

VIRGINIA:

BEFORE THE STATE HEALTH DEPARTMENT SEWAGE
HANDING AND DISPOSAL APPEALS REVIEW BOARD

In Re: Kenneth W. Cooper

FINAL ORDER

Mr. Cooper appeals the Health Commissioner's denial of a permit for an onsite sewage disposal system on his property at TM A45-134-3-6 in Shenandoah County.

The Department characterizes the procedural history of this case as a "mess." The Board has no ground to disagree with that conclusion.

In 1989, Mr. Cooper set out to subdivide a 20 acre tract into three parcels. Two smaller subdivided parcels were to become lots 1 and 3; the larger remainder of the tract was to become lot 2. In accordance with the County subdivision ordinances, Mr. Cooper sought Health Department approval prior to putting the new lots to record.

On September 1, 1989, Mr. Cooper applied for an onsite sewage disposal permit for a 3 bedroom dwelling on lot 3. The application includes a soil report from Mr. Benedetto, a consultant. On December 11, 1989, Mr. Wolverton, a sanitarian with the Department, wrote Mr. Cooper that lots 1 & 2 were approved; the letter continued:

Lot 3 will be approved for a 2 bedroom Low Pressure Design based on an 80 min/inch [perc rate] and the

area size evaluated. Additional soil evaluation will be necessary to increase the number of bedrooms for this lot.

Apparently the Department issued a permit for lot 1, and Mr. Cooper built his residence there. He plans later to build a larger residence on Lot 2. Lot 3 became a problem.

On March 21, 1991, Mr. Wolverton wrote Mr. Cooper that "[d]uring an earlier review, our office had found an existing well which would require the proposed drainfield to be relocated on Site #3." The well in question is in front of the lot, immediately across Rt. 676. In fact, Mr. Benedetto's backhoe pits (dug for the soils evaluation) and the area about them all are located more than 100' from this well. *See* Dept. Exhibit 4. Accordingly, the well cannot be the basis for the Department's change of position regarding Lot 3.

Unfortunately, Mr. Wolverton did not attend the informal conference with the Health Director; moreover, he no longer is with the Department and he was not subpoenaed to this Board's hearing. The record does not supply a resolution to this discrepancy between the facts and Mr. Wolverton's second letter.

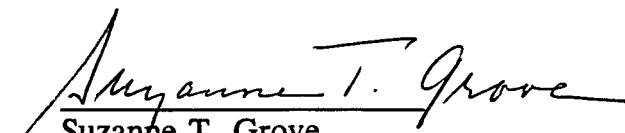
Some portion of the ensuing comedy of errors is set forth in the exhibits and the Department's proposed findings. It appears that while Mr. Cooper was attempting to expand the permission of Mr. Wolverton's letter to allow a 3 bedroom house, the Department was looking into the question whether it would issue even the 2 bedroom permit. At the end, four facts are clear to the Board:

- As set out in Mr. Cobb's report, the soils on Lot 3 are unsuitable for a subsurface drainfield system, primarily because of the restrictive permeability. The percolation tests confirm Mr. Cobb's examination of the soils. These soils do not meet the requirements of the *Sewage Handling and Disposal Regulations* (State Board of Health, May 1989). Mr. Cooper's expert, Mr. Swecker, does not contradict Mr. Cobb's finding in this respect.
- Mr. Cooper seeks a permit for a 2 bedroom dwelling; his sole basis is the Department's representations in Mr. Wolverton's letter. In particular, Mr. Cooper does not aver that the soils are satisfactory even for a drainfield to serve a 2 bedroom dwelling.
- The Department has denied Mr. Cooper's application, whether for the originally requested 3 bedrooms or for the 2 bedrooms in Mr. Wolverton's letter.
- Mr. Cooper is very unhappy about the process and the result.

As the Department admitted, this situation is a mess. Mr. Cooper's anger appears to be justified. At the same time, Mr. Wolverton's letter is neither a permit nor a subdivision approval that could be grandfathered under the Regulations. Whatever other conclusion the letter might support, it provides no basis for issuing a permit for a drainfield that plainly does not meet the requirements of the Regulations and that almost certainly will fail. Accordingly, the Board denies Mr. Cooper's appeal.

Mr. Cooper may initiate a judicial appeal of this decision by filing a notice of appeal with the Board's Secretary, Ms. Constance Talbert, Division of Environmental Health Services, 1500 East Main Street, Richmond, Virginia 23219 within 33 days of the date of mailing of this order to him. 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 13, 1995

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