In re: Appeal of Mr. Frank L. Beveridge

ORDER

FINDINGS OF FACT

1. This case is an appeal of the denial by the Virginia Department of Health (the "Department") of a request by Frank L. Beveridge ("Mr. Beveridge" or the "Appellant") that the Department: (1) issue written certification pursuant to § 32.1-165 for a building designed for human occupancy; and (2) issue a permit for the construction of an onsite septic system serving such building.

2. Mr. Beveridge is the owner of record of an approximately 0.17 acre property (the "Property") located in Matthews County at Lot 20, Block 4, Bayton Beach Subdivision.

3. The Property contains a well and an unpermitted onsite sewage disposal system.

4. On or about July 25, 1983, Berryman Pillow, a previous owner of the Property applied to the Matthews County Health Department (the "Local Health Department" or "LHD") for a Sewage Disposal System Construction Permit. The application described a summer cottage on the Property served by a well and pit privy. It proposed construction of a new, two-bedroom cottage on the Property, designed for intermittent use. (*See* Commonwealth's Exhibits (hereinafter, "Com. Ex.") 1-3).

5. Upon investigation, the Local Health Department found a seasonal water table at the surface of the Property with free water at 36 inches below the surface. Accordingly, on August 10, 1983, the Local Health Department denied Mr. Pillow's

application for a permit due to insufficient depth of soil above a seasonal water table. (Com. Ex. 1-3).

6. Mr. Pillow filed a new application on August 4, 1983, requesting a conditional permit for seasonal occupancy of the proposed cottage. (Com. Ex. 4). The Local Health Department inspected the Property to determine suitability for a seasonally-restricted permit but concluded that a permit could not issue because the Property provided insufficient area to install a system enabling the required separation from the drinking-water well. The Local Health Department also noted a shallow seasonal water table at 12 inches, with free water at 42 inches below the surface of the Property. (Com. Ex. 5-6). Consequently, the Local Health Department denied Mr. Pillow's application for a seasonally-restricted permit by letter of August 18, 1983. (Com. Ex. 6).

7. Sometime after the Local health Department denied Mr. Pillow's application for a seasonally-restricted permit, Mr. Beveridge acquired the Property. (Com. Ex. 7-8).

8. On March 13, 1985, Mr. Beveridge filed an application with the Local Health Department for a permit to construct a new well on the Property and a permit to install a septic tank and drainfield system on the Property. The application noted that, at that time, a cottage and pit privy were located on the Property and that the well serving the Property was located on an adjacent lot. On June 6, 1985, the Local Health Department denied Mr. Beveridge's application, citing the earlier evaluations and denials. (Com. Ex. 7-8).

9. On or about April 2, 2004, the Local Health Department received an evaluation and design package (the "Design Package") from Authorized Onsite Soil

Evaluator William Meagher which indicated a seasonal water table at the surface of the Property with free water existing at twelve (12) inches below the surface of the Property. The Design Package did not include an application by Mr. Beveridge to install an onsite sewage treatment system on the Property. The Cover to the Design Package indicated that it concerned "Repair Only." However, the Design Package proposed installation on the Property of a proprietary pre-engineered system which utilized advanced wastewater treatment with dispersal to a soil absorption "pad" installed at 2-3 inches below the surface of the Property. The Design Package showed an existing septic tank and drainfield system on the Property located approximately thirty-six (36) feet from the well serving the Property on the adjacent lot. (Com. Ex. 9).

10. Sometime after April 2, 2004 and prior to May 18, 2004, as a result of reviewing the Design Package, the Local Health Department became aware of the unpermitted drainfield system on the Property. Accordingly, on May 18, 2004, the Local Health Department, issued a Notice of Violation ("NOV") to Mr. Beveridge indicating that the installation and operation of the unpermitted drainfield system violated §§ 12 VAC 5-610-20, *et seq.*, of the Sewage Handling and Disposal Regulations (the "Regulations"). Specifically, the NOV indicated that Mr. Beveridge had violated and continued to violate the Regulations by occupying a dwelling not served by an approved sewage disposal system and by discharging treated or untreated sewage into the soils or waters of the Commonwealth without a permit. The NOV requested that Mr. Beveridge:

- Contact the Local Health Department within five (5) days;
- Cease discharging sewage without a valid permit;
- Cease occupying the dwelling served by an unpermitted sewage system;

- Remove any plumbing fixtures from the dwelling to ensure that no running water was piped into the dwelling without a proper means of sewage disposal; and

- File an application for a permit to install a composting toilet, if desired, to replace the existing pit privy.

INFORMAL HEARING AND CASE DECISION

11. On July 8, 2004, Mr. Beveridge participated in an informal hearing over which District Health Director Reuben Varghese, M.D., M.P.H., presided.

12. At the hearing, Mr. Beveridge acknowledged that he installed a toilet in the dwelling on the Property after the Local Health Department denied his 1985 application for a sewage disposal system permit.

13. Mr. Beveridge also acknowledged that, although he was unaware of previous denials when he purchased the Property in 1984, he had utilized the existing system for disposal of toilet wastes after receiving the Local Health Department's denial of a permit in 1985.

14. On July 9, 2004, Dr. Varghese issued a case decision (the "Case Decision") affirming the Local Health Department's denial of a permit for both the existing and proposed sewage disposal systems on the Property. Pursuant to § 32.1-165 of the Code of Virginia (1950), as amended, Dr. Varghese concluded that the Local Health Department could not issue the required certification for the existing system, nor could it issue a permit for construction of the proposed system, Specifically, Dr. Varghese found that:

- The existing system had never been permitted;

- Permits previously had been denied Mr. Beveridge;

- Mr. Beveridge did not challenge the 1985 denial of a permit;
- Mr. Beveridge installed a toilette in the dwelling on the Property and connected it to the existing, unpermitted system on the Property;
- A permit could not be issued pursuant to the Design Package specifications because site and soil conditions did not meet the minimum requirements of the Regulations for a new system;
- Site and soil conditions on the Property did not meet the minimum requirements of the Regulations at the time of the 1983 application for a permit.

16. On August 2, 2004, Dr. Varghese issued a corrected case decision (the "Corrected Case Decision"), eliminating the finding that Mr. Beveridge had connected a toilette to the unpermitted existing system.

CONCLUSIONS OF LAW

1. Section 32.1-12 of the Code of Virginia (1950), as amended, authorizes the Board of Health to adopt and enforce regulations protecting the public health and welfare. Accordingly, § 32.1-64 authorizes the Board to adopt regulations governing the treatment and disposal of sewage.

2. Pursuant to Code §§ 32.1-12 and 32.1-64, the Board lawfully promulgated 12 VAC 5-610-20, *et seq.* (the "Sewage Handling and Disposal Regulations" or the "Regulations") regulating the permitting, installation and operation of onsite sewage disposal systems.

3. Pursuant to Code § 32.1-65, no county, city, town or employee thereof may issue a permit for construction or occupation of a building designed for human occupancy without the prior, written authorization of the Commissioner of Health (the "Commissioner") or his agent. The Commissioner may issue such authorization only

upon finding that: (1) safe, adequate and proper sewage treatment is or will be made available to such building, or (2) issuance of a permit has been approved by the Sewage Handling and Disposal Appeals Review Board.

4. The system existing on the Property cannot be certified as safe and adequate as required by Code § 32.1-65 because:

- The system was constructed and operated in violation of the Regulations without a valid permit;
- The system is located 36 feet from the drinking water well serving the Property and the adjoining property. Consequently, system does not meet the Regulations' minimum requirements for set-back of a sewage disposal system from a drinking water well;
- The system does not meet the Regulations' requirements regarding vertical separation from a seasonal water table for either a septic effluent system or a system employing secondary treatment; and
- Because the system was not permitted, the precise size and construction details thereof are not determinable.

5. A permit for the system proposed by the Design Package cannot be issued pursuant to the Regulations' grandfather clause (the "Grandfather Clause"). A lot governed by the Grandfather Clause is one regarding which no permit previously has been issued and which is located in a subdivision approved by the Department of Health prior to July 1, 2000 in accordance with a local subdivision ordinance. A lot governed by the Grandfather Clause may include any lot, parcel or portion thereof with a previously issued permit or specific written approval (not including a certification letter) issued by the Health Department. However, there is no evidence that the Department ever approved the Property under any of the conditions enumerated by the Grandfather Clause for any type of onsite sewage disposal system.

WHEREFORE, the August 2, 2004 Corrected Case Decision is ***affirmed***.

If the Appellant wishes to appeal this Order to Circuit Court, he should do so by: (1) filing a notice of appeal with Susan Sherertz, Sewage Handling and Disposal Appeal Review Board, within thirty (30) days of receipt of this Order; and (2) filing a Petition for Appeal with the Circuit Court within thirty (30) days of filing the Notice of Appeal as required by Rule 2A:4 of the Rules of the Supreme Court of Virginia.

Chairman

Dated: March 15, 2005