

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty  
Order Issued to Peter Hansen, d/b/a  
Hansen's Harbor

**ORDER ON MOTION FOR  
SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Eric L. Lipman on February 3, 2012 for an oral argument on the Respondent's Motion for Summary Disposition.

Gina D. Jensen, Assistant Attorney General, appeared on behalf of the Minnesota Department of Health ("Department"). David A. Shulman, Shulman and Associates, appeared on behalf of the Respondent Peter Hansen d/b/a Hansen's Harbor ("Hansen's Harbor").

**STATEMENT OF THE ISSUES**

1. Is it impossible for the Respondent, Hansen's Harbor, to comply with the requirements of Minnesota Rules, Part 4630.0800, subp. 1?
2. If so, is Hansen's Harbor entitled to judgment as a matter of law?

The Administrative Law Judge concludes that it is not impossible to meet the requirements of Minn. R. 4630.0800, subp. 1, and that as a result, Hansen's Harbor is not entitled to judgment as a matter of law.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

**IT IS HEREBY ORDERED THAT:**

1. Hansen's Harbor's Motion for Summary Disposition is DENIED.
2. Within five business days of the date of this Order, counsel shall confer with each other as to mutually convenient times during the weeks that begin on April 16 and April 23, 2012, in which they could participate in a 30-minute scheduling conference. The conference will be conducted by way of "meet me" telephone conference call.



non-conforming building or use.”<sup>5</sup> The zoning code contemplates the gradual elimination of non-conforming uses, like marinas and manufactured home parks, within the B-2 zone.<sup>6</sup>

Operating a marina or a manufactured home park is a conditional use under the county zoning regulations within areas that are denominated as Commercial Recreation – or CR districts.<sup>7</sup>

In 1987, the Minnesota Legislature enacted the following water quality provisions:

All manufactured home parks shall be well drained and be located so that the drainage of the park area will not endanger any water supply. No wastewater from manufactured homes or recreational camping vehicles shall be deposited on the surface of the ground. All sewage and other water carried wastes shall be discharged into a municipal sewage system whenever available. When a municipal sewage system is not available, a sewage disposal system acceptable to the state commissioner of health shall be provided.<sup>8</sup>

In 2005, Hansen’s Harbor hired J & J Excavating to perform a compliance analysis of this system. On October 5, 2005, J & J Excavating asserted that it was unable to determine whether the system was operating in conformance with current standards.<sup>9</sup>

On November 27, 2005, Hansen’s Harbor submitted plans to Goodhue County for a new sewage disposal system. These plans did not result in the issuance of the requested permits due to design concerns of County engineers.<sup>10</sup>

On December 22, 2006, a new design plan was submitted to Goodhue County for a permit to install a new sewage disposal system. Goodhue County officials again denied the building permit necessary for the installation of the system, noting what its engineers perceived as potential problems with the design.<sup>11</sup>

---

<sup>5</sup> Goodhue County Zoning Ordinance, Article 6, Section 1, Subdivision 7; see also, Attachment C to the Wozniak Affidavit.

<sup>6</sup> Wozniak Affidavit at ¶¶ 3 and 6.

<sup>7</sup> Attachments C and D to the Wozniak Affidavit.

<sup>8</sup> 1987 Laws of Minnesota, Chapter 195, Section 1 (codified at Minn. Stat. § 327.20, subd. 1 (2)); see also, Minn R. 4630.0800, subp. 1.

<sup>9</sup> See, Attachment A to the Wozniak Affidavit.

<sup>10</sup> Attachment C to the Petersen Affidavit.

<sup>11</sup> See, Hansen Memorandum of Law, at 2.

In the spring of 2007, however, County officials did issue authorizations for the placement of backfill on the property – presumably as part of a larger project for a replacement of the current septic system.<sup>12</sup>

Department officials inspected Hansen’s Harbor on two occasions in late 2010. On each occasion, the inspector noted that Hansen’s Harbor does not have in place a sewage disposal system that is “acceptable to the commissioner of health,” under Minn. R. 4630.0800.<sup>13</sup>

In November of 2010, Hansen’s Harbor submitted a newly revised set of plans to Goodhue County, and this proposal was also rejected by the County.<sup>14</sup>

On February 16, 2011, the Department sent by certified mail a “ten day” letter to Hansen’s Harbor alleging a violation of state health rules on the grounds that it did not have an approved sewage disposal system in place. The Department stated that if a response to the letter was not received within 10 days, the Department might take additional enforcement action, including the assessment of an administrative penalty.

On May 2, 2011, the Department conducted a third inspection at Hansen’s Harbor and again concluded that an acceptable sewage disposal system was not in place.<sup>15</sup>

On May 5, 2011, the Department held an “enforcement forum” to decide on an appropriate enforcement action for Respondent’s violation of Minn. R. 4630.0800, subp. 1 (2011). The enforcement forum participants determined that the issuance of an administrative penalty order was appropriate. They further concluded Hansen’s Harbor should “install an approved sewage disposal system, or provide a certificate of compliance, consistent with Minnesota Pollution Control Agency requirements, for the current system, in full accordance with the requirements of Minnesota Rules, part 4630.0800, subp. 1, and Minnesota Rules, Chapter 7080.”<sup>16</sup>

On June 3, 2011, the Department issued an Order to Hansen’s Harbor assessing a nonforgivable civil penalty in the amount of \$500 and a forgivable civil penalty in the amount of \$4,500.<sup>17</sup>

---

<sup>12</sup> See, Attachment 2 to the Shulman Affidavit; Attachment D to the Wozniak Affidavit; Attachment A to the Petersen Affidavit.

<sup>13</sup> Peloquin Affidavit at ¶¶ 6 and 7; see *generally*, Minn. Stat. § 327.20, subd. 2 (“The state Department of Health may prescribe such rules for the operation and maintenance of manufactured home parks or recreational camping areas and for safeguarding the health and safety of persons occupying licensed manufactured home parks and recreational camping areas as the department shall deem to be necessary and expedient. Such rules pertaining to health and safety shall have the force and effect of law”).

<sup>14</sup> Attachment D to the Petersen Affidavit.

<sup>15</sup> Peloquin Affidavit at ¶ 9.

<sup>16</sup> *Id.*, at ¶¶ 10 through 15 and Attachment B.

<sup>17</sup> *Id.*, at ¶ 16.

On June 17, 2011, Respondent submitted a written request for a contested case hearing to review the Department's assessment of the Order.<sup>18</sup>

## Analysis

For its part, Hansen's Harbor asserts that it would gladly install a septic system on its property that meets the requirements of Minn. R. 7080 (and has the approval of the Commissioner of Health), and that it has spent time and money with local engineers to accomplish this result.<sup>19</sup> It argues that a compliant system would have been installed long before the Health Department inspections in 2010, but for the unwillingness of Goodhue County officials to issue construction permits authorizing the installation work.

The Department of Health argues that there are disputed issues of material fact with respect to the County's actions, and the sufficiency of the proposed solutions, that make summary disposition in favor of Hansen's Harbor inappropriate.

The Administrative Law Judge agrees.

First, while the Department expresses doubt as to whether the impossibility of performance – a doctrine that is familiar in the law of private contracting – is ever appropriate as a defense to the imposition of civil penalties, in at least one other case, the Minnesota Court of Appeals has held that impossibility of compliance can be a basis for avoiding the imposition of civil penalties.

In *Metro Gold, Inc. v. Coin*, the issuer of a check lapsed into a coma and died before he had received notice from the payee that the check had been dishonored. Because it was impossible for the issuer of the check to learn of the dishonor, or have an opportunity to cure the shortfall, the appellate panel concluded that the application of statutory civil penalties for the dishonored check was inappropriate.<sup>20</sup> In the view of the Administrative Law Judge, if Minnesota law did not punish, through civil penalties, the failure to do an impossible task in *Metro Gold*, it is available to Hansen's Harbor as a potential defense to other civil penalties.

With respect to the regulatory duty, Minn. R. 4630.0800, subpart 1 requires that discharges of "sewage and water carried wastes" from manufactured home parks only occur into municipal sewage systems or systems that were earlier-approved by the Commissioner of Health. Municipal sewer service is not available to Hansen's Harbor. Likewise, Respondents have not yet obtained the approvals needed to install a compliant individual sewage treatment system. There is another, if unpalatable alternative, by which Hansen's Harbor can meet its regulatory obligation: It can refrain

---

<sup>18</sup> *Id.*, at ¶ 17.

<sup>19</sup> Attachment 2 to the Shulman Affidavit; Attachment B to the Petersen Affidavit.

<sup>20</sup> *Metro Gold, Inc. v. Coin*, 757 N.W.2d 924, 927 (Minn. App. 2008).

from any discharges of sewage or other water carried wastes at this site until a conforming system is available.

It is understood that shuttering the park and marina until a conforming sewer system is in place is not favored by the business owners, or the staff and customers who reside at the site during the year – and may even be an unwelcome result for Goodhue County and its taxpayers – but this is not enough. Merely because an alternative is unwelcome and severe does not render it impossible to perform.

Likewise important, the type of construction that is contemplated by the installation of a new septic system is no small matter. Installation of an 8,000-gallon pump tank and a “pressurized trench drainfield system” is more than the “non-structural repairs and incidental alterations which do not extend or intensify the non-conforming building or use.”<sup>21</sup> To the contrary, installation of a new septic system is a structural alteration whose purpose is to extend the use of this site as a home park and marina.

For these reasons, the key decision-making as to future operations of Hansen’s Harbor lies with County officials. The County can either continue Hansen’s Harbor on toward the path of eliminating this non-conforming use at the current site,<sup>22</sup> or, alternatively it can issue the needed construction permits, perhaps with an adjustment of the zoning map, allowing its continued operation.

Because compliance with the standards of Minn. R. 4630.0800, subpart 1 is not impossible, summary disposition in favor of Hansen’s Harbor is not appropriate. The matter will be set on for an evidentiary hearing.

**E. L. L.**

---

<sup>21</sup> Compare, Goodhue County Zoning Ordinance, Article 6, Section 1, Subdivision 7 and Attachment 2 to the Shulman Affidavit with *State v. Thibodeau*, C3-96-2419, slip op. at \*2 (Minn. App. 1997) (unpublished) (“But the plain and ordinary meaning of ‘extend’ includes a deck as a prohibited alteration” to a manufactured home park); *State v. Loomis*, C6-96-1278, slip op. at \*3 (Minn. App. 1997) (unpublished) (“Loomis’s conversion of the area in question from an undeveloped area where a tent could be pitched to five campsites that have electrical, water, and sewer connections, and often sundecks and gardens, qualifies as an alteration or addition”).

<sup>22</sup> See, *Freeborn County v. Claussen*, 203 N.W.2d 323, 325 (Minn. 1972) (The public policy behind the prohibition of nonconforming uses is to increase the likelihood that such uses will in time be eliminated due to obsolescence, exhaustion, or destruction); *County of Lake v. Courtney*, 451 N.W.2d 338, 341 (Minn. App.) *review denied* (Minn. 1990) (the underlying policy of nonconformity ordinances is to “regulate existing non-conformities and to provide for their gradual elimination”).