

VIRGINIA:

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

In Re: James and Katrina Holden

ORDER

Mr. and Mrs. Holden appeal the Health Commissioner's denial of their application for a permit¹ for an onsite sewage disposal system on their property at 721 Stewarts Road in James City County.

The Holdens bought the lot in 1989. At the time, the lot was the subject of a permit issued by the Department to Ms. Martin, the prior owner. The permit expired on May 7, 1991. On April 28, 1989 Mr. Holden applied for a permit for a larger drainfield to serve a proposed four-bedroom dwelling. The Department denied the application on May 2, 1989.

On May 4, 1995, Mr. Holden applied again for a permit on the lot. The Department denied the application on May 18, 1995, on grounds of insufficient depth of soil to seasonal water table, slow rates of adsorption, insufficient area of

¹Code § 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* 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.

acceptable soil, and portions of the landscape subject to flooding or periodic saturation.

Following an informal hearing on June 15, 1995, Mr. & Mrs. Holden appealed to this Board, which heard the matter on September 20, 1995.

The study by the Department's expert, Mr. Peacock, plainly shows that these soils are not suitable for a drainfield. Department Exhibit 10. Mr. Holden does not dispute this conclusion; indeed, he confesses he is "a little nervous now" about building on the lot. Mr. Holden nonetheless points out that the Department earlier issued a permit for this site; he cannot understand how that permit could have been issued if the lot was not in accord with the Regulations.

I. Effect of the Grandfather Clause

Section 1.7 of the Regulations provides:

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.²

²§ 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. 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.

The current Regulations were effective November 1, 1982³; the Department approved the Holden lot on November 11, 1986, some four years after the effective date of the regulations. Thus, by its own terms, the Grandfather Clause does not apply.

This conclusion is consistent with the purpose of § 1.7. The Grandfather Clause is written to deal with approvals made under the 1971 or earlier regulations that are less detailed and less rigorous than the 1982 regulations. The present permit was issued under the 1982 regulations, so the question before the Board is the effect of that permit, not the effect of the Grandfather Clause.

II. Revalidation of the Permit

Section 2.18 of the Regulations provides for revalidation of construction permits "if the permit has been previously issued in accordance with these regulations and the site conditions are the same as shown on the application and construction permit.

In the case of the Holden permit, the permit has expired, so there is nothing to revalidate. Moreover, the site conditions plainly are *not* the same as shown on

4. Reserve areas will not be required unless there was a pre-existing local requirement.

³The 1982 Regulations have since been amended in minor respects. The watershed date, for the purposes of the Grandfather Clause is the initial date of the major new replacement for the 1971 Regulations, *i.e.*, November 1, 1982. This becomes clear in light of the use of the 1971 regulations in the Grandfather Clause as the basis for decisions regarding grandfathered permits.

the earlier application and construction permit. Accordingly, there is no basis to revalidate the permit.

Absent a statute or rule so providing, the only basis for the result the Holdens seek is estoppel. 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, to correct what appears to be the mistake of one of its employees.

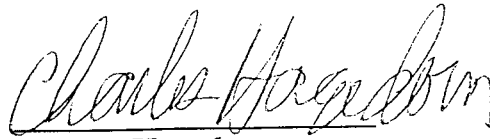
III. Conclusion

The Board must sustain the denial of the permit. There is no dispute that the soils are inadequate. To issue a permit in these circumstances only would lead to the installation of a drainfield system that almost certainly would fail. A permit in these circumstances probably will impose the costs of a failed septic system upon the owner of this lot and surely will create a threat to public health.

Accordingly, the Holdens' appeal is **OVERRULED**.

If the Holdens wish to appeal this decision, they may do so by filing a notice of appeal with the Board's Secretary, Ms. Beth Bailey Dubis, 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 them. Other re-

quirements 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: October 10, 1995

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