

VIRGINIA:

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

In Re: Appeal of Ms. Stacy Williams.

ORDER

Findings of Fact.

Based upon the entirety of the record of this matter and the documents, other evidence and argument offered by the parties, the Board makes the following findings of fact:

Ms. Stacy Williams ("Ms. Williams") is the owner of record of two parcels of property identified as Lots 7 and 8 of the Hillcrest Subdivision located in the City of Chesapeake, Virginia (the "Property").

On August 17, 1953, a Norfolk County Zoning Officer (the "Zoning Officer") signed the subdivision plat for Hillcrest Subdivision and certified that the plat "conforms to applicable regulations relating to the sub-division of land." (See Commonwealth's Exhibit ("Com. Ex.") 1-D-1 and 4).

The Hillcrest Subdivision Plat contains no approval by an official of the Virginia Department of Health ("VDH").

On or about November 5, 1975, the Chesapeake Health Department ("CDH") denied sewage disposal system construction permits for several lots in the Hillcrest Subdivision, including Lot 8. Such denials resulted from "poor soil conditions" and a finding that the seasonal water table was perched at a depth of 0-6 inches as indicated by evidence of "grey mottles" in the soil at such depth. (Com. Ex. 1-D-2).

In 1975, the Rules and Regulations of the Board of Health, Commonwealth of Virginia, Governing Sewage Disposal (the "1975 Regulations") provided that:

Soil evaluation for the drainfield system shall follow a systematic approach including consideration of physiographic province position of landscape, degree of slope and soil profile (thickness of horizon, color, texture). Such evaluation shall indicate whether or not the soil has problems relative to the position in the landscape, the seasonal water table, shallow depths, rate of absorption, or a combination of any of the above.

1975 Regulations, Part III, Article 1, § B, ¶ 2.

On or about August 8, 2002, Ms. Williams applied to CDH for a Sewage Disposal and/or Water Supply Permit for Lots 7-8 via her agent, Christopher Falk. (Com. Ex. 1-D-3).

On August 15, 2002, Jason Fulbright ("Mr. Fulbright"), Environmental Health Specialist with CDH, conducted a site and soil evaluation of Lots 7 and 8 to determine suitability for an onsite sewage disposal system. Mr. Fulbright documented the presence of the seasonal water table as indicated by chroma-two-or-less gray mottles at the surface. (Com. Ex. 1-D-4).

On August 16, 2002, CDH denied Ms. Williams' application because site and soil conditions did not substantially comply with the Sewage Handling and Disposal Regulations (the "Regulations") in effect at the time of the site and soil evaluation with respect to the vertical separation between drainfield trenches and the seasonal water table. (Com. Ex. 1-D-5).

On August 26, 2002, Ms. Williams simultaneously appealed CDH's denial of her application and asked the State Health Commissioner (the "Commissioner") to grant variances from the Regulations for Lots 7 and 8. (Com. Ex. 1-C).

Pursuant to an October 29, 2002 informal fact-finding conference, District Health Director Nancy Welch, M.D., M.P.H. ("Dr. Welch"), upheld permit denial on the ground that site and soil conditions did not substantially comply with the Regulations with respect to the vertical separation between drainfield trenches and the seasonal water table.

Dr. Welch also ruled that Lots 7 and 8 were not subject to § 70 of the Regulations (the so-called "Grandfather Clause") because Ms. Williams produced no evidence that VDH approved the Hillcrest Subdivision or had previously issued written approval of onsite sewage disposal systems for Lots 7 and 8. Indeed, in 1953, VDH did not approve subdivision plats. (See Com. Ex. 1-D).

On February 28, 2003, the Commissioner denied Ms. Williams' request for variances under Regulation § 120 and §§ 600, *et seq.* (See Com. Ex. 1). In so doing, the Commissioner also ruled that the Grandfather Clause did not apply to Lots 7 and 8 because Ms. Williams produced no evidence that VDH approved the Hillcrest Subdivision or had previously issued written approval of onsite sewage disposal systems for Lots 7 and 8. Indeed, in 1953, VDH did not approve subdivision plats. (See Com. Ex. 1: Commissioner's Decision).

Conclusions of Law.

The Board enters the following conclusions of law:

VDH properly denied Ms. Williams' application because site and soil conditions on Lots 7 and 8 do not meet the minimum requirements of the Regulations. The totality of the evidence on the record supports the finding that the soils have a shallow seasonal water table as indicated by chroma-two-or-less gray mottles or colors at the surface of the ground (Regulations §§ 120, 490) and restrictive permeability (shallow, 12 inches below surface).

Tables 4.3 and 4.4 of the Regulations also require specified separation distances between soil absorption systems and limiting factors such as seasonal water tables and soil restrictions. These requirements do not permit any system to be installed in a site with a

seasonal water table at the surface of the soils and allow only systems with secondary treatment on a site with 12 inches separation to a restrictive horizon. Thus, for this reason also, soil conditions do not meet the minimum requirements of the Regulations for installation of a septic system on Lots 7 or 8.

VDH also properly denied Ms. Williams request for variance under the Grandfather Clause. No such clause existed in the 1975 Regulations. Under the Grandfather Clause contained in the applicable version of the Regulations existing on July 1, 2000, a grandfathered lot is one for which no permit has been issued and which is located in a subdivision approved by VDH prior to July 1, 2000 in accordance with local subdivision ordinances. (Regulations § 120).


Accordingly, VDH properly denied Ms. Williams' request for variance under the Grandfather Clause because there is no evidence that Hillcrest Subdivision was approved by a local health department pursuant to local ordinance. Nor is there evidence that VDH previously issued a permit or written approval for a septic system on Lots 7 and/or 8. To the contrary, the record shows that VDH previously denied an application for permit for Lot 8 in 1975.

Correspondingly, the 1953 subdivision plat does not constitute approval by a local health department under local ordinance because Norfolk County had no local ordinance requiring VDH plat approval at the time of recordation of the plat. The plain language of the Grandfather Clause requires VDH plat approval in conjunction with a local ordinance so requiring which is not the case here.

By the same token, VDH issuance of septic and well permits for certain Hillcrest Subdivision lots other than Lots 7 and 8 does not constitute VDH approval of a subdivision plat pursuant to local ordinance as required by the Grandfather Clause.

Because the Board rules that Lots 7 and 8 do not fall within the Grandfather Clause, it does not consider whether VDH properly denied Ms. Williams' application on the ground that, even if grandfathered, site and soil conditions on Lots 7 and 8 preclude successful operation of the system.

If Ms. Williams 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.


Felton T. Sessoms
Chairman

Dated: April 29, 2004