VIRGINIA:

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

IN RE: NELSON PATTON
IN RE: RICHARD L. HARMON

Messrs. Patton and Harmon appeal the Health Department's denials of their applications for onsite sewage disposal permits[1] for their property in Shenandoah County.

Mr. Patton owns Lot 1 in the Windsor Farms Subdivision in the Madison Magisterial District, North of Lantz Mills. Mr. Harmon owns Lot 1 in the Harmon Harper Subdivision, just south of Woodstock. Both owners held permits, now expired, that had been issued under the prior version of the regulations. Both owners reapplied under the current regulations, and the Department denied both applications. Messrs. Patton and Harmon both appealed to this Board.

The Board heard both appeals on April 24, 1996, in Woodstock. Both appellants were capably represented by the same attorney, Mr. Neal, who raised the same issue in each case.

The facts of the cases are set out in the Department's respective proposed findings of fact; these facts are not in dispute. The only issue in these appeals is whether the Grandfather Clause of the *Sewage Handling and Disposal Regulations,* VR 355-34-02, 12 VAC 5-610-200 (the "*Regulations*") requires that the Department issue permits on these lots.

---

[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,* VR 355-34-02, 12 VAC 5-610-200 (the "Regulations") 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. 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.

The Department concedes that it issued permits on both lots under the 1971 *Regulations* and, thus, that the lots are subject to the Grandfather provision at § 1.7 of the *Regulations*. The Department argues, however, that the site and soil conditions on the lot do not meet the requirements of the 1971 regulations. Indeed, the Department's evidence in that respect is compelling and uncontroverted.

Messrs. Patton and Harmon do not dispute the soils evidence; they rely only upon the earlier permit.[2] In this respect, § 1.7 of the *Regulations* provides:

> **§ 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.
>
> * * *
>
> B. 1. Previously issued permits shall be reissued if the site, soil conditions and the design requirements are in accordance with the 1971 regulations.
>
> * * *
>
> 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.

In this respect, the Grandfather Clause is turbid and ambiguous. It requires, at once,

- that the permit be "valid" if site and soil conditions meet the 1971 *Regulations*, and
- that the permit be reissued only if site and soil conditions would not preclude successful operation of the system.

These terms must be read together. To read the Grandfather Clause to require reissuance on the sole ground that the site meets the 1971 *Regulations* reads out

---

[2]Mr. Patton claims that the denial of the permit is a taking, but he states that the Board lacks jurisdiction to decide whether there has been a taking. Whether or not the Board has jurisdiction to decide that question, it only can decide questions brought to it. Accordingly, the Board expresses no opinion on the taking issue.

the requirement of successful operation; to read the Clause to solely require successful operation of the system (particularly as predicted by the current *Regulations*) reads out any deference to the ancient, 1971 *Regulations*. The Department must seek to give effect to both parts of the Clause.

Moreover, as the Department pointed out in argument, the Grandfather Clause speaks of the conditions when a grandfathered permit might be issued or denied; plainly the Grandfather Clause is not a blank ticket for a permit.

The *Rules and Regulations of the Board of Health Governing the Disposal of Sewage,* 1971 (the "1971 *Regulations*") provide at Part III, Section B.7:

> *Soil Evaluation* -- Soil evaluation for a 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, seasonal water table, shallow depths, rate of absorption, or a combination of any of the above. If absorption rate problems are suspected and there is no indication of a water table, percolation tests should be made . . . .

In contrast to the 1971 *Regulations*, the *Regulations* are detailed and specific in many respects. For instance, where the 1971 *Regulations* require only a "systematic" evaluation of the "soil profile (thickness of horizon, color, texture)", the *Regulations* contain specific provisions regarding color, texture (including a four-group categorization), permeability (with the required setoff to water table set forth as a function of percolation rate), placement in alluvial and colluvial deposits, and requirements as to soil restrictions, soil concretions, free standing water, and shrink-swell soils. *Regulations*, §§ 3.5 and 4.30.

At the same time, the *Regulations* are not always more stringent than the 1971 *Regulations*. For example, the *Regulations* allow, in appropriate cases, slower percolation rates, smaller drainfield area for a given percolation rate, and, in some cases, a smaller standoff from a water table.

The lack of detail in the 1971 *Regulations* compounds the obscurity of the Grandfather Clause. As the Department points out in its background memorandum

regarding the Grandfather Clause (Department Exhibit 20 in the Harmon appeal, Department Exhibit 18 in the Powell appeal):

> The 1971 regulations contain [few] specific site criteria on which to base the issuance or denial of a permit. For example, lacking a specific standard some areas of the state required water tables to be at least 30 inches from the ground surface. This requirement was by no means uniform between counties. There are counties where it can be documented that permits were issued with a water table at 18 inches from the surface.
>
> Further, inadequate training, a general lack of scientific knowledge, together with meager quality control and supervision, allowed many permits to be issued in violation of even this liberal requirement. In some instances, it appears that individual sanitarians set individual standards. As a result, the intent of the 1971 regulations became less and less clear with each passing year. Hence the need to define the criteria for the reissuance of previously issued permits.

The present cases are paradigms of the quandary this union of the Grandfather Clause and the 1971 *Regulations* can produce.

The Patton Permit, Department Exhibit 2 in the Patton appeal, was issued without any record of soil testing. It states that the depth to grey mottles (water table) is "< 30 inches," presumably less that the miminum required in Shenandoah County under the 1971 *Regulations*. Yet when Mr. Patton reapplied in 1981, after the original permit expired in 1979, the Department evaluated three backhoe pits, and rejected the site because of gray seasonal water mottles (beginning at about 30") and hardpans beginning at 10-11 inches. The Department's expert, Mr. Cobb, now confirms the rejection in detail, finding soil wetness features as shallow as 12-15 inches, free standing water in the evaluation holes, and fragipans and clay loam to clay horizons with restrictive permeability beginning at 12-20 inches.

Similarly, the Harmon permit states, baldly, that the depth to grey mottles is "> 40 inches." Yet Mr. Cobb's evaluation of the site shows shrink-swell clays and as shallow as 6 inches, other restrictive permeability as shallow as 11 inches, gray mottles as shallow as 25 inches, and other evidence of perched water table

as shallow as 13-20 inches. Mr. Cobb testified that the soils do not meet either the *Regulations* or the 1971 *Regulations*.

Into the regulatory murk, the appellants would project a beacon of clarity: The appellants argue that the 1971 regulations do not provide specific criteria for the soils examination, and require only a professional judgment of soil characteristics. In each case, the appellants say, the Department's sanitarians provided that expert judgment, by issuing the permits, and the Department cannot now gainsay that earlier judgment.

Unfortunately, the appellants' suggestion is contrary to the intent and destructive of the purpose of the *Regulations*.

First, the appellants' suggestion would require reissuance of an earlier permit without any consideration whether the system might operate successfully. In addition to overlooking a vital portion of the regulation (as well as the very purpose of the regulation), this amounts to an argument that the Department is estopped to reconsider even an erroneous judgment that had been made under the 1971 *Regulations*.[3] The Supreme Court 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 allow a mistake to stand when an essential governmental interest, such as protection of public health, would be impaired.

As the record shows, the Department has made a commendable effort to bring some clarity to the Grandfather Clause. On April 19, 1995, the Department adopted a policy, its "GMP #66," setting forth clear procedures for evaluating an application under the Grandfather Clause and providing specific, numerical interpretations of the minimum site and soil conditions under the 1971 *Regulations*. Department Exhibit 16 (Patton); Department Exhibit 19 (Harmon). As the Department's Mr. Alexander explained in his background memorandum, the Department's goal is "to honor as many of our previous commitments as is safely possible, using the best available technology and applying what we have learned in the almost 25 years since the 1971 regulations were adopted." Department Exhibit 17 (Patton); Department Exhibit 20 (Harmon).

---

[3]This is particularly clear in Mr. Patton's case. He does not explain why the Department's issuance of his permit under the 1971 *Regulations* is not cancelled by the Department's later denial of a permit under the same regulations. He only can reach that result if the Department's first expert judgment estops the second one, in the absence of the Grandfather Clause.

The Department's interpretation of its own regulation is entitled to great deference. The Board finds that the Department's policy is a rational and reasonable interpretation of the Grandfather Clause and the 1971 *Regulations*. Accordingly, the failure of both of these sites to meet the criteria in the Department's policy is a further ground upon which the Board must uphold the Department's decision that the Grandfather Clause does not compel the reissuance of the permits here at issue.

Finally, and most tellingly, the appellants' suggestion also is destructive of the purpose of the *Regulations*. The Department is charged with the protection of the public health.[4] The uncontroverted evidence is that a conventional drainfield placed in the soils on either of these lots will fail.[5] To issue permits in these circumstances will impose the costs of failed septic systems upon the owners of these lots and will create threats to public health. Thus, considering the purposes of the Department's basic law also leads to denial of these appeals.

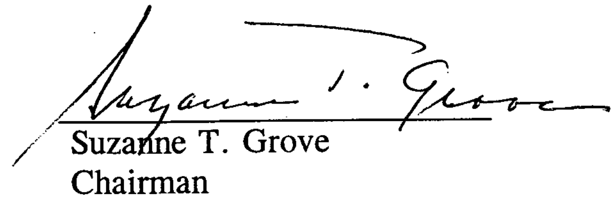
Accordingly, Mr. Patton's and Mr. Harmon's appeals of the Department's denial of their applications for permits for onsite sewage disposal are OVERRULED. As to Mr. Patton, the record is silent on the question whether the soils of the site would support the experimental system described in the Department's GMP #79. Accordingly, the Board directs the Department to evaluate the Patton lot under GMP #79.

Either owner may initiate a judicial appeal of this decision by filing a notice of appeal with the Board's Secretary, Beth Bailey Dubis, Office 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.

---

[4]Code § 32.1-164 gives the Board of Health the authority and duty to supervise and control "the safe and sanitary collection , conveyance, transportation, treatment, and disposal of sewage . . . ." At § 1.2, the *Regulations* state their purposes to include the assurance "that all sewage is handled and disposed of in a safe and sanitary manner. . . ."

[5]It appears from the correspondence in the record that both appellants were advised by Mr. Swecker, a certified professional soil scientist. Yet, Mr. Swecker did not appear to dispute the Department's judgment of the soils. The Board must conclude that the appellants were reluctant to pay Mr. Swecker to affirm the Department's judgment that the soils on these lots are not suited for onsite sewage disposal.



Suzanne T. Grove
Chairman

Dated: May 6, 1996

E:\JRB\WP\D10\PATTON