VIRGINIA:

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

**IN RE: BARBARA AND LEWIS SIMPKINS**

Mr. & Mrs. Simpkins appeal the Health Department's denial of their application for an onsite sewage disposal permit[1] for Lot 877 in the Lake Caroline Subdivision in Caroline County.

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

- On June 11, 1968, the Department issued a subdivision approval, indicating that about 80% of the lots in the Lake Caroline subdivision would be useable for drainfields, and that the remaining 20% either would be unsuitable or would have to be tested for suitability.

- On November 11, 1988, the Department issued a permit to the Simpkins' predecessor in title, Mr. Tubb, for Lot 877.

- The permit expired in April, 1993.

- On September 13, 1994, real estate agent Sandi Robinson filed an application for a prospective buyer, Charles Boaz. The Department's Environmental Health Specialist (aka Sanitarian) found Lot 877 to be dominated by a drainageway. When the Specialist went to the portion of the lot where the 1988 permit shows a

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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 . . . ." 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.

drainfield, she found a shallow seasonal water table. By letter of October 26, 1994, the Department denied the application.

- Following an informal hearing with the local medical director, the denial came to be heard by this Board on June 2, 1993.

The Department concedes that the lot is subject to the Grandfather provision at § 1.7.A of the Sewage Handling and Disposal Regulations.[2] The Department argues, however, that the site and soil conditions on the lot do not meet the requirements of the 1971 regulations. Indeed, the Department's evidence in that respect is overwhelming, *see* Dept. Exhibit 18.[3]

Mr. & Mrs. Simpkins do not dispute the soils evidence; they rely only upon the earlier permit. Regarding prior permits, § 1.7 of the Regulations provides:

> Sewage disposal system permits granted prior to the effective date of these regulations shall be valid if site

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[2]§ 1.7 **Grandfather Clause.** Subdivision plat approvals made in accordance with local subdivision ordinances by the local health department prior to the effective date of these regulations shall be valid and conclusive regarding the general suitability of soils for installation of septic tanks.

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A. Subdivision approvals. Subdivision plat approvals granted in accordance with local subdivision ordinances will not be re-evaluated as a result of the 1982 regulations.

1. To carry out the intent of § 1.7, pertaining to previously approved subdivision plats the local health departments will evaluate lots for which applications are received but for which septic tank permits have not been issued by:

a. Utilizing the criteria included in the 1971 regulations to assess soils, siting and sizing of the system; however,

b. Since the 1971 regulations do not address soils with percolation rates over 60 min/inch, these regulations will apply when soils are encountered that have rates greater than 60 min/inch and less than or equal to 120 min/inch, for soil evaluation and system design.

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

[3]In particular, position in the landscape (in a drainageway) and seasonal water table (much too shallow). The restrictive permeability found by Mr. Cobb, the Department's expert, probably is responsible for the seasonal water table.

and soil conditions would not preclude the successful operation of the system.[4]

As the Board said in *In re Sitzman* (May 31, 1995), regarding a subdivision plat approval: The Regulations were effective November 1, 1982;[5] as to an approval after the effective date of the regulations, the Grandfather Clause does not apply.

The Department issued the permit in question here in 1988, some four years after the effective date of the 1982 regulations. Accordingly there is no basis to apply the Grandfather Clause.

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 approval was made under the 1982 regulations, so the question before the Board is the effect of that approval, not of an approval under the Grandfather Clause.

Section 2.18.B of the Regulations provides for revalidation of old 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 present case, it is apparent that the site conditions on the original

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[4]§ 1.7 . . . 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.

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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. . . .

[5]The 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.

permit are not the site conditions on the present lot. Moreover, the permit has expired, so there is no permit to revalidate.

The Department suggests that the original permit was issued for Lot 877 and all or part of Lot 876 based upon the owner's staking the property line incorrectly. That conclusion surely is supported by the later issuance of a permit on lot 876, in about the position shown for the drainfield on the 1988 permit. *Compare* Dept. Exhibit 23 with Exhibits 6, 10, and 18. The Board need not resolve this question, however: The soil conditions on the present lot clearly are not those shown in the 1988 papers, and the conditions plainly are unsatisfactory, so there is no basis to revalidate the expired permit.

Absent a statute or rule so providing, the only basis for the result the Simpkins 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 the prior lot owner.

The Board thus 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, Mr. & Mrs. Simpkins' appeal of the Department's denial of their application for a permit for onsite sewage disposal is OVERRULED.

Mr. & Mrs. Simpkins may initiate a judicial appeal of this decision by filing a notice of appeal with the Board's Secretary, Beth Bailey Dubis, 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 them. 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

Charles Hagedorn
Vice Chairman

Dated: October 10, 1995

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