VIRGINIA:

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

In Re: Roland H. Satchell

FINAL ORDER

Mr. Satchell appeals the denial of an application for permits[1] for onsite sewage disposal systems on his property at Lots 51, 52, 53, and 54, Pine Ridge Development (also knows as the "Rosedale" subdivision) in the Town of Chincoteague in Accomack County. The Department denied the applications on December 28, 1998, following an informal conference. The Board heard the appeal in Richmond on August 18, 1999. Mr. Satchell appeared in person and by his able counsel, Daniel Hartnett.

The facts are not in dispute. The Board adopts the Department's proposed findings of fact.

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[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 prior to the construction, installation, modification or operation of a sewerage system . . . ." Section 2.12 of the Board's *Sewage Handling and Disposal Regulations* (the *Regulations* now are codified at 12 VAC 5-610-10 *et seq.*; § 2.12 is codified at 12 VAC *5-610-240*) imposes that requirement. Section 1.4 of the *Regulations,* 12 VAC 5-610-40, 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; he has not delegated the authority to issue variances. 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.

In summary, the lots in question are part of a subdivision that was put to record in 1973. Dept. Exhibit 1. The subdivision plat shows an approval by Bruce Jester, an official of the Town. The plat does not show any approval by the Department, and the Department has no record of approving this subdivision.

Mr. Satchell does not dispute that the soils on these lots do not meet the requirements of the Sewage Handling and Disposal Regulations. In particular, the soils are in a landscape position subject to flooding or periodic saturation, there is insufficient depth of soil to restrictive strata and to a seasonal or perched water table, and the drainfields would be installed in fill. Mr. Satchell says, rather, that he bought in a subdivision that has been approved by the Town and County, that 38 of the 56 lots, including Lots 39 and 55 adjacent to his lots, have dwellings with permits, and none of these systems has failed. He asks for the same permits that the Department has granted to his neighbors.

The Grandfather Clause is § 1.7 of the 1982 Sewage Handling and Disposal Regulations.[2] This regulation is not a marvel of clarity, but clearly enough it applies only to lots with permits granted under the earlier regulations or to lots in subdivisions approved by the Department in accordance with the local subdivision ordinance.

Mr. Satchell does not aver either of these situations, and there is no evidence to support either conclusion. Indeed, the Department demonstrates that

[2] Now codified at 12 VAC 5-610-70.

evidence to support either conclusion. Indeed, the Department demonstrates that even if the subdivision were grandfathered, the lots in question do not meet the requirements of the 1971 Regulations, as would be necessary to issue a grandfathered permit.

Instead Mr. Satchell says that he bought at a time permits were freely available, and that it is unfair to deny him a permit now simply because he has waited longer than his neighbors to apply. Further, in light of the 38 houses already in the subdivision, four more hardly can create an environmental Armageddon.

The Board understands and sympathizes with Mr. Satchell's position. At the same time the Board and the Department both are bound by the Regulations. Mr. Satchell might well have been able to obtain permits in the past, but he clearly cannot obtain them under the current Regulations. To the extent Mr. Satchell argues estoppel, the Commonwealth cannot be estopped in this matter that directly affects the public health and welfare.[3]

Accordingly the Board will sustain the Department's denial of the application.

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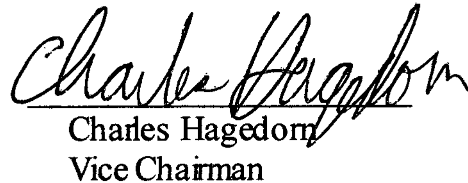
[3] The Supreme Court has "repeatedly held that estoppel does not apply to the state . . . when acting in a governmental capacity." *Westminster-Canterbury v. City of Virginia Beach,* 238 Va. 493, 503 (1989). This doctrine appears harsh at first glance, but it is necessary: The Commonwealth cannot sacrifice an essential governmental interest, such as protection of public health, even to correct the mistake of one of its employees. *See, e.g., In Re Pierce* (1997).

Two of these lots abut a canal and it does not appear that Mr. Satchell has sought permits for discharging systems. The Board expects that the Department will make every effort to assist Mr. Satchell if he elects to seek permits for discharging systems for his lots.

If Mr. Satchell wishes to appeal this decision, he may initiate an appeal by filing a notice of appeal with the Board's Secretary, Ms. Susan Sherertz, Division 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.



Charles Hagedorn
Vice Chairman

Dated: August 20, 1999

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