

VIRGINIA:

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

IN RE: MR. RICHARD CLIMENHAGA

Mr. Climenhaga appeals the Health Department's denial of his application for an onsite sewage disposal permit for a three bedroom house on his property at lot 20A, Moorcones Subdivision, Loudoun County.

The convoluted history of this proceeding is set out fully in the Health Department's proposed findings of fact. The salient events are:

- On September 27, 1976, the Department issued a permit for a three bedroom dwelling on this lot to Mr. Hearne, predecessor in interest to Mr. Climenhaga.
- Sometime in 1977, Mr. Climenhaga's neighbor installed a Class IIB well 10' from the highway right of way and 15' from the property line. The Department modified the 1976 permit to move the drainfield area downslope, apparently to maintain the required 50' setback from the well.
- The permit was renewed four times, the last renewal being on June 30, 1980.
- Mr. and Mrs. Climenhaga both testify to conversations with an unknown employee of the County Health Department in 1981. This employee told them that the permit did not need to be renewed until the Climenhagas were ready to build, and that they would be notified of any change in the regulations. The Climenhagas were not informed of the subsequent Loudoun ordinance requiring a 100% reserve area nor of the major revisions to the *Sewage Handling and Disposal Regulations* (the "Regulations") in 1982.
- Mr. Climenhaga allowed the 1980 permit to expire. He applied for another permit for a three bedroom dwelling on December 19, 1989. The Department denied that application. Following an informal hearing with the local medical director, the denial came

to be heard by this Board on June 2, 1991. ^{1993.} *wfs*

The Department agrees that the 1980 permit is subject to the Grandfather provision at § 1.7.B of the Regulations.¹ The Department argues, and the Board finds, that the site and soil conditions on the lot do not meet the requirements of the 1971 regulations. The only suitable soils on the lot are on the front (North-East) corner of the lot. The measured percolation rate of the soils in that area is 85 min/inch. The 1971 regulations do not provide for drainfields in soils with permeabilities greater than 60 min/inch except by "special design." 1971 Regulations at Table V.

Accordingly, the question becomes whether the site meets the 1982 regulations. Allowing for the required 50' setback from the neighbor's well, Regulations Table 4.4, the Department's data clearly show that the available area of suitable soils is only about 40' by 60'. See, especially, Department Exhibit 33. At the trench separation distance required by § 4.30 of the Regulations, this area is not quite sufficient for a two bedroom house, and plainly is insufficient for a three bedroom house.

Mr. Climenhaga does not directly challenge these conclusions. He argues, first, that the four earlier permits show that the site complies with the 1971 regulations. In the absence of any later evidence as to the soils on the site, that position might be well taken. However, the Department's technical evidence shows unequivocally that the percolation rate takes the lot out of the 1971 regulations, and that the site fails to meet the requirements of the 1982 regulations for a three bedroom dwelling.

Next, Mr. Climenhaga appears to argue that the Department should be estopped by the representations made by the local Health Department. In the absence of any writing, the Board would be reluctant to draw any conclusions about telephone conversations over ten years ago, where the Board hears evidence only of one side's version of the conversation. In any event, an estoppel argu-

¹This section of the Regulations provides:

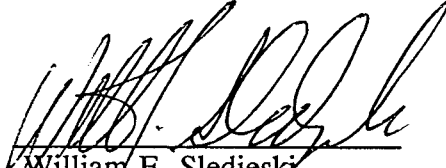
- B. Individual lot(s) approvals
 1. Previously issued permits shall be reissued if the site, soil conditions and the design requirement are in accordance with the 1971 regulations.
 2. If the design requirements on the permit are not in compliance with the 1971 regulations but a system meeting the design 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.

ment is misplaced. As a matter of law, the doctrine of 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 is particularly true here, where granting the permit Mr. Climenhaga seeks would only create a menace to the public health and, especially, to the health of Mr. Climenhaga's own family.

Finally, Mr. Climenhaga argues that he should be granted a variance under § 2.7 of the Regulations because the proposed system would pose no threat to the public health. The Board could grant a variance only if it could find, *inter alia*, that the system "does not subject the public to unreasonable health risks." Regulations, § 2.7.B. In light of Mr. Alexander's testimony that a system on this lot serving a three bedroom house is likely to fail and put sewage on the surface, the Board would be unable to make that finding. In any event, only the Commissioner can grant or deny a variance in the first instance. Regulations § 2.7. Mr. Climenhaga has not sought a variance from the Commissioner, so there is no variance issue for the Board to decide in this appeal.

Accordingly, Mr. Climenhaga's appeal of the Department's denial of his application for a permit for onsite sewage disposal for a three bedroom house is **OVERRULED**.

Mr. Climenhaga may initiate a judicial appeal of this decision by filing a notice of appeal with the Board's Secretary, Ms. Constance Talbert, 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 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.



William F. Sledjeski,
Chairman

Dated: June 16, ¹⁹⁹³~~1992~~ w/s

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