

Chet Janik

From: David Stoker <dstoker@cstmlaw.com>
Sent: Tuesday, February 6, 2018 1:44 PM
To: Chet Janik
Subject: septic investigations
Attachments: violations.pdf

Attorney – Client Privileged

Chet,

At your request I am writing to confirm our phone call from yesterday relating to Health Department septic inspections. As I previously advised you, and as mentioned by Commissioner Melinda Lautner, I had a phone conversation with Commissioner Lautner last week to review some of our prior opinions concerning enforcement of the environmental laws and regulations concerning problematic septic systems, and as noted in the opinion letters from this office to you from October 23, 2017, concerning *Point of Sale Regulation*, and from December 26, 2017, on *County/Township Liability for Private Septic Waste Contamination*. As Commissioner Lautner apparently mentioned, I did indicate that I believed the Health Department currently had the authority to enforce their regulations to address problematic septic systems, and this could include going onto private property to make necessary inspections as to compliance with the law. However, I did also indicate that the Department should get a search warrant through the Prosecutor and the courts to assure such inspections will not create further legal issues.

I would note that the *ENVIRONMENTAL HEALTH REGULATIONS FOR LEELANAU COUNTY HEALTH DEPARTMENT*, as posted online < <http://www.bldhd.org/local/upload/file/leelacode.pdf> > , include a number of sections on how to enforce the Health Department Sanitary Code. These include seeking criminal, civil infraction, and civil actions for such enforcement (*copy of relevant sections attached*).. Section 5.171 expressly outlines the procedure to be used by the health department for obtaining samples from private property as part of investigations of a potential contamination issue.

Should you have any further questions, please let me know.

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CHAPTER V – CODE ENFORCEMENT

Section 5.100

VIOLATION OF THE CODE

Upon receipt of information that there is a violation of the Code or its regulations the Board of Health, or the health officer or his/her designated representative may:

- A. Issue a Cease and Desist Order and suspend any permit, Certificate or other approval issued pursuant to this Code to the owner or other person violating this Article, and afford the owner or other interested person Notice and Opportunity for Hearing as provided in Sec. 5.19 of this Article;
- B. Request the prosecuting attorney in the County where the violation has occurred or is occurring to commence an action to enjoin the act or practice and obtain injunctive relief and abatement upon a showing that a person has violated, or is continuing to violate, any Article or provision of the Code in a manner that may become injurious to public health, safety or welfare. Upon approval of the Board of Health, the health officer may obtain the services of a special attorney to commence and prosecute such action for injunctive relief or abatement. The action authorized by this paragraph shall include all injunctive relief to restrain, prevent or correct a violation of law, rule or order which the health officer has a duty to enforce; or to restrain, prevent or correct any activity or condition which the health officer believes "adversely effects the public health" as authorized by 1978 PA 368, part 127; MCLA 333.1101 et seq.; MSA 14.15 et seq., or other law. In addition to injunctive or other relief as authorized herein, the health officer may seek costs of avoiding, correcting, removing or abating the violation requiring immediate response, including any other costs authorized by law in such action.

Section 5.110

RESTRAINING ORDER

Notwithstanding any other provision herein, if a health officer reasonably believes that any activity or condition in violation of this Code adversely affects the public health, then such health officer is authorized to seek to obtain an injunction to restrain, prevent or correct any such activity or condition and to assess the costs thereof, including the costs of coming upon the premises and correcting, abating, removing or remediating any such activity or condition in the event that the owner refuses to take such action on a reasonable request.

Section 5.120 CIVIL FINES OR PENALTY

Any person who violates a provision of the Code, or makes a false statement or representation with respect to any material matter under this Code, should be liable for fines or civil penalties of not more than \$1,000.00. If a violation is of a continuing nature, then each day that a violation occurs shall be considered a separate offense and shall be subject to a separate fine or penalty for each such occurrence. Any person who violates a provision of this Code, or who makes a false statement under the Code, shall be subject to an assessment of costs for enforcement action authorized and required, including, but not limited to the cost of abatement, remediation, prevention of further violation, expert witness fees and actual attorney fees. Any enforcement action taken under this provision shall not constitute a waiver of any other claims or remedy of a health officer or the Health Department as provided for in this Code and Regulations, or other law.

Section 5.130 INJUNCTION

Notwithstanding the existence of any other remedy, a health officer, without posting a bond, may maintain an injunction or equitable action to restrain, prevent or correct the violation of law, rule, or order which the health officer has the duty to enforce, or restrain, prevent or correct any activity or condition which the health officer reasonably believes adversely affects the public health. The costs of such action, including the costs of restraining, preventing or correcting such violation, and witness fees and attorney fees as authorized by law, shall be assessed against the defendant.

Section 5.140 ISSUANCE OF A CIVIL CITATION

If a local Health Department representative or health officer believes that a person is violating a provision of this code or an order issued pursuant to this code which the local Health Department has the authority and duty to enforce, the representative may issue a citation at that time or not later than ninety (90) days after discovery of the alleged violation. The citation shall be written and shall state with particularity the nature of the violation including reference to the section, rule, order or regulation believed to be, or have been, violated, the civil penalty established for such violation, if any, and a right to appeal the citation pursuant to Section 2462 of 1978 PA 368; MCLA 333.2462; MSA 14.15(2462); or 5.19 of this Code and its Regulations. The citation shall be delivered or sent by certified mail to the alleged violator. This provision is optional, and a decision by the health officer not to issue a citation shall not be construed to waive any other rights or remedies authorized by law or this Code.

A. The alleged violator may petition the local Health Department for a

Hearing not later than twenty (20) days after receipt of the citation, and the Hearing shall be held within thirty (30) days after receipt of the petition. The Administrative Hearing shall be conducted in accordance with Section 5.19 of this Code. After the Hearing, the health officer may affirm, dismiss or modify the citation. The decision of the local health officer shall be final, unless within sixty (60) days of the decision the Board of Health or its duly delegated committee grants review of this citation, and after such review, affirms, dismisses or modifies the citation.

- B. A person aggrieved by a final decision of the health officer or the Board of Health or its designated committee, may petition for review the Circuit Court of the county where the property or premises is located. In the event that the sewage disposal system or water supply crosses the boundaries of two counties, a petition for review may be filed not later than sixty (60) days following receipt of the final decision from the health officer, Board of Health or its designated committee, and not later than the time period provided by the Michigan Court Rules, as amended. The time periods for appeal shall begin to run the day after the date of such final decision.
- C. A civil penalty for violation pursuant to this Section shall be final if a petition for an Administrative Hearing or Review is not received by the Department or Board of Health within the time specified in this Section. In the event a civil penalty is not paid, the health officer is authorized to commence a civil action to collect the same in the County in which the violation occurred or the defendant resides, and such action shall be an addition to any other action authorized by law.
- D. In addition to the authority to issue and serve a civil citation as described above, the Health Officer or a designee of the Health Officer may issue or serve an appearance ticket pursuant to 1927 PA 175, Chapter 4; MCLA 764.9(a)-(g); MSA 28.868(1)-(7). The Sheriff's Department of the county in which the violation is alleged shall also have authority to issue or serve an appearance ticket pursuant to these regulations and applicable law.

Section 5.150 ASSESSMENT AGAINST THE PROPERTY

If the owner or person violating a provision of this Code refuses on demand to pay such expenses incurred by the Department to abate, correct or remove a violation, unsanitary condition or nuisance under Section 5.151, the sum shall be assessed against the property and shall be collected and treated in the same manner as taxes assessed under the general tax laws of this State.

Section 5.151 REMOVAL OF A NUISANCE

In the alternative, a health officer may petition a Circuit Court for removal of such nuisance, unsanitary condition or violation of this Code, and a Court, upon finding that a violation or nuisance may be injurious to the public health, may order the removal, abatement or destruction of the violation or nuisance at the expense of the defendant, and in such instance any order or bench warrant issued to the sheriff or other law enforcement officer may be fashioned to accomplish such purposes.

Section 5.160 ISSUANCE OF A WARRANT

If an owner of the premises in which a condition causing nuisance, unsanitary condition or person violating the provision of this Code does not comply with an order to such owner or person to avoid, correct or remove such condition which the health officer has reason to believe exists, the health officer may cause such violation, nuisance or unsanitary condition to be removed and may seek a warrant for this purpose. In such event, the owner of the premise shall upon demand pay the reasonable expenses incurred. Warrants shall be based upon facts which establish a reasonable belief that such nuisance, unsanitary condition or violation exists.

Section 5.170 INSPECTIONS AND INVESTIGATIONS

To assure compliance with this Code and its regulations, the local Health Department or a health officer may inspect, investigate or authorize an inspection or investigation to be made of any matter, thing, premise, place, person, record, vehicle, incident or event where a health officer has reason to believe that noncompliance with the laws enforced by a state or a Health Department exists.

Section 5.171 RIGHT TO OBTAIN SAMPLES

An inspection, under Section 5.17, shall include the right to obtain samples where a health officer has reason to believe that there is a likelihood of contamination of surface water, ground water, water supply or other unsanitary conditions. Upon written notice, an owner or occupant of premises for which such inspection is sought shall provide a reasonable opportunity to a health officer or his/her designated representative. In the event an owner or occupant fails or refuses to provide such opportunity for inspection within ten (10) days of such written notice, a health officer shall have the right to petition a Circuit Court for an order enforcing this Section.

Section 5.180 CONVICTION OF MISDEMEANOR

Any person who violates a regulation or provision of this Code is guilty of a misdemeanor, punishable by imprisonment for not more than six (6) months, or a fine of not more than \$200.00 or both, or a fine not in excess of that authorized by 1978 PA 368; MCLA 333.1101 et seq. MSA 14.15 et seq.; or both.

Conviction by jury, court or voluntary plea and acceptance by court under this provision shall not waive any other claim for fines, costs, injunctive or other relief authorized by this Code.

Section 5.190 VARIATIONS

Variations in tests, standards, or general requirements may be permitted by the Health Office based on written policies and procedures established by the department. These policies and procedures shall state specific site conditions and design criteria which must be met. In no case shall a variance be construed to permit the commission of any act that may jeopardize the public health, safety, or welfare of people in Leelanau County.

Section 5.200 HEARINGS AND APPEALS

In the event that an owner or interested person is adversely affected by any determination under this code, the owner or such interested person may request in writing a Hearing before the Board of Health or its designated Committee within Thirty (30) days of the date of such determination. Upon receipt of such request, the health officer shall issue a Notice of Hearing within fifteen (15) days of the receipt of the request, and a Hearing shall be held at the next regular meeting of the Board of Health, or its designated Committee, scheduled for such purposes; provided, that a Hearing shall be conducted not later than sixty (60) days from the date of Notice of Hearing. The Hearing shall be conducted with flexibility in regard to rules of evidence because of the quasi-administrative nature of the proceeding, and the decision of affirming, reversing or modifying, any such determination shall be based upon a majority vote of the Board of Health or its designated committee, and based upon the whole record of testimony and exhibits received at the Hearing. A decision of the Board of Health or its designated committee shall state reasons and grounds for such decision, and the decision shall be in writing, and a copy furnished to the owner, any interested person, and the health officer within thirty (30) days of the decision.

Individual variances from the requirements of these regulations may be made when said Board has adequately determined that all of the following conditions exist:

- a. That no substantial health hazard or nuisance is likely to occur therefrom;