

VIRGINIA:

BEFORE THE STATE HEALTH DEPARTMENT  
SEWAGE HANDLING AND DISPOSAL APPEAL REVIEW BOARD

In Re: Melvin and Masako Skinner

ORDER

Mr. and Mrs. Skinner appeal the Health Commissioner's denial of their application for a permit<sup>1</sup> for an onsite sewage disposal system on their property, a 1.3 acre lot in Prince William County. The lot has been the subject of a convoluted series of transactions that are set out in the Department's Proposed Findings of Fact, and in Exhibit 14A. The Board adopts the procedural and factual history set forth in the Department's proposed Findings at ¶¶ 1-35.

The Skinners and the Department agree that the proposed site is not suitable for the installation of a conventional drainfield at the customary 18" trench depth because of the presence of shrink-swell clays and a probable perched water table.

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<sup>1</sup> Code § 32.1-164.B.1 authorizes the Board of Health to adopt regulations to include "[a] requirement that the owner obtain a permit from the Commissioner prior to the construction, installation, modification or operation of a sewerage system . . . ." Section 2.12 of the Board's *Sewage Handling and Disposal Regulations* (the *Regulations* now are codified at 12 VAC 5-610-10 *et seq.*; § 2.12 is codified at 12 VAC 5-610-240) imposes that requirement. Section 1.4 of the *Regulations*, 12 VAC 5-610-40, authorizes the Commissioner to delegate his authority under the *Regulations* (except for variances and orders) to the Department and appoints the Department as the primary agent of the Commissioner for the purpose of administering the regulations. Pursuant to that authority, the Commissioner has delegated the authority to issue and deny permits; he has not delegated the authority to issue variances. Denials of permits and variances may be appealed to this Board for the final administrative decision pursuant to Code §§ 32.1-164.1 and 32.1-166.6.

This does not end the matter, however. As commonly happens in these soils, there is a layer of weathered rock under the clay layer and above the underlying rock. In some parts of Virginia, this weathered material has a sandy consistency and a thickness such that a drainfield can be installed in it under the authority of § 4.30.A.4 of the *Regulations*, now codified at 12 VAC 5-610-950.A.4:

**4. Placement of absorption trenches below soil restrictions.** Placement of the soil absorption trench bottom below soil restrictions as defined in 12 VAC 5-610-490.E, whether or not there is evidence of a perched water table as indicated by free standing water or gray mottlings or coloration, requires a special design based on the following criteria:

- a. The soil horizon into which the absorption trench bottom is placed shall be a Texture Group I, II or III soil, or have an estimated or measured percolation rate of less than 91 minutes per inch.
- b. The soil horizon shall be a minimum of three feet thick and shall exhibit no characteristics that indicate wetness or restriction of water movement. The absorption trench bottom shall be placed so that at least two feet of the soil horizon separates the trench bottom from the water table and/or rock. At least one foot of the absorption trench side wall shall penetrate the soil horizon . . . .

The Skinner's expert, Mr. Helm, testified that the horizon below the clay layer is texture group I, II, or III and he estimates the percolation rate to be about 45 min/inch. He further testified that there are at least three feet of the material, and that it does not show features to indicate wetness. The Department's expert, Mr. Cobb, agrees that there are three feet of weathered rock and he says that it may have a percolation rate less than 91, but he says that he finds features indicating wetness

and, more fundamentally, that the material is rock, not soil.

On the question of wetness, the Board has one expert who does not report any signs of wetness and another says he sees “lots of” manganese coatings that are characteristic of at least seasonal wetness. On the question of permeability, the one expert says he thinks the material will perc, while the other says that the restrictions in the layer cause the flow to move through fractures, as in rock, so that even if the movement is sufficiently rapid to meet the required percolation rate, the movement is not soil-like. Mr. Skinner’s expert does not really deny that the material is more rock-like than soil-like, and he makes a crucial admission when he suggests that the percolation rate be measured to determine whether the layer is a restriction.


The Board is grateful for the thoughtful and candid views of these experts. Mr. Helm is unable to say that the material in question is soil. He thinks the layer will perc (he wants to test it) and he thinks a system will function there. Mr. Cobb says that the percolation rate may meet the regulations, but the effluent will be moving through fractures in rock, not between the pores of soil. That is supported by Mr. Cobb’s observation of manganese stains on rock faces in this zone, consistent with the presence of water on those faces, and not consistent with soil-like texture.

The *Regulations* plainly expect that the effluent from the drainfield will receive biological treatment as it moves through soil. Section 3.6 of the *Regulations*, 12 VAC 5-610-500, contemplates “[s]ufficient suitable soils” to install the drainfield. Section 3.5 of the *Regulations*, 12 VAC 5-610-490, explicitly provides

that "soil restrictions in themselves may form the basis for outright rejection of the site." The Board concludes that the incompletely weathered rock, reported by Mr. Cobb, is not soil-like and therefore precludes the installation of a system at this location.<sup>2</sup>

Accordingly, the appeal is OVERRULED.

If Mr. & Mrs. Skinner wish to appeal this decision, they may do so by filing a notice of appeal with the Board's acting Secretary, Mr. Gary Hagy, Division of Environmental Health Services, 1500 East Main Street, Richmond, Virginia 23219 within thirty-three days of the date of mailing of this order to them. Other requirements for perfecting an appeal are set out in Part 2A of the Rules of the Supreme Court of Virginia and in the Administrative Process Act.

  
Felton T. Sessoms  
Acting Chairman

Dated: February 24, 1998

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<sup>2</sup> Mr. Skinner, at least implicitly, raises also the question of the Grandfather Clause. § 1.7, 12 VAC 5-610-70. The Board concludes that the Department is correct when it says that the Clause does not apply where, as here, the drainfield that was permitted under the 1971 Regulations has been constructed and is in use. There is no drainfield site to be grandfathered.