

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

William M. Chasanov, Esquire
Brown Shiels Beauregard & Chasanov
10 East Pine Street
Georgetown, DE 19947

Matthew P. Chesser, Esquire
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, Delaware 19904-6750

Re: ***Hughes v. Melson***
C.A. No. 02M-07-018-RFS

Submitted: November 20, 2003
Decided: December 2, 2003

Dear Counsel:

On July 31, 2002, plaintiff, the Department of Natural Resources and Environmental Control, filed a suit by and through its Secretary (hereafter "DNREC" or "State"), against defendant Ward A. Melson (hereafter "Melson"). Defendant owns a manufactured home community named Concord Mobile Home Park (hereafter "Concord") near Seaford, Sussex County, Delaware. On December 16, 2002, summary judgment was entered against Melson. Thereafter, evidence was taken in penalty phase proceedings on February 15, 2003 and on May 16, 2003. Transcripts of the proceedings were filed recently. After review of the record and arguments, Melson shall pay a fine of \$200 per day for the period of May 3, 2002

through January 31, 2003 plus reimbursement of the State's expenses and costs of this action.

FINDINGS

- 1) Concord was established in 1963.
- 2) Concord was purchased by Melson in 1977.
- 3) Concord has 18 manufactured homes which require waste water disposal.
- 4) Thirteen homes are supported by one septic and disposal system. This system has a cesspool, distribution box, and a drainage field.
- 5) On and before January 31, 2002, Melson dug a trench and installed pipe with stone to attempt to prevent waste water overflows for the system that served the 13 homes. The pipe was first manufactured in the 1980's, and it was not part of the system which Melson purchased.
- 6) On January 31, 2002, waste water had ponded at the end of the trench as a result of an overflow.
- 7) The area of sewage was approximately 75 feet long and 50 feet wide and the waste water was approximately 4 inches deep.
- 8) The odor resulting from the overflow was prominent which resulted in a complaint to DNREC, and thereafter the spill was discovered.
- 9) Melson was not authorized by DNREC to alter the septic system or to extend it by the trench with pipe and stone.
- 10) Melson caused raw sewage to overflow on January 31, 2002.

11) Melson offered an explanation that the liquid was rainwater.

12) This explanation is not credible, and the State's evidence is more persuasive.

13) Melson offered an explanation that the pipe and trench were part of new road construction.

14) This explanation is not credible, and the State's evidence is more persuasive.

15) On April 2, 2002, Melson was served with "Notice of Conciliation and Secretary's Order" (hereafter "Order"), and Melson failed to answer it. Personal Service was made by leaving the Order with his wife, and he has no credible reason to excuse the default.

16) While supporting the summary judgment entered against Melson on December 16, 2002, Melson's failure to answer the Order admitted that:

(i) On January 31, 2002, the Department responded to a complaint regarding odors by performing an inspection at Concord Mobile Home Park, located on County Road #20 near Seaford, Sussex County, Delaware. Concord Mobile Home Park is owned by Respondent. Department staff found thirteen (13) mobile homes on the western most road in the park sharing a common septic tank. The tank was fitted with a float system that would allow Respondent to see the effluent level from the outside of the tank. In a shed adjacent to the septic tank, a pump had been installed that pumps wastewater from the septic tank, under pressure, to an excavated trench that extended from the septic system to a wooded area. At the end of the trench was a pool of wastewater overflow approximately 50 feet wide by 75 feet long. An attempt was made to speak with Respondent that day but Respondent refused.

(ii) On February 1, 2002, Environmental Protection Officer Cook visited the home of Respondent to inform him of the illegal discharge. At that time, Respondent admitted that he had added a seepage lateral in the wooded area and installed

pressure piping from the existing onsite waste water system to the seepage trench. Respondent was cited accordingly for the disposal of waste in a manner not approved by DNREC; and

(iii) On February 6, 2002, an inspection of the five (5) mobile homes on the eastern most road in the park was performed. The first two mobile homes showed no visible discrepancies. The third mobile home showed signs of previous effluent overflow and a large depressed area was evident at the rear of the home indicating a possible collapse of the septic tank. The fourth mobile home had a visible steel septic tank that had caved in and effluent was visible. The fifth mobile home had a recently constructed cesspool that was full and showed signs of recent overflow of effluent onto the ground.

17) The Order became effective on April 23, 2003. Compliance with the terms of the Order was required within a 10-day period, starting May 3, 2002, and the following actions were required:

- 1) Upon receipt of this Order, employ the services of a Class F Liquid Waste hauler licensee to pump out the system on a continuous basis to prevent surface discharge.
- 2) Submit a written record of all pump-out receipts to the Department on a monthly basis until a replacement treatment and disposal system is in place.
- 3) Within 10 days of this Order, employ the services of a Class E System Contractor licensee to disconnect and remove all piping, both pressurized and gravity flow, that was recently installed without a permit.
- 4) Employ the services of a Class D Site Evaluator licensee to perform a site evaluation and submit the site evaluation to the Department within 30 days of this Order.
- 5) Employ the services of a Class C System Designer licensee to design replacement on-site wastewater treatment and disposal system(s) to service all the mobile homes located at Concord Mobile Home Park.

- 6) Submit an application for the construction and operation permit for the replacement system to the Department within 30 days of the Site Evaluation Approval.
- 7) Employ the services of a Class E System Contractor licensee to complete the construction and installation of the replacement wastewater treatment and disposal system within 45 days of permit issuance.

18) Melson has not complied with the Order.

19) The life expectancy of the septic system serving the 13 homes was 20 years.

20) The aforesaid system had been in place since 1963.

21) The septic system serving the 13 homes exceeded its life expectancy, and it failed on or before January 31, 2002.

22) The septic systems for 3 of the remaining 5 mobile homes failed on or before February 6, 2002.

23) All the failed systems posed a hazard to public health.

24) DNREC incurred \$5,345.16 in expenses in this action.

CONCLUSIONS

(a) Melson's conduct of constructing and modifying the onsite waste water system at Concord, without a permit from DNREC, violated *7 Del.C. § 6003(b)(2)* and Section 3.02000 of the Regulations Governing the Design Installation, and Operation of Onsite Waste Water Treatment and Disposal Systems.

(b) Melson's conduct in causing or contributing to the discharge of effluent onto the ground without a permit from DNREC violated *7 Del.C. § 6003(a)(2)*.

(c) The Order became effective on April 23, 2002, and Melson was required to comply with the terms under 7 *Del.C.* § 6005(b)(2) with the first requirement due on May 3, 2002. Melson has not satisfied any requirement.

(d) Violations of the Order are punishable by civil penalty of not less than \$1,000.00 nor more than \$10,000 plus costs. Additionally, each day of continued violation shall be considered a separate violation under 7 *Del.C.* § 6005(b)(1),(c).

(e) The penalty for each day of violation began on May 3, 2002.

(f) The first penalty hearing was scheduled for January 31, 2003, and, at that time, Melson had violated the Order for 273 days. Evidence was taken on May 16, 2003, and the penalty phase ended. The State suggested a 273 day period for assignment of a fine. This period is accepted although Melson has greater exposure.

(g) The fine is subject to suspension under the Court's inherent authority to do justice. *DNREC v. Front Street Properties*, 808 A.2d 1204 (Del. 2002).

(h) As discussed below, \$800 of the minimum penalty of \$1,000 per day should be suspended for \$200 per day for the 273 day period totaling \$54,600.00 plus \$5,345.16 in expenses with costs of this action.¹

(i) In calculating the penalty, the following factors are considered:

- 1) The daily amount of \$200 adequately addresses the public interest that failed systems must be replaced;

¹ DNREC argued for a \$250 per day fine while Melson claimed his exposure should be limited to expenses of \$5,345.16.

- 2) The figure deters Melson from failing to comply with the terms of the Order;
- 3) Melson offered disingenuous explanations for his actions at Concord and with DNREC;
- 4) Melson is primarily culpable as Concord's owner;
- 5) Melson had two prior environmental violations at Concord;
- 6) The nature and circumstances of the problem concern Melson's failure to comply with the Order, after the septic systems at Concord failed. Melson resorted to self help in violation of environmental laws and regulations;
- 7) Melson's ability to pay includes his income from Concord. The exact amount was not established at the hearings, and, consequently, this is not an active factor in this decision. The amount awarded is, however, substantially less than the statutory minimum;
- 8) Melson realized an economic benefit or savings by failing to comply with the Order to attempt to save the cost of compliance;
- 9) The gravity of the offense is significant. Melson is required to obey the Order and cannot pollute the environment. Melson has ignored his responsibilities which forced DNREC to commit its limited resources in this enforcement action. DNREC's capacity to protect the environment elsewhere was diminished;
- 10) Melson tendered a no contest plea for willfully/negligently discharging a pollutant into surface or ground water without a permit for the circumstance surrounding the January 31, 2002 spill, and a judgment of guilt was entered in *State v. Ward Melson t/a Concord Mobile Home Park*, ID #0202001882. A \$2,500 fine was assessed which is taken into account to prevent an excessive penalty.

j) Considering the foregoing, a minimum fine of \$1,000 per day of violation is imposed for the 273 day period. \$800 of that fine is suspended. \$200 per day is assessed.

Judgment is entered against Melson in the amount of \$59,945.16 (\$54,600.00 + \$5,345.16) plus costs and interest at the legal rate from date of judgment. Melson was liable for a much larger sum. However, the amount imposed satisfies the public and private interests at stake in this case.

IT IS SO ORDERED.

Richard F. Stokes

Original to Prothonotary