

STATE OF NORTH CAROLINA
COUNTY OF MITCHELL

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DHR 06333

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| <p>Lacey Queen Petitioner,</p> <p>v.</p> <p>NC Department of Health and Human Services Respondent.</p> | <p>FINAL DECISION</p> |
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This matter was heard remotely before the Honorable David F. Sutton, Administrative Law Judge, on March 17, 2021, with all participants appearing via Microsoft Teams.

APPEARANCES

For Petitioner: Steven Snyder
2267 Old NC 226
Spruce Pine, NC 28777

For Respondent: John H. Schaeffer
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

APPLICABLE STATUTES AND RULES

N.C.G.S. §§ 130A-335, 130A-337; 15A NCAC 18A .1950, .1955; 2013 Food Code.

ISSUE

Did the Mitchell County Health Department have reasonable grounds to issue the Notice of Intent to Suspend or Revoke Petitioner's Food Stand permit?

EXHIBITS ADMITTED INTO EVIDENCE

Respondent's Exhibits A, B, C, D, E, F, G, H, I, and J were admitted into evidence without objection. Petitioner's Exhibits B, C, D, E, G [sic], H, I, J, and K, all of which related to water quality, were excluded per the Tribunal's ruling on Respondent's Motion in Limine prior to the hearing. Furthermore, Petitioner's Exhibits M and N, both of which related to Petitioner's potential damages, were also excluded in the same ruling. Petitioner's Exhibits A and L were marked but not offered or admitted into evidence.

WITNESSES

For Respondent: Alan McKinney
 Leslie McKinney

For Petitioner: John Silver
 James Emory

Petitioner had listed Keith Holtsclaw, Steve Miller, and Matt Mazzuckelli as witnesses. However, those witnesses were subject to Respondent's Motion in Limine and Petitioner's counsel stated they would not testify. The Tribunal granted Respondent's Motion in Limine as to those three witnesses and they were precluded from testifying. The Tribunal, in the same order, limited the scope of testimony from John Silver and James Emory to issues contained in the Respondent's Notice of Intent to Suspend.

FINDINGS OF FACT

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 factual findings that are material to the resolution of the dispute presented in this case. See Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993), aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993) (recognizing "the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.")

In making the following findings, the Undersigned has weighed all of the evidence and assessed the credibility of the witnesses, taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, 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

Petitioner's Permit

1. On May 2, 2017, the Mitchell County Health Department issued a Permit to Petitioner Lacey Queen to operate a Food Stand known as the Tin Shed at 2598 Altapass Highway, Spruce Pine, North Carolina. (Respondent's Exhibit B).

2. The permit was issued by John Silver, an Environmental Health Specialist with the Mitchell County Health Department.

3. Mitchell County is one of three County Health Departments that comprise the Toe River Health District.

Respondent's Notice of Intent to Suspend

4. Leslie McKinney has been an Environmental Health Specialist since 2006.
5. Her primary duties as an Environmental Health Specialist involve inspecting and permitting food establishments, among other things.
6. Ms. McKinney worked for the Toe River Health District in Avery County from 2006 through December 2017.
7. In February 2018, Ms. McKinney transferred to Mitchell County, essentially switching positions with John Silver who transferred to Avery County.
8. Soon after starting in Mitchell County, Ms. McKinney received a telephone call from Petitioner about Petitioner's desire to build a barbeque pit near her Food Stand.
9. Ms. McKinney conducted a site visit to Tin Shed in early March 2018, but during that visit did not notice the well head or the septic system for the establishment.
10. Following that site visit, Ms. McKinney had questions about the feasibility of a barbeque pit and discussed them with Patrick Muse, the Regional Supervisor for Food & Lodging.
11. Later in March 2018, Ms. McKinney and Mr. Muse returned to the Tin Shed property to discuss the barbeque pit plans with Petitioner.
12. During that visit, Ms. McKinney and Mr. Muse asked about the well and the septic system, which were pointed out to them.
13. Both Ms. McKinney and Mr. Muse advised Petitioner that both the well and the septic system appeared to be too close to her Food Stand.
14. Following that second visit, Ms. McKinney was aware of and involved in discussions with Mitchell County Health Department employees and representatives of the North Carolina Department of Health and Human Services, Division of Public Health, Environmental Health Section, in which Ms. McKinney and Mr. Muse's concerns about the well and septic were discussed.
15. Arrangements were then made to make a return visit to Petitioner's property with representatives from both the County and the State.
16. On April 17, 2018, Ms. McKinney and Mr. Muse returned to the Tin Shed site along with Diane Creek, the Toe River Health Director, and Alan McKinney, a Regional Soil Scientist for the Environmental Health Section. John Silver also attended the meeting.

17. Alan McKinney is a Regional Soil Scientist with the State, working as a resource for local health departments in his assigned area of the state.

18. As a Regional Soil Scientist, Mr. McKinney has specialized knowledge and training in on-site wastewater systems, also known as septic systems, including their design, components, space and soil requirements, interaction with the land, and the various laws and rules that pertain to septic systems.

19. Upon arrival at the Tin Shed, Mr. McKinney established the boundaries for the septic tank on the property, as well as the drain field.

20. Mr. McKinney then located the well casing and measured the distance from the well casing to the septic tank.

21. The distance was less than 50 feet, specifically 49 feet, 8 inches.

22. Mr. McKinney measured the distance two times because the first time he had Mr. Silver assist him and Mr. McKinney noted Mr. Silver allowed for too much slack in the measuring tape by pulling it over top of the well and down the side.

23. Mr. McKinney then measured the distance from the well casing to the distal end of the drain field, which once again was less than 50 feet.

24. Mr. McKinney measured the distance from the septic tank to the closest building foundation and found it was less than 5 feet, specifically 4 feet 9 inches.

25. Mr. McKinney then noted that the drain tiles led from the septic tank down a hill, rather than following the contour of the ground as required by rule.

26. Mr. McKinney noted that the proximal end of the drain field was dry, while the distal end was wet and under pressure.

27. Mr. McKinney advised Petitioner that the system was at risk for imminent failure.

28. Prior to arriving at the property, Mr. McKinney had requested a copy of any permit on file for the septic system but learned that none was found.

29. Mr. McKinney identified exhibits of the applicable statutes and rules for well and septic systems in the State of North Carolina. (Respondent's Exhibits E, F, G, and H).

30. Following the April 17, 2018 site visit, Mr. McKinney shared his findings with representatives of both the State and County.

31. Leslie McKinney was then ordered by Patrick Muse to issue a Notice of Intent to Suspend the Petitioner's Permit.

32. This was the first Notice of Intent to Suspend that Ms. McKinney had to issue in her 12 years as an Environmental Health Specialist.

33. She wrote a Notice of Intent to Suspend by hand, using a form she had found in the office. (Respondent's Exhibit C).

34. The handwritten Notice of Intent to Suspend was dated April 26, 2018 and Ms. McKinney delivered it to Petitioner, but Petitioner refused to sign it.

35. Upon returning to the office, Ms. McKinney discovered that she had used an old form for the Notice of Intent to Suspend.

36. She obtained the current form and completed it with some assistance from Alan McKinney.

37. The new, corrected form of Notice of Intent to Suspend was dated May 11, 2018 and was delivered to Petitioner by Ms. McKinney. (Respondent's Exhibit D).

38. Petitioner signed the Notice of Intent to Suspend issued on May 11, 2018.

39. Ms. McKinney identified exhibits of the applicable statutes and rules for well and septic systems in the State of North Carolina. (Respondent's Exhibits E, F, G, and H).

40. Ms. McKinney also identified relevant sections of the 2013 Food Code. (Respondent's Exhibits I and J).

41. Petitioner called John Silver as a witness.

42. Mr. Silver is now an Environmental Manager for a mining company and is no longer with the Toe River Health District.

43. In 2017, Mr. Silver worked for Mitchell County inspecting restaurants and issuing permits.

44. Mr. Silver was contacted by Petitioner who wanted to open a retail store to sell USDA pork products, as well as operate an ice cream shop.

45. At some point after opening the retail facility, Petitioner applied for a Food Stand permit.

46. The normal procedure prior to issuing a Food Stand permit would have been for Mr. Silver, as Environmental Health Specialist, to look at the well and the septic system. Because he was the only Environmental Health Specialist working in the County at the time, Mr. Silver did not follow normal procedure when he issued a Permit to Petitioner Lacey Queen to operate a Food Stand in May 2017.

47. Petitioner filed a Petition for Contested Case on May 16, 2018.
48. Petitioner's Food Stand remained open until the fall of 2018.
49. In the fall of 2018, Petitioner voluntarily closed her Food Stand operation and has not since re-opened.
50. Petitioner voluntarily dismissed her Petition on November 27, 2018.
51. Petitioner's Contested Case Petition dated November 18, 2019, was re-filed on November 19, 2019.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to chapters 131E and 150B of the North Carolina General Statutes.
2. All parties have been designated correctly, and there is no question as to misjoinder or nonjoinder.
3. The North Carolina Department of Health and Human Services, Division of Public Health, and the local Health Departments are authorized to insure that all on-site wastewater/septic systems meet the standards set by the North Carolina General Statutes and the North Carolina Administrative Code to insure the safety and general welfare of the public.
4. N.C.G.S. § 130A-335(a) states "A person owning or controlling a residence, place of business or a place of public assembly shall provide an approved wastewater system. Except as may be allowed under another provision of law, all wastewater from water-using fixtures and appliances connected to a water supply source shall discharge to the approved wastewater system. A wastewater system may include components for collection, treatment and disposal of wastewater."
5. N.C.G.S. § 130A-337(a) states "No system of wastewater collection, treatment or disposal shall be covered or placed into use by any person until an inspection by the local health department has determined that the system has been installed or repaired in accordance with any conditions of the improvement permit, the rules, and this Article."
6. 15A NCAC 18A .1950(a) states that "Every sanitary sewage treatment and disposal system shall be located at least the minimum horizontal distance from the following: (1) Any private water supply source, including any well or spring – 100 feet; . . . (10) Any building foundation – 5 feet."
7. 15A NCAC 18A .1955(g) states in part that "Nitrification trenches shall be constructed as level as possible but in no case shall the fall in a single trench bottom exceed one-fourth inch in 10 feet as determined by an engineer's level or equivalent. When surface slopes are

greater than two percent, the bottom of the nitrification trenches shall follow the contour of the ground.”

8. The septic system located at Petitioner’s Tin Shed food stand location falls within the scope and authority of the Mitchell County Health Department and the Toe River Health District.

9. Petitioner had the burden to prove, by a preponderance of the evidence, that Respondent deprived her of property; or otherwise substantially prejudiced her rights and that Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; or, acted arbitrarily or capriciously when Respondent issued the May 11, 2018 Notice of Intent to Suspend or Revoke Permit to Petitioner. N.C.G.S. § 150B-25.1

10. The preponderance of the evidence is that Petitioner has failed to meet that burden. The septic system in use on Petitioner’s property did not meet the requirements for an approved sanitary sewage treatment and disposal system in that the minimal distance between the septic tank and the private well supply was less than 100 feet; the minimal distance between the septic tank and the closest building foundation was less than 5 feet; and the drain lines of the sanitary sewage treatment and disposal system did not follow the contour of the ground.

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent had a reasonable basis to issue the Notice of Intent to Suspend or Revoke Petitioner’s Permit and that Respondent did not deprive Petitioner of her property; nor otherwise substantially prejudiced Petitioner’s rights and that Respondent did not exceed its authority or jurisdiction; did not act erroneously; did not fail to use proper procedure; nor, did Respondent act arbitrarily or capriciously when Respondent issued the May 11, 2018 Notice of Intent to Suspend or Revoke Permit to Petitioner.

NOTICE OF APPEAL

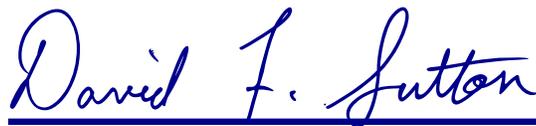
This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 as indicated by 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 26th day of April, 2021.



David F Sutton
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.

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This the 26th day of April, 2021.



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