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VIRGINIA:

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

In Re: William H. and Doris A. Pierce

ORDER

Mr. and Mrs. Pierce appeal the Health Commissioner's denial of their application for a permit[1] for an onsite sewage disposal system on their property, a three-acre lot identified as Lot 5 on Quaker Drive in Suffolk.

The underlying facts, which are not in dispute, are set forth in the Department's proposed findings of fact, which the Board adopts. In summary:

- The Department issued a permit for Lot 5 on February 27, 1986. The Pierces bought the lot while that permit was in effect. The permit expired August 27, 1990.[2]

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[1]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 . . . ." Section 2.12 of the Board's *Sewage Handling and Disposal Regulations* (the *Regulations* now are codified at 12 VAC 5 *et seq.*) imposes that requirement. Section 1.4 of the *Regulations* 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.

[2]The Department admits the expiration date on the face of the permit, August 27, 1986, is incorrect.

- When the Pierces' contract purchaser sought a new permit in 1996, the Department denied the application on the ground of insufficient depth to the seasonal water table.
- Following an informal hearing, Dr. Buck, the District Health Director, affirmed the denial. Mr. and Mrs. Pierce then appealed to this Board.

The Pierces' expert, Danny Meadows, confirms the Department's view that the drainfield area has a seasonal water table at a depth of eighteen to twenty inches. At the 40 inch/minute percolation rate estimated by Mr. Meadows, the Regulations require that any water table be at least 28" from the surface (eighteen inch minimum trench depth, § 4.30.C; ten inch setoff between the trench bottom and the water table, § 4.30.A.3 and Table 4.5). Accordingly, the site plainly does not meet the requirements of the Regulations.

Mr. & Mrs. Pierce do not claim otherwise. They argue instead that they bought the property in good faith, in reliance upon the permit issued by the Department; they did everything they could do, they say, and they should not be penalized for the Department's mistake. The Pierces further argue that a shallow-placed conventional drainfield on their property should function adequately, and that even if it were to pollute groundwater, the downhill property is unlikely to developed, so no harm would ensue.

Insofar as they seek a relaxation of requirements as to trench depth or depth

to the water table, the Pierces are asking for a variance. *See*, § 2.7.A of the *Regulations* (Variance is a conditioned waiver of a specific regulation). Mr. & Mrs. Pierce have not sought a variance from the Commissioner, *Id.* § 2.7, so the question of a variance is not before this Board. We turn, therefore, to the effect of the earlier permit.

I. Grandfather Clause

Section 1.7 of the *Regulations* provides:

> Sewage disposal system permits granted prior to the effective date of these regulations shall be valid if site and soil conditions would not preclude the successful operation of the system.[3]

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[3] § 1.7 **Grandfather Clause.** . . . Sewage disposal system permits granted prior to the effective date of these regulations shall be valid if site and soil conditions would not preclude the successful operation of the system.

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B. Individual lot(s) approvals

1. Previously issued permits shall be reissued if the site, soil conditions and the design requirement are in accordance with the 1971 regulations.

2. If the design requirements on the permit are not in compliance with the 1971 regulations but a system meeting the design requirements can be placed on the site, the permit can be reissued to contain the corrected design.

3. If the site and soil conditions do not meet the criteria contained in item (1) above, these regulations shall be used to determine if a permit can be issued.

4. Reserve areas will not be required unless there was a pre-existing local requirement.

The current regulations were effective November 1, 1982[4]; the Department approved Lot 5 on February 27, 1986, more than three years after the effective date of the regulations. Thus, by its own terms, the Grandfather Clause does not apply.[5]

This conclusion is consistent with the purpose of § 1.7. The Grandfather Clause is written to deal with approvals made under the 1971 or earlier regulations that are less detailed and less rigorous than the 1982 regulations. The present permit was issued under the 1982 regulations, so the question before the Board is the effect of that permit, not the effect of the Grandfather Clause.

II. Revalidation of the Permit

Section 2.18 of the *Regulations* provides for revalidation of construction permits "if the permit has been previously issued in accordance with these regulations and the site conditions are the same as shown on the application and construction permit.

In the case of the Pierce lot, the permit has expired, so there is nothing to

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[4]*In re Holdlen* (October 10, 1995). The 1982 Regulations have since been amended in minor respects. The watershed date, for the purposes of the Grandfather Clause is the initial date of the major new replacement for the 1971 Regulations, *i.e.*, November 1, 1982. This becomes clear in light of the use of the 1971 regulations in the Grandfather Clause as the basis for decisions regarding grandfathered permits.

[5]The provision of the Grandfather Clause regarding subdivision plat approvals does not apply here because Lot 5 is not in a subdivision approved by the local health department. *Regulations* § 1.7.

revalidate. Moreover, the site conditions plainly are *not* the same as shown on the earlier application and construction permit (primarily, the water table is ten to twelve inches more shallow). Accordingly, there is no basis to revalidate the permit.

The Department suggests that the original permit was issued for a lot other than the present Lot 5. That conclusion surely is supported by the difference between the shape of the lots on the original permit and the later application (Department Exhibits 3 and 4). The Board need not resolve this question, however: The soil conditions on the present lot clearly are not those shown in the 1986 papers, and the conditions plainly are unsatisfactory, so there is no basis to revalidate the expired permit.

Absent a statute or rule so providing, the only basis for the result Mr. & Mrs. Pierce seek is estoppel. At bottom Mr. & Mrs. Pierce are saying that they acted reasonably and in good faith, and the Department should be estopped to deny them the permit upon which they relied. The Supreme Court, however, has "repeatedly held that estoppel does not apply to the state . . . when acting in a governmental capacity." *Westminster-Canterbury v. City of Virginia Beach,* 238 Va. 493, 503 (1989). This doctrine appears harsh at first glance, but it is necessary: The Commonwealth cannot sacrifice an essential governmental interest, such as protection of public health, to correct what appears to be the mistake of one of its employees.

III. Conclusion

The Board must sustain the denial of the permit. There is no dispute that the soils do not meet the requirements of the *Regulations*. Department states that there are at least four alternatives to a conventional system that it will approve for installation on this lot. All of these are more expensive than a conventional system, but none is prohibitively so.

Accordingly, the Pierce appeal is OVERRULED.

If Mr. & Mrs. Pierce 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.

Suzanne T. Grove
Chairman

Dated: February 3, 1997

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