorney, Ed Woltz, met at Petitioners' property to discuss permitting options. (Trp., p. 281; Order on Pre-Trial Conference)

34. At the time of the February 11, 2015 site visit, a letter denying the Petitioners' Application had not been issued. ADHD did not send a notice of application denial because there were other possible options that could be considered if Petitioners would allow Respondent to evaluate other adjacent property that Petitioners owned. Because Petitioners lived in the house that was connected to the system that needed to be repaired, ADHD wanted to try to work with Petitioners to find a permitting option, which Respondent, in good faith, believed could be found; so that Petitioners would not be placed in a situation where the notice of application denial would cause them to be displaced from their house. (Trp., pp. 163, 165, 245-6)

35. Petitioners' expert witness, Avery Lee Jackson, reviewed photographs of Petitioners' original septic tank taken by Mr. Blethen on February 11, 2015, and opined that a permit was needed to replace or fix the tank. Mr. Jackson further testified for Petitioners that their illegal system could be contaminating the water strata. Mr. Jackson's testimony corroborated Mr. McKinney's testimony that a repair permit is necessary to replace a septic tank. (Trp., pp. 362, 367)

36. Mr. McKinney testified that replacing a pipe is not analogous to replacing a septic tank, and that the latter would be considered a repair that required a permit.

37. During the February 11, 2015 meeting it was determined that because Petitioner had damaged the initial septic tank in a way that removed the structural integrity and caused it to no longer be watertight, that the initial tank could not be used unless an engineer proposed a way to remedy the lack of structural integrity and water tightness. The expert witnesses for both Petitioners and Respondent testified that it is possible that there is additional damage to the interior of the initial septic tank. In order for the initial tank to be put back in use, it would have to be repaired and would require a permit. (Trp., pp. 282-3, 369)

38. Petitioner's installation of the illegal septic tank complicated the matter because before the initial septic tank could be replaced or repaired and put back into use, Respondent would have to ensure that the initial drainfield was still present and able to properly function. Mr.

McKinney testified that old drain fields typically start immediately at the end of the septic tank and because he observed the presence of work at the end of the initial septic tank, that the initial drainfield may have been encroached upon during the installation of the illegal system. In order for Respondent to evaluate whether the initial drainfield could properly function, someone would need to find the old system. These options were not previously evaluated because Petitioner was not interested in repairing his old system because he wanted to install a new septic tank and drainfield. (Trp., pp. 326, 329-30, 311)

39. During the February 11, 2015 evaluation, Petitioner reconsidered Respondent's continued offer to evaluate other property that he owned and gave them permission to evaluate a new area that was uphill from their house. As a result of Respondent's evaluation of the property upslope from Petitioners' house, Respondent was able to locate an area for a repair wastewater system that complied with North Carolina laws and rules.

40. Petitioner and his attorney requested that a repair permit for the upslope property be issued and Respondent did in fact issue a repair permit for a pump system on Petitioners' upslope property. (Trp., p. 286)

41. On February 13, 2015, Respondent issued a repair permit to Petitioners in response to their Application, as noted by the CDP File Number, which is used by ADHD for tracking purposes. (Trp., p. 166)

42. The evidence presented did not indicate that Petitioners requested or desired a notice of an application denial.

43. At an Appalachian District Health Board meeting, Perry Yates, a County Commissioner and member of the Appalachian District Health Board, suggested that prior to the installation of the wastewater system (February 13, 2015 permit), that Petitioners' illegal system be inspected by Respondent for twenty-four months, at which time a permit would be issued if the illegal system worked. Mr. Yates did not have any training in the State Wastewater laws and rules, but was aware that if a system fails, it has to be repaired. Respondent knew of nothing in North Carolina law or rule that would allow Mr. Yates' suggestion to be used. (Trp., pp. 81-2, 288)

44. Mr. Yates, Petitioners' witness, testified that the Appalachian District Health Board voted to support ADHD's enforcement of the general statues of the State of North Carolina that a permit is necessary to install a system. (Trp., pp. 85-86)

45. During this entire episode, it would seem that the matter could have been handled more gracefully by both sides; however, the undersigned cannot allow Petitioner to install an ad hoc system, which ignores the rule of law.

CONCLUSIONS OF LAW

To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein as Conclusions of Law. Based upon the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law:

1. The North Carolina General Assembly enacted laws to regulate wastewater systems because the installation of "septic tank systems and other types of wastewater systems in a faulty or improper manner and in areas where unsuitable soil and population density adversely affect the efficiency and functioning of these systems, has a detrimental effect on the public health and environment through contamination of land, groundwater and surface waters." N.C.G.S. § 130A-333.

2. A septic tank system is a type of wastewater system. N.C.G.S. § 130A-333(15).

Whether Respondent failed to follow N.C.G.S. § 130A-334 and N.C.G.S. § 130A-336 by requiring Petitioners to obtain a permit to do work on their initial septic system.

3. Under North Carolina law, an on-site wastewater system can be maintained without a permit. (N.C.G.S. § 130A-336(b)) "Maintenance" means normal or *routine* maintenance including replacement of broken pipes, cleaning, or adjustment to an existing wastewater system. (N.C.G.S. § 130A -334(3a)

4. However, a permit is required to repair an on-site wastewater system. N.C.G.S. § 130A-336. "Repair" means "the extension, alteration, replacement, or relocation of existing components of a wastewater system." N.C.G.S. § 130A-334(9a)

5. A wastewater system is considered to be malfunctioning if either of the following occur: (1) "a discharge of sewage or effluent to the surface of the ground, the surface waters, or directly into groundwater at any time;" or (2) "a back-up of sewage or effluent into the facility, building drains, collection system, or freeboard". 15A NCAC 18A .1961(a)(1)

6. Contrary to the argument that a repair permit was not needed, Petitioners willfully submitted an Application for Well and On-Site Wastewater Permits in which they requested that Respondent issue a repair permit.

7. Substantial and overwhelming evidence was presented to support that Petitioners' original septic tank system had malfunctioned and was in need of repair at the time of Respondent's first site visit. Testimony offered by Petitioners' own witnesses corroborated Respondent's testimony that the initial septic system required a repair, not maintenance. Both parties offered evidence that Petitioners' initial septic tank was damaged and it would be considered a repair to fix or replace the initial tank. As a result, Petitioners' were required by law to obtain a repair permit.

8. Neither fixing the extensively damaged septic tank, nor installing a new septic tank, is a matter of routine or normal maintenance; both of these acts would require a repair permit.

9. Therefore, Respondent did not fail to follow N.C.G.S. §§ 130A-334 or -336 by requiring Petitioners to obtain a permit to do work on their initial septic tank system.

10. Because "No person shall commence or assist in the installation, construction, or repair of a wastewater system unless an improvement permit and an authorization for wastewater

system construction have been obtained from the Department or the local health department", Petitioner Coy Miller acted in violation of N.C.G.S. § 130A-336 when he installed an illegal system on his property without an improvement permit or repair permit. N.C.G.S. § 130A-336(b).

Whether Respondent unjustly and unlawfully denied Petitioners' request for a septic permit.

11. Prior to issuing an improvement permit, "an authorized agent of the State must determine that the site is suitable or provisionally suitable and that a system can be installed so as to meet the provisions of [Section .1900 of Subchapter 18A of Chapter 15A of the North Carolina Administrative Code]." 15A N.C.A.C. 18A .1937(f).

12. In response to Petitioners' Application and in accordance with 15A N.C.A.C. 18A .1939 and related rules, Respondent conducted multiple site evaluations of Petitioners' property to determine whether their site was suitable for a wastewater system repair.

13. 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 5 limiting uncorrectable characteristics shall be used to determine the overall site classification."

14. Aside from the requirements in N.C.G.S. § 130A-341 and related rules, giving due deference to the expertise of the agency, for a site to be suitable for a wastewater system, it must contain "naturally occurring soil", which is "soil formed in place due to natural weathering processes and being unaltered by filling, removal, or other man-induced changes other than tillage." 15A N.C.A.C. 18A .1935 (25)

15. The overwhelming weight of the evidence presented at the hearing establishes that the front of Petitioners' property is unsuitable due to the presence of non-naturally occurring soil, which is fill material. Petitioners did not offer any evidence to rebut the findings that the front of their property was unsuitable for a wastewater system.

16. The evidence offered during the hearing suggested that the non-naturally occurring soil, or fill material, on Petitioners' property could have been the result of dirt that was excavated for Petitioners' basement and used to relevel the site.

17. Under N.C.G.S. § 130A-341, "a site that has existing fill, including one on which fill material was placed prior to July 1, 1977, and that has sand or loamy sand for a depth of at least 36 inches below the existing ground surface, shall be evaluated for an on-site wastewater system". Because the fill material on Petitioners' property did not consist of sand or loamy sand and the site does not meet the requirements of 15A N.C.A.C. 18A .1957, their property does not meet the requirements for an existing fill system pursuant to N.C.G.S. § 130A-341.

18. Even if Petitioners' property did not contain the non-naturally occurring soil, or fill material, their property is also unsuitable because of a soil wetness condition.

19. Soil wetness is determined by "the indication of colors of chroma 2 or less (Munsell Color Charts) at [greater than or equal to] 2% of soil volume in mottles or matrix of a horizon or horizon subdivision." 15A N.C.A.C. 18A .1942(b)(1) "Sites where soil wetness conditions are less than 36 inches below the naturally occurring soil surface shall be considered UNSUITABLE with respect to soil wetness." 15A N.C.A.C. 18A .1942(c).

20. The scientific evidence and expert testimony presented supported the conclusion that Petitioners' property contains 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. Petitioners did not produce any conflicting evidence to suggest that the front of Petitioners' property does not have an unsuitable soil wetness condition. Therefore, the site was properly classified as UNSUITABLE.

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

22. Substantial and overwhelming evidence was presented to support that Respondent's classification of the front of Petitioners' property as UNSUITABLE. Respondent's decision to not issue a repair permit for the front of Petitioners' property was made pursuant to proper procedure and was neither arbitrary nor capricious.

23. Petitioners' argument as to why Respondent should have issued a repair permit for the front of their property was largely premised on the fact that they had lived in their home with their initial septic system for over 50 years, in the same area that Respondent recently determined to be unsuitable for a wastewater system. Alan McKinney, recognized by the Court as an expert in soils and site evaluations for onsite wastewater treatment systems, without objection by Petitioner, refuted Petitioners' proposition and provided credible and convincing testimony that Petitioners' original system predated the permitting requirements for onsite wastewater systems. Further, the only applicable requirements in Section .1900 of Subchapter 18A of Chapter 15A of the North Carolina Administrative Code that apply to "properly functioning sewage collection, treatment, and disposal systems in use . . . prior to July 1, 1977" are the requirements in Rule .1961 for system operation, maintenance, and management. (15A N.C.A.C. 18A .1962) Once Petitioners' initial septic tank system malfunctioned, their system no longer met the criteria for the Rule .1962 exception, and as a result, their initial system was required to meet all the requirements in Section .1900 of Subchapter 18A of Chapter 15A of the North Carolina Administrative Code. After Petitioners' initial system malfunctioned, it could not meet the requirements in Section .1900 of Subchapter 18A of Chapter 15A of the North Carolina Administrative Code, Respondent acted properly by not issuing a repair permit for the front of Petitioners' property.

24. The evidence and testimony presented does not support a finding that Respondent should have issued a repair permit for the front of Petitioners' property; therefore, Respondent did not unjustly or unlawfully deny Petitioners' request for a septic permit.

Respondent failed to adequately notify Petitioners of the denial and offer Petitioners the proper appeal procedures pursuant to N.C.G.S. § 130A-335(g).

25. N.C.G.S. § 130A-335 requires that, "When an improvement permit is denied, the local health department shall issue the site evaluation in writing stating the reasons for the unsuitable classification. The evaluation shall also inform the applicant of the right to an informal review by the Department, the right to appeal under G.S. 130A-24, and to have the appeal held in the county in which the site for which the improvement permit was requested is located."

26. "Any person appealing an *action* taken by the Department pursuant to this Chapter or rules of the Commission shall file a petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a). The petition shall be filed not later than 30 days after *notice* of the action which confers the right of appeal unless a federal statute or regulation provides for a different time limitation. The time limitation imposed under this subsection shall commence when notice of the agency decision is given to all persons aggrieved." N.C.G.S. § 130A-24(a1), emphasis added

27. A notice of an application denial itself does not confer a right to appeal, rather it is an *action* taken by Respondent that confers the right to appeal. The purpose of a notice of an application denial is to *inform* the applicant of the right to appeal and to establish a timeframe in which a person can appeal an action by Respondent.

28. Because Respondent did not issue a notice of an application denial to Petitioners' application for a repair permit, the 30-day timeframe in which Petitioners had to appeal Respondent's decision had yet to run.

29. Petitioners have failed to demonstrate how, if at all, they were harmed from Respondent's non-issuance of a notice of an application denial. Petitioners were not denied the right to a contested case and, even though this Court finds that Petitioners have not met their burden of proof, Petitioners were afforded the opportunity to challenge actions taken by Respondent.

30. Respondent's non-issuance of a notice of an application denial prior to the issuance of a repair permit did not justify Petitioner's action of installing an illegal system in an area of his property that Respondent informed him was unsuitable for a wastewater system. Petitioner Miller acted in a manner that disregarded the wellbeing of others and the environment when he installed the illegal system.

31. Petitioner's installation of an illegal system was not justified based on Petitioners' allegation that Respondent was non-responsive. Although Petitioner claimed that he had no contact with Respondent during a two and a half month gap, the evidence shows that Petitioner told ADHD in April that he did not want a supervisor review if the same result would be reached; and that he only wanted a new system located on the front of his property. Petitioner made it clear to Respondent that he was not interested in a pump system prior to the February 11, 2015 site evaluation; he made it clear to ADHD that he would take care of things with his attorney. Shortly thereafter, in April or May, Petitioner and Mr. Blethen met at ADHD to discuss available options to the Petitioners, but Petitioner wanted only to put a system in the front of Petitioners' property,

which was not an available option. ADHD made no further contact with Petitioners because Petitioners were not interested in the suggested options. Mr. Blethen testified that ADHD does not always immediately issue denials in order to give an opportunity to reconsider available options. Respondent was not being non-responsive, as alleged by Petitioners; rather Respondent was simply respecting Petitioners' wishes as understood by ADHD. ADHD made contact with Petitioners through the use of a Notice of Violation when it appeared that the Petitioners were installing an illegal system.

32. **Paragraph 32 now removed.**

33. Petitioners have not been substantially prejudiced by Respondent's non-issuance of a denial notice of their application because they were able to file a petition for a contested case with the Office of Administrative Hearings and have a hearing on the merits.

34. Furthermore, although Respondent was unable to issue a repair permit for the front of Petitioners' property, Respondent had a good faith belief that a repair permit could be issued and did in fact issue a repair permit on property owned by Petitioners and in response to Petitioners' Application.

35. Respondent presented compelling evidence to show that Respondent's actions were not improper, erroneous, arbitrary, or capricious.

36. Substantial and overwhelming evidence was presented to support that the illegal system that Petitioner installed on his property does not meet the on-site wastewater system permitting laws or rules in North Carolina.

FINAL DECISION

After remand from the Honorable Mark E. Powell, Judge Presiding for the Superior Court of Watauga County on Judicial Review, the undersigned has reconsidered the decision without any reliance on Conclusion of Law paragraph 32. The undersigned finds that removal of Conclusion of Law paragraph 32 makes no difference to the decision in this matter. Therefore, the undersigned has removed Conclusion of Law paragraph 32 from the original *Final Decision* and reaffirms the finding that Respondent justly and lawfully denied Petitioner's request for a septic permit; did not harm Petitioners, or deny Petitioners a right to appeal any action taken by Respondent; and that Respondent followed N.C.G.S. §§ 130A-334 and 130A-336 by requiring Petitioners to obtain a permit to do work on their initial septic system.

THEREFORE, Respondent's decision to classify the front of Petitioners' property as unsuitable, and to not issue a repair permit for the front of their property, 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.

IT IS SO ORDERED.

This the 23rd day of July, 2018.

J Randall May
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Nathan A Miller
Miller & Johnson, PLLC
PO Box 40
Boone NC 28607
Attorney for Petitioner

John P Barkley
Assistant Attorney General, NC Department of Justice
jbarkley@ncdoj.gov
Attorney for Respondent

The Honorable Mark E. Powell
Superior Court Judge Presiding
Watauga County Courthouse
842 West King Street
Boone, NC 28607

This the 23rd day of July, 2018.

Betty Owens
Paralegal
Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Telephone: 919-431-3000

Filed May 10, 2018 11:14 AM Office of Administrative Hearings

FILED
2018 APR 17 PM 3:40
WATAUGA COUNTY, C.S.C.

STATE OF NORTH CAROLINA

COUNTY OF WATAUGA

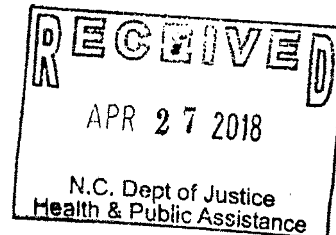
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16-CVS-219

COY AND SHELBY MILLER,
Petitioners,

Vs.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

ORDER ON PETITION FOR JUDICIAL REVIEW



THIS MATTER COMING to be heard at the September 25, 2017 session of the Watauga County Superior Court before the Honorable Mark E. Powell, Superior Court Judge Presiding upon the Petitioners' Petition for Judicial Review of the Administrative Law Judge J. Randall May's March 30, 2016 Final Decision. All parties were present for the hearing including the Petitioners, Coy and Shelby Miller, their attorney Nathan A. Miller, Esq., Respondent North Carolina Department of Health and Human Services as represented by Assistant Attorney General John Barkley, Esq; and in the Petition, the Petitioners contest the written decision of Administrative Law Judge J. Randall May's March 30, 2016 Final Decision which found that the Respondent justly and lawfully denied Petitioners' request for a septic permit, that Respondent's actions did not harm Petitioners or deny Petitioners a right to appeal any action taken by Respondent.

This matter is properly reviewed by the Superior Court as an appeal of a final decision therefore for all matters dealing with the factual allegations the Superior Court reviews the matter pursuant to the whole records test and as to matters of law the Superior Court reviews the matter pursuant to a de novo review.

ATTACHMENT 1

In accordance with applicable law, this Court has conducted a de novo review concerning questions of law. In accordance with applicable law, this Court has applied "whole record" review concerning issues of whether the Administrative Law Decision was not supported by the evidence or was arbitrary and capricious. Based upon its review of the Record (including all exhibits and transcripts), the briefs and authorities presented by counsel for the parties, the oral arguments of their counsel, and application of the appropriate standard of review as to each issue raised, this Court has concluded as follows with respect to the issues raised by Petitioners in their Petition:

1. Based upon application of the whole record test, substantial, competent and material evidence in the Record supports the Administrative Judge's Final Decision that the Respondent did not unjustly and/or unlawfully deny Petitioners' request for a septic permit.

2. Based upon application of the whole record test, substantial, competent and material evidence in the Record supports the Administrative Judge's Final Decision that the Respondent did adequately notify and offer Petitioners the proper appeal procedures pursuant to N.C.G.S. § 130A-335(g).

3. Based upon application of the whole record test, substantial, competent and material evidence in the Record supports the Administrative Judge's Final Decision that the Respondent did not fail to follow N.C.G.S. § 130A-334 and N.C.G.S. § 130A-336 by requiring Petitioners to obtain a permit to do maintenance on their initial septic tank.

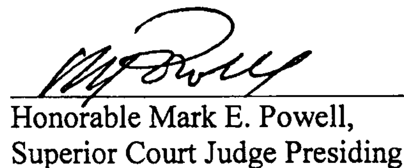
4. Based upon application of the whole record test, substantial, competent and material evidence in the Record supports the Administrative Judge's Final Decision in the Findings of Fact in paragraphs 17, 18, 19, 20, 21, 26, 29, 30, 37, 38, 42, 43 and 45.

5. Based upon application of the whole record test, substantial, competent and material evidence in the Record does **NOT** support the Administrative Judge's Final Decision in the Conclusion of Law contained in paragraph 32. Conclusion of Law paragraph 32 is totally irrelevant to any issue to be decided, as there is no burden for the Petitioners to indicate a request or desire for notice of an application denial. Based upon application of the whole record test, substantial, competent and material evidence in the Record does support the Administrative Judge's Final Decision in the Conclusions of Law contained in paragraphs 6, 7, 8, 9, 10, 15, 16, 17, 18, 20, 21, 22, 23, 24, 27, 29, 30, 31, 33, 34, and 36.

6. Based upon the application of a de novo review the exception contained in paragraph 6 of the Petition is not proper for judicial review.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Final Decision by Administrative Law Judge J. Randall May is upheld in part and reversed in part and this matter is remanded back to the Office of Administrative Hearings and J. Randall May to reconsider the decision without any reliance on Conclusion of Law paragraph 32.

This the 12 day of April, 2018.



Honorable Mark E. Powell,
Superior Court Judge Presiding