

VIRGINIA:

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

In Re: Appeal of Kevin R. Wightman, USMRC Ret.

ORDER

Findings of Fact.

1. Kevin R. Wightman ("Mr. Wightman") is the owner of record of certain property identified as Parcel 2B in the Liberty Fork Subdivision of Caroline County. On July 19, 2002, Mapledale, L.L.C. filed applications for certification letters with the local health departments as part of a land-division proposal that created two parcels, including Parcel 2B subsequently purchased by Mr. Wightman. (Commonwealth's Exhibit 1).

2. The application for Parcel 2B contained a certification (the "Certification") and supporting documentation prepared by Harold Bradley ("Mr. Bradley"), an Authorized Onsite Soil Evaluator, who identified primary and reserve drainfield areas on Parcel 2B and certified that the site and soil conditions met the minimum requirements of the Sewage Handling and Disposal Regulations, 12 VAC 5-610-20, *et seq.* (the "Regulations") for conventional septic-effluent sewage systems. Mr. Bradley's Soil Evaluation Report identified the location of the primary drainfield site by showing the location of the soil borings used to determine the primary drainfield site on a scale drawing (the "Scale Drawing") apparently taken from a survey plat. The location and dimensions of the primary drainfield on the Scale Drawing did not, however, correspond to the location of the primary drainfield on a survey plat (the "Survey Plat") prepared by Gordon L. Jones, a licensed surveyor. (Commonwealth's Exhibits 2-4).

3. On July 26, 2002, Nicholas Watkins ("Mr. Watkins"), Environmental Health Specialist Senior for the local health department ("Mr. Watkins") issued a certification letter (the "Certification Letter") for Parcel 2B. On September 9, 2002, Mr. Watkins issued a construction permit (the "Permit") for a septic system on Parcel 2B. The location of the primary drainfield shown on the Permit corresponded to the location as identified on the Survey Plat, not the location identified on the Scale Drawing and the Certification Letter. There is no evidence in the record from which to determine whether Mr. Watkins: (1) visited Parcel 2B and/or the proposed construction site of the primary drainfield; or (2) evaluated soil conditions and/or determined the location and dimensions of the primary drainfield independent of the information presented in the Scale Drawing and Survey Plat. (Commonwealth's Exhibits 5-6).

4. In July, 2003, Mr. Wightman engaged James Cecil of Caroline Excavators ("Mr. Cecil"), a septic system construction company, to install the sewage system for Parcel 2B. Mr. Cecil advised the local health department that he encountered problems

with the soil conditions in the permitted primary drainfield area and believed the soils to be unsuitable. Tommy Thompson, Environmental Health Supervisor for the Rappahannock Health District ("Mr. Thompson") and Mary Benton, Environmental Health Supervisor Senior for Caroline County, visited Parcel 2B and confirmed that soils within the installation site did not conform to the minimum requirements of the Regulations. Evaluating a trench Mr. Cecil had excavated for installation of the septic system, Mr. Thompson determined that there was no separation between the bottom of the trench and the seasonal water table. He also concluded that there was no separation between the bottom of the trench and a restrictive horizon. (Commonwealth's Exhibits 8-12).

5. By letter of August 12, 2003, Mr. Bradley submitted a letter to Mr. Thompson, disagreeing with the health department's evaluation of the soils within the drainfield area and requesting a modification of the Permit so that the two upper ditches of the septic system would be installed at a depth of 24 inches while the partially-constructed third ditch would remain at a depth of 42 inches. (Commonwealth's Exhibit 13).

6. On or about August 13, 2003, Phillip Cobb ("Mr. Cobb"), a soil scientist with Virginia Tech on contract to the Virginia Department of Health ("VDH"), evaluated site and soil conditions in the primary drainfield area of Parcel 2B. According to Mr. Cobb's report, the soils in and around the drainfield did not meet the criteria of the Regulations. Mr. Cobb reported that the two major features of the soils that rendered them unsuitable for drainfield use were the soils' wetness features and restrictive permeability. In his report, Mr. Cobb stated that:

[the soils] have soil wetness or redoximorphic features as indicated by highly mottled soil colors of gray, red, yellowish red, and yellowish brown. These mottled colors indicate that the soils are or have been periodically wet. . . . The second major limitation in the soils is the slow to very slow, restrictive permeability that impedes the movement of groundwater

(Commonwealth's Exhibits 10, 14-16).

7. On August 29, 2003, District Health Director R. Donald Stern, M.D., M.P.H., convened an informal hearing (the "Informal Hearing") regarding VDH's intent to revoke the Permit. At the Informal Hearing, Mr. Wightman argued that percolation tests he performed suggested soils in and around the drainfield were sufficiently permeable to sustain the septic system. Mr. Thompson explained that permeability was not the only problem with soils in the drainfield area and that Mr. Wightman's percolation observations did not conform to requirements for such tests contained within the Regulations. Mr. Thompson also explained that VDH does not sanction percolation tests on soils considered unsuitable for other reasons - e.g., insufficient separation from a seasonal water table. (Commonwealth's Exhibits 17-20).

8. Based on this evidence, Dr. Stern revoked the Permit.

9. Mr. Wightman appealed the revocation and the Board heard that appeal on October 22, 2003. (Commonwealth's Exhibit 21).

Conclusions of Law.

1. **§§ 32.1-163.5 and 32.1-164 Code of Virginia (1950), as amended.** Code §§ 32.1-163.5 provides that, for the purposes of subdivision review, permit approval and issuance of letters for residential development, the Board and VDH accept private site evaluations and designs . . . designed and certified by . . . an on-site soil evaluator. Code § 32.1-164 further provides that VDH shall issue permits on the basis of AOSE certifications and that VDH shall not be required to perform a field check of AOSE certifications prior to issuing letters or permits based upon such certifications.

2. **Section 470.D of the Regulations.** Section 470.D of the Regulations defines the term "seasonal water table" as that portion of a soil profile where color change has occurred in the soil as a result of saturated soil conditions or where soil concretions have formed. Typical colors are gray mottlings, solid gray or black and the depth at which these conditions first occur is termed the "seasonal water table."

3. **Sections 120, 490 of the Regulations.** Sections 120 and 490 of the Regulations define soil restrictions and soil colors as indicators of soil suitability for in-ground septic systems.

4. **Sections 593, 594, Table 4.3 of the Regulations.** Sections 593, 594 and Table 4.3 of the Regulations prescribe a vertical separation distance of 18 inches between the trench bottom and a soil restriction /water table for septic tank effluent systems. These sections also require a minimum installation depth of 18 inches for all septic effluent systems.

5. **Sections 300.A and 300.C of the Regulations.** Section 300.A of the Regulations provides that sewage disposal system construction permits are null and void when conditions such as sewage system location are changed from those shown on the application. Section 300.C provides that VDH may revoke a construction permit when facts become known which reveal that a potential health hazard would be created or that ground water may be adversely affected by allowing a proposed sewage disposal system to be installed or completed.

6. **VDH properly issued the Certification Letter in reliance upon documentation submitted by Mr. Bradley, a certified AOSE.** As an AOSE, Mr. Bradley was required by law and contract to certify only sites that conform to the requirements of the Regulations. By law, VDH was required to accept his Certification. The law did not require and records do not indicate that Mr. Watkins independently evaluated soil and site conditions at Parcel 2B or obtained and/or reviewed information other than the Certification and supporting documentation in determining whether to issue the Certification Letter

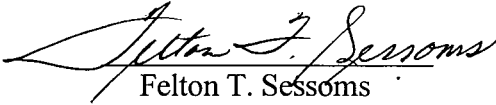
7. **VDH properly issued the Permit in reliance upon the Certification Letter and Mr. Bradley's Certification.** GMP #52 contains VDH's policy regarding

certification letters and provides that a site visit by VDH staff is optional if there has not been a substantial physical change to site conditions. Although this policy was written prior to VDH's implementation of the AOSE program, these policy statements are consistent with the AOSE program and the provisions of Va. Code §§ 32.1-163.5 and 32.1-164 and GMP #100. There is no requirement that, prior to issuing a construction permit, VDH staff conduct a field inspection of site and soil conditions. There is also no evidence that there was a substantial physical change in the soil and site conditions on parcel 2B between issuance of the Certification Letter and the Permit. Accordingly, VDH properly issued the Permit in compliance with applicable law, regulations and its policies.

8. ***VDH properly revoked the Permit upon discovery that site and soil conditions in the primary drainfield area of Parcel 2B did not conform to the minimum requirements of the Regulations.*** Site and soil evaluations by VDH staff and by Mr. Cobb show that there is a seasonable water table present at depths between 16 and 32 inches below the surface in the drainfield areas of Parcel 2B. The seasonal water table is indicated by a chroma-two or less gray colors and/or mottles and by red and yellow mottles according to Table 4.3 and sections 120, 470.D and 490 of the Regulations. The Regulations require a minimum vertical separation between the trench bottom and the seasonal water table of 18 inches and, at the permitted installation depth of 42 inches, no separation is provided between the trench bottom of the proposed system and the seasonal water table. Given the minimum installation depth of 18 inches for all septic effluent systems, a minimum depth of 36 inches is required for the proposed system and site and soil conditions do not meet requirements for this reason also.

9. ***VDH properly revoked the Permit because conditions changed from those shown on the application.*** Mr. Bradley's original certification package showed a location for the primary drainfield area on Parcel 2B drawn on the Scale Drawing. The Survey Plat reveals, however, that the location and dimensions of the drainfield area are not as indicated on the Scale Drawing and amount to a change on location of the primary drainfield are of approximately 80 feet in one direction and 90 feet in another. Accordingly, the actual drainfield site is not the same as the site indicated in the application materials and Certification and, thus, the Permit is null and void. Because of this change in location, furthermore, there is evidence that installation and/or completion of the proposed system would adversely impact the groundwater supply and/or create a health hazard. Therefore, VDH properly revoked the Permit.

For these reasons, the revocation of the Permit is ***affirmed.***


Felton T. Sessoms
Chairman

Dated: December 3, 2003