

In re: Appeal of Lee and Donna Smith

ORDER

On May 17, 2006, a quorum of the Sewage Handling and Disposal Appeal Review Board (the "Board") duly convened to hear the appeal by Lee and Donna Smith (collectively, "Appellant") of a September 19, 2005 case decision (the "case Decision") issued by the Fauquier County Health Department ("FCHD")¹ denying Appellant's application for a permit (the "Application") to construct an onsite sewage disposal system to serve a proposed new dwelling to be constructed on property owned by appellant and identified as 6179 Beach Road in Fauquier County, Virginia (the "Property"). Upon considering the arguments and materials presented by Appellant, the Board rules as follows:

1. On May 23, 2005, Appellant submitted the Application to FCHD for a permit to construct an onsite sewage disposal system to serve a proposed three (3) bedroom, single-family dwelling to be constructed on the Property. Virginia Department of Health Exhibit 2: Application.

2. A four (4) bedroom single-family dwelling currently exists on the Property, served by a conventional onsite sewage disposal system (the "Existing System") constructed according to permit issued March 5, 1987. Consequently, the Existing system is governed by Sewage Handling and Disposal Regulations effective July 1, 1982 (the "1982 Regulations").

3. On June 8 and June 13, 2005, Katherine Merten, FCHD Environmental Health Specialist Senior ("Ms. Merten"), inspected the Property to evaluate the suitability of soils on the Property for construction of an onsite sewage disposal system to serve the propped new dwelling. Specifically, Ms. Merten tested soils in two (2) areas of the Property near the site of the proposed

¹ Pursuant to Virginia Code §§ 32.1-30 and 32.1-31, the Fauquier County Health Department operates as a local health department under contract with the Virginia Board of Health.

dwelling and determined that such soils did not meet the requirements of 12 VAC 5-610-20 *et seq.* (the “2000 Regulations”). *See* Virginia Department of Health Exhibit 3: Inspection Report.

4. Correspondingly, on or about July 2, 2005, FCHD denied Appellant’s Application.

5. Via letter of July 17, 2005, Appellant requested that FCHD reconsider such denial.

Therein, Appellant proposed connecting the proposed new dwelling to the Existing System and installing new drainfield trenches in the reserve area of the Existing System. *See* Virginia Health Department Exhibit 6: July 17, 2005 letter from Appellant to Fauquier County Health Director Lilian Peake, M.D., M. P. H (“Director Peake”). Appellant subsequently proposed constructing approximately 687 square feet of new drainfield trenches in the reserve area of the Existing System. *See* Virginia Health Department Exhibit 10: September 5, 2005 letter from Appellant to Director Peake. Ms. Merten later confirmed that adding approximately 700 square feet of trenches to the Existing System would provide the square footage required by the 2000 Regulations for two (2) dwellings with a total of six (6) bedrooms, assuming the soils at the site of installation of such trenches otherwise met the requirements of the 2000 Regulations and evinced an estimated percolation rate of 60 minutes per inch. *See* Virginia Health Department Exhibit 9: August 30, 2005 letter from Ms. Merten to Appellant; Virginia Health Department Exhibit 11” Handwritten notes of FCHD Environmental Health Supervisor John Largent.

6. As Appellant recognizes, the 2000 Regulations require that a permitted onsite septic system identify a reserve area equal to fifty percent (50%) of the area of the system’s drainfield. *See* Virginia Department of Health Exhibit 10. However, Fauquier County ordinance separately requires that onsite sewage disposal systems identify a reserve area equal to two hundred percent (200%) of the area of the system’s drainfield (the “County Ordinance”). *See*

Virginia Department of Health Exhibits 9 through 11.

7. As Appellant further recognizes, the Existing System's drainfield and reserve area will are not sufficient large to enable construction of the proposed additional drainfield trenches while also meeting the requirements of the County Ordinance. *See* Virginia Department of Health Exhibit 10.

8. On August 5, 2005, FCHD convened an informal fact-finding conference, Director Peake presiding, to consider Appellant's request for reconsideration.

9. On September 19, 2005 Director Peake issued the Case Decision denying Appellant's request for reconsideration. Therein, Director Peake found that Appellant failed to challenge FCHD's site and soil evaluation and that soil conditions did not support installation of a conventional onsite sewage disposal system in the area identified in Appellant's Application.

10. On November 17, 2005, FCHD issued Appellant a conditional construction permit (the "Conditional Permit"). That Conditional Permit authorizes Appellant to connect an onsite sewage disposal system serving a proposed new dwelling to the Existing System on the Property. However, it limits total occupancy of the existing and the proposed new dwellings to seven (7) persons and imposes other terms and conditions, including: limiting total hydraulic loading of the Existing System to six hundred (600) gallons per day; requiring that Appellant keep a monthly account of total water usage on the Property; install water-saving fixtures throughout both dwellings; and record the Conditional Permit in county property records. 11. By appealing the Case Decision Appellant correspondingly appeals issuance of the Conditional Permit pursuant to the Case Decision.

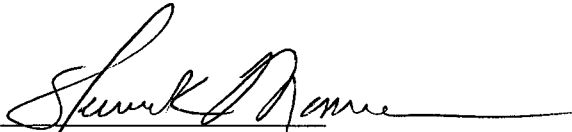
12. During the May 17, 2006 hearing on this appeal, Appellant challenged the Case

Decision by arguing, inter-alia, that Fauquier County lacked authority to promulgate the County Ordinance imposing a reserve requirement exceeding the 50% reserve requirement enumerated in the 2000 Regulations. Appellant has not, however, appealed the County Ordinance to Circuit Court pursuant to Virginia Code §§ 2.2-4000, *et seq.* Further, Appellant has filed no other action in Circuit Court seeking to invalidate or enjoin enforcement of the County Ordinance.

13. During the May 17, 2006 hearing on this appeal, appellant argued that FCHD failed to consider his proposal to expand the Existing Drainfield as suggested in Appellant's September 5, 2005 letter to Director Peake and elsewhere.

WHEREFORE, pursuant to Virginia Code § 32.1-166.6, the Board hereby remands this matter to FCHD with instruction to consider Appellant's July 17, 2005 proposal to expand the drainfield of the Existing System and render a decision on such proposal within forty-five (45) days of the date of this Order. In so doing, FCHD should consider Appellant's July 17, 2005 letter to FCHD, the record of this appeal and any other documents or information FCHD may require.

If Appellant 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.


Steven Thomas
Chairman

Dated: July 13, 2006

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