

**BEFORE THE DEPARTMENT OF HEALTH
SEWAGE HANDLING AND APPEALS REVIEW BOARD**

In re: Appeal of Gwynn's Island Civic League

ORDER

I. BACKGROUND

This case constitutes an appeal of the denial by the Virginia Department of Health ("VDH") of an application to modify the conditions of an existing, seasonally-restricted permit.

The Gwynn's Island Civic League (the "Civic League") owns a parcel of real property comprising approximately four (4) acres located on Gwynn's Island (the "Property"). For many years, the Property constituted the site of the Gwynn's Island Elementary School (the "School"). Prior to 1980, an onsite sewage disposal system served the School. In 1980, the Mathews County Health Department (the "Local Health Department" or "MCHD") issued a permit authorizing the Civic League to connect a new structure on the Property to the existing septic system. In 1995, MCHD issued a second permit, authorizing the Civic League to use the same, existing system to serve a caretaker's dwelling on the Property during the period between April 15th through October 31st annually.

The Civic League has applied for a permit that does not contain such seasonal occupancy restriction. From a denial of its application, the Civic League appeals to this Board.

II. FINDINGS OF FACT

1. On July 23, 1980 the Civic League submitted an application to MCHD seeking a permit to construct a sewage disposal system on the Property. That application noted that the Civic League intended to place a "community building" or civic center (the "Civic Center") on the property. See **COMMONWEALTH'S EXHIBIT ("COM. EX.") 1**.
2. On July 29, 1980, MCHD issued a permit (the "Permit") authorizing the connection of the Civic Center to the existing onsite sewage system which previously had served the School. MCHD does not have records pertaining to the construction of that original system. However, sanitarian Janet Comninaki noted on the 1980 Permit that soils were not "[n]aturally drained, suitable by sight" and that the depth to grey mottles was zero inches. See **COM. EX. 2**. Ms. Comninaki indicated that the estimated water consumption of the permitted site totaled 500 gallons per day and noted the following on the permit:

High water usage activities are not recommended. 2 toilets, 2 bathroom hand sinks, 1 kitchen hand sink and 1-3 compartment kitchen sink to be installed. No additional plumbing to be installed. Existing septic tank is to be pumped before plumbing is added. Existing septic system appears to be functioning normally- T's in the tank to be checked before it goes into use.

3. On May 24, 1995, the Civic League applied for a sewage disposal system construction permit to connect a two-bedroom double-wide trailer (the "Dwelling") to the existing system on the condition that the Dwelling be occupied only seasonally from April 1 through October 1, annually. *See COM. EX. 3.*
4. On May 25, 1995, the Mathews County Health Department issued a conditional permit (the "Conditional Permit") which restricted occupancy of the dwelling to one person during the period from April 15 through October 31, annually. The Conditional Permit also reiterated the conditions associated with the 1980 Permit, including the maximum water consumption of 500 gallons per day. The Civic League recorded the Conditional Permit in the land records of Mathews County on June 7, 1995.
5. On March 2, 2005, MCHD issued a Notice of Violation to the Civic League upon learning that the double-wide trailer was occupied beyond the dates authorized by the Conditional Permit. *See COM. EX. 4.*
6. On January 5, 2006, the Civic League filed an application with MCHD seeking modification of the terms of the Conditional Permit. In that application, the Civic League requested that the Conditional Permit be amended to allow year-round occupancy by no more than two persons. According to the application, use of the existing system would be accomplished by reallocating wastewater flows into the existing system with 150 gallons per day (gpd) allocated to the Dwelling and 350 gpd allocated to the Civic Center. *See COM. EX. 5.*
7. MCHD denied the Civic League's application on February 3, 2006. In so doing, MCHD stated that it would not authorize the additional use of the existing system and that any additional uses would require a separate sewage disposal system "meeting current regulatory site and soil conditions." *See COM. EX. 6.*
8. On March 3, 2006, the Civic League requested an informal hearing to challenge the denial of its application. *See COM. EX. 7.*
9. As part of the informal appeal process, District Environmental Health Manager Rick Cox and others, including the Civic League's attorney James E. Hutchins, met to inspect the Property on March 21, 2006. At that time, Mr. Cox recorded one soil profile from a hand auger boring. Mr. Cox reported that the site essentially was flat and that he observed a seasonal water table at the surface of

- the soil. Mr. Cox encountered free water at a depth of 36 inches. The group also discussed certain uses of the Civic Center, including: monthly meetings of 30-35 people; bi-monthly gatherings of 15-20 people for bridge; weekly exercise classes involving 15-20 people conducted four times per week; and Boy Scout meetings. *See* **COM. EX. 8.**
10. Mr. Cox documented the results of inspection of the Property in a March 24, 2006, letter from to Mr. Hutchins regarding the informal hearing. **COM. EX. 9**
 11. Three Rivers Health District Director Thomas Irungu, M.D., M.P.H. convened an informal hearing on the Civic League's application on April 4, 2006.
 12. **COM. EX. 10** constitutes an article concerning the Civic Center published in the *Gloucester-Mathews Gazette-Journal* on February 2, 2006. That article details much of the history of the community cultural center and many of its current uses, which in addition to the ones previously mentioned, include blue grass concerts once per month drawing as many as 85 people.
 13. **COM. EX. 11** contains a summary of uses prepared by Civic League president Art Dubey.
 14. **COM. EX. 12** is a December 24, 2005, inspection report from Smith's Septic Service, Inc. regarding the existing sewage system serving the cultural center and double-wide trailer. J. Richard Smith reported a septic tank of approximately 1200 to 1500 gallons capacity with two discharge pipes, each of which leads to a drainline approximately 200 feet in length. Mr. Smith reported that the effluent levels in the septic tank appeared normal and there appeared to be no sign of eruption of effluent from the system.
 15. **COM. EX. 13** is Dr. Irungu's decision from the informal hearing. Dr. Irungu concluded that the existing system "functions by discharging effluent into the ground water table during times when the seasonal water table is present." He noted that the local health department's approvals in 1980 and in 1995 relied upon intermittent and limited uses of the structures. He concluded that allowing year-round occupancy of the double-wide trailer would dramatically alter the system and stress it "in a way that may hasten failure and certainly provides continuous discharge into the water table." Ultimately, Dr. Irungu concluded that allowing continuous discharge of septic effluent, or even secondary effluent, into the seasonal water table goes against the Health Department's charge to protect ground water and public health.
 16. **COM. EX. 15** is a memorandum written by State Health Commissioner Robert B. Stroube, M.D., M.P.H. which details many of the health risks associated with improperly treated human wastes and onsite sewage systems.
 17. **COM. EX. 14** is the Civic League's request for a hearing before this Board.

III. APPLICABLE LAWS AND REGULATIONS

18. Va. Code § 32.1- 164.A provides that the Board of Health “shall have supervision and control over the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage by onsite sewage systems and alternative discharging sewage systems, and treatment works as they affect the public health and welfare. In discharging the responsibility to supervise and control the safe and sanitary treatment and disposal of sewage as they affect the public health and welfare, the Board shall exercise due diligence to protect the quality of both surface water and ground water.”
19. Va. Code § 32.1- 164.B provides that the Board of Health’s regulations “shall govern the collection, conveyance, transportation, treatment and disposal of sewage.”
20. Va. Code § 32.1-164.1.B provides that “[T]he holder of any permit for a septic tank issued with conditions shall have the permit recorded in the land records of the clerk of the circuit court having jurisdiction over the site of the septic system. The holder of the permit and any subsequent holders of the permit through land purchase or transfer shall be bound by the conditions stated in the permit unless the holder or subsequent holder obtains an additional permit for modification or alteration of the septic system to meet any new use conditions.”
21. Va. Code § 32.1-165 provides that:

No county, city, town or employee thereof shall issue a permit for a building designed for human occupancy without the prior written authorization of the Commissioner or his agent. The Commissioner or his agent shall authorize the issuance of such permit upon his finding that safe, adequate and proper sewage treatment is or will be made available to such building, or upon finding that the issuance of said permit has been approved by the Review Board.
22. The Board of Health lawfully promulgated the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20 et seq., the “*Regulations*”) governing the permitting and operation of onsite sewage systems in the Commonwealth.
23. Section 280 of the *Regulations* establishes the following requirements for issuing construction permits:
 - A. A construction permit shall be issued by the commissioner after approval of the application submitted under 12 VAC 5-610-250 A and D and fulfilling the requirement contained in 12 VAC 5-610-700 E 2, if applicable.
 - B. A construction permit shall be issued by the commissioner after approval of the application and plans and specifications submitted under

12 VAC 5-610-250 B and C. Such approvals shall include the requirement contained in 12 VAC 5-610-700 E 2, if applicable, and applicable requirements of the Department of Environmental Quality in accordance with § 32.1-164.3 of the Code of Virginia.

C. Exception.

1. If compliance with the criteria contained in Part IV (12 VAC 5-610-591 et seq.) or Part V (12 VAC 5-610-660 et seq.) of this chapter imposes economic or other conditions that are not justified by the health considerations upon which the criteria are based, a construction permit may be issued for the disposal system design which substantially complies with the criteria set forth in Part IV or V of this chapter.
 2. When issuing a construction permit for repair of an existing failing sewage disposal system for an occupied structure with indoor plumbing, the criteria contained in Parts IV and V of this chapter shall be complied with to the greatest extent possible. However, it is not necessary to substantially comply with all of the requirements in those parts of this chapter with the exception of the set back distances for shellfish waters or drinking water wells, unless the system is already closer in which case the corrected system shall not be closer than the existing system. Furthermore, when it can be documented that compliance with those parts creates an economic hardship, the district health director or the district environmental health manager may waive the requirements for pretreating the effluent. All corrections must be of such a nature that they can reasonably be expected to reduce the risk to public health caused by the malfunctioning systems.
24. Section 594 of the *Regulations* establishes a minimum trench-bottom depth of 18 inches for an in-ground soil absorption system utilizing septic effluent. Table 4.2 of the *Regulations* requires a minimum vertical separation of 18 inches between the trench bottom and the seasonal water table.
25. 12 VAC 5-610-250.J contains the following regulatory criteria for onsite sewage system construction permits with conditions:
1. Definition: "Conditional construction permit" means a permit authorizing the installation of a septic tank subsurface soil absorption system which does not fully conform to the criteria in Part V (12 VAC 5-610-660 et seq.) of this chapter pertaining to septic tank size, subsurface soil absorption system size and certain ground water table conditions as indicated by soil evaluation, but which, under the conditions to which the permit is subject, can be reasonably expected to function without danger to public health.
 2. The purpose of this section is to allow for the issuance of conditional construction permits. Procedures for obtaining a conditional construction

permit are the same as those contained in subsections A, B, C and D of this section.

3. Conditional construction permits may be issued for any one or more of the following use conditions when satisfactory substantiation is provided by the applicant:

- a. Reduced water flow based on permanent water saving plumbing devices;
- b. Limitations on the number of persons occupying the dwelling or using the facility served by the proposed septic tank system;
- c. Intermittent or seasonal use of the dwelling or facility served by the septic tank system; and
- d. Temporary use of the septic tank system for a specified time period not to exceed one year. Such permits may be renewable when the commissioner determines there is a good cause for renewal.

4. Criteria.

- a. The septic tank and/or drainfield size may be reduced based on the use conditions contained in subdivision 3 a, b, c, or d of this subsection.
- b. In areas with seasonal fluctuating water table(s), where the seasonally high water table would cause failure if the system were to be used continuously, septic tank systems may be installed when the period of use of the septic tank system coincides with the period when the ground water table, as indicated by free water, is at its lowest level. Acceptable separation distances to free standing ground water are the same as those found in Tables 4.3 and 4.4 of this chapter.
- c. Because of the increased risk of failure, a conditional permit shall not be issued, in an area with a seasonally fluctuating water table if the proposed absorption area is within 200 feet of a shellfish growing area, recreational waters or a public water supply impoundment.

5. The district or local health department shall affix to the conditional construction permit a clear and concise statement relating the conditions and circumstances which formed the basis for issuing the conditional permit as well as the owner's obligations under the permit.

6. The holder of any conditional construction permit shall have the permit recorded and indexed in the grantor index under the holder's name in the land records of the clerk of the circuit court having jurisdiction over the site of the septic tank system. District or local health departments shall be provided with certification that the conditional septic tank system permit has been recorded in the land records of the circuit court. The conditional

permit shall become effective one day after the district or local health department receives notification of recordation. The district or local health department shall advise the local building official that conditional septic tank system permits are not valid without certification that the permits have been properly recorded as required and shall forthwith notify the local building official when the conditional permit becomes effective. Final approval of the construction of the septic tank subsurface soil absorption system shall not be given until or unless the system is constructed in accordance with the conditions of the permit. The operation permit will be issued in accordance with 12 VAC 5-610-340.

7. As per § 32.1-164.1 of the Code of Virginia, the holder of the permit and any subsequent holders of the permit shall be bound by the conditions stated in the permit unless the holder or subsequent holder obtains an additional permit for modification or alteration of the septic tank system to meet any new use conditions.

IV CONCLUSIONS OF LAW

MCHD granted the 1995 Conditional Permit pursuant to the Civic League's 1995 application, effectively denying a year-round occupancy permit for the Dwelling. That decision resulted from MCHD's finding at that time that the site and soil conditions on the Property did not comply with the minimum requirements of the *Regulations* for year-round occupancy. VDH denied the current application for the same reason - because it does not comply with the minimum requirements of the *Regulations* and to do otherwise would result in unacceptable risks to public health as well as ground and surface waters.

MCHD acted properly and within its authority in issuing the 1980 Permit with certain conditions. It is undisputed that MCHD found in 1980 that there was an existing system on the Property that had been used previously by the School. The 1980 Permit, however, was not a permit for unlimited use of the Civic Center to be served by the existing system. In the Permit, MCHD specified an estimated maximum water use of 500 gallons per day and listed additional restrictions which included a limit on the number of plumbing fixtures that could be installed, a note saying that no additional plumbing was allowed, and a note saying that "high water usage activities are not recommended."
COM. EX. 1.

MCHD modified the 1980 Permit conditions by issuing the 1995 seasonally-restricted Conditional Permit. In 1995, the *Regulations* would have allowed the MCHD to issue a permit for a new sewage system under a seasonally-restricted permit (*Regulations*, § 250.J). The Civic League did not apply for such a new system and MCHD exercised its discretion in not requiring one, agreeing instead to allow the new caretaker's trailer to be connected to the existing system with the same conditions that would have applied to a new system. **COM. EX. 3.** The Civic League has not alleged (nor is it true) that MCHD acted improperly in 1980 or in 1995 nor has there been any evidence adduced to that effect.

According to Va. Code § 32.1-164.1 the Civic League is bound by the restrictions of the 1995 Conditional Permit unless it obtains a new permit with modified conditions. The Civic League did not challenge the seasonal occupancy restrictions of the Conditional Permit in 1995. Nevertheless, the Civic League is not barred from filing a new application seeking modification of the Conditional Permit as it has done. In response to that application, however, MCHD found no change in the site and soil conditions existing on the Property since 1995 and the Civic League has not produced any evidence to refute that finding.

There has been no change in the *Regulations* that would facilitate the issuance of a permit with the new conditions. In fact, the Board of Health amended the *Regulations* in 2000 effectively increasing the minimum vertical separation between the trench bottom and a seasonal water table.

The *Regulations* require issuance of permits that comply, or substantially comply with the *Regulations*, when new construction is proposed. The *Regulations* authorize issuance of non-complying permits when the purpose of the permit is to repair a failing system serving an occupied dwelling with indoor plumbing. *See Regulations*, § 280. The *Regulations* also authorize the issuance of certain permits that do not comply with the minimum requirements of the *Regulations* via the conditional-permit procedures. *Regulations*, 250.J.

The Department's records, including the most recent site and soil evaluation conducted March 21, 2006 **COM. EX. 8**, show that the soil conditions on the Property do not meet the minimum requirements of the *Regulations* for a conventional septic tank effluent system because the vertical separation from the seasonal water table is insufficient. A seasonal water table exists on the Property at a depth of zero inches — or, in other words, at the surface of the soil. The *Regulations* (§ 594 and Table 4.2) require a minimum trench depth of 18 inches and a vertical separation of 18 inches from the trench bottom to the seasonal water table for a septic effluent system. Collectively, these requirements yield a restriction that the seasonal water table exist at least 36 inches below the surface, a requirement which cannot be satisfied given conditions on the Property.

Accordingly, the evidence establishes that MCHD cannot issue a permit for the Property which substantially complies with the minimum requirements of the *Regulations*. The Civic League has not produced any evidence to dispute this finding, nor does it assert that it is seeking a permit under the provisions of the *Regulations* allowing non-complying permits the purpose of repairing a failing system serving an occupied dwelling with indoor plumbing. The only permit allowed under the *Regulations* is the one the Civic League already possesses — a conditional permit with restricted seasonal occupancy.

Insofar as the Civic League contends that the Conditional Permit constitutes a 'construction permit' whose restrictions somehow expired or lapsed, the Board rejects such interpretation of the Conditional Permit and/or the law. The Board also notes that the Civic League has recorded the Conditional Permit in the land records of Mathews

County and that the use of the Property, therefore, is subject to the terms of the Conditional Permit.

For the foregoing reasons, the Board affirms VDH's decision to deny the Civic League's application to modify the terms of the existing, seasonally-restricted Conditional Permit.

Entered: 09 1 13 1 06


Chairman

If the Civic League wishes to appeal this Order, it may do so pursuant to Virginia Code §§ 2.2-4000, et seq. and the Rules of the Supreme Court of Virginia by filing a Notice of Appeal with the Board Secretary within thirty (30) days of receipt of this Order as required by Rule 2A:2 and filing a Petition for Appeal in the Circuit Court within thirty (30) days of filing the Notice of Appeal as required by Rule 2A:4.