

DECISION OF ENVIRONMENTAL APPEALS BOARD

RE: Edgar M. Downs  
Property located on the east side of Route 285  
Holly Mount  
Sussex County

An appeal was taken to the Environmental Appeals Board pursuant to 7 Del. C. 6008 and a hearing was held on October 10, 1984.

By letter of July 18, 1984 the supervisor of the Water Pollution Branch, Robert J. Zimmerman, communicated to Mr. Edgar Downs that his property located on the east side of Route 285, 800 feet south of Route 280B, north of Holly Mount, Delaware, would be denied the sewage disposal system permit application which had been sought. The original application had been submitted to the Georgetown office on January 12, 1983. It had proposed a conventional septic tank-tile field system at twenty-four (24) inches below the ground surface. On April 27, 1983, the application was returned with a letter which indicated the Department thought that this was unsuitable. On October 24, 1983, the application was resubmitted and the proposal was made for an elevated sand mound-type system. The Department indicated that based on the findings of Dr. Carey that the proposed system was unsuitable in that area where the water table had attained such an elevation. This is an appeal from that denial.

Having considered the testimony and evidence given at the hearing, and taking into consideration that information and evidence submitted and stipulated to be entered into evidence we find that the decision of the Department must be reversed.

Having considered the correspondence and exchange between the

applicant and the Department and having reviewed the testimony given and the technical data included in the record, we are convinced that the proposed septic system, as altered could be installed within the limits established by the regulations. The proposed septic system could be installed in keeping with the Water Pollution Control Regulation No. 2 governing the installation and operation of sewage disposal systems, Section 0806.

The appropriate law provides, at 0806 of the Water Pollution Regulation No. 2 that:

Water Table - Septic tank -- Tile Field  
Sewage Disposal Systems shall not be installed in areas where the maximum elevation of the groundwater table is less than four feet below the ground surface except where it can be shown to the satisfaction of the Commission that due to the special nature of the area involved or the particular manner of construction the system will not cause or contribute to a state of pollution.

We find that the elevated sand mound, as described in the evidence and testimony, may be constructed in such a manner that it will not cause or contribute to a state of pollution.

SUMMARY OF THE EVIDENCE, FINDINGS OF FACT

The following witnesses testified. A brief summary of the testimony is as follows:

1. Kay W. Dewson. Ms. Dewson is a Resource Control Specialist out of the Georgetown office and handles preliminary field work for septic system applications. She has been with the Department since December of 1982. She visited the site on two occasions and once conducted a percolation test. On March 3,

1983 in the morning she visited the subject premises and was unable to perform percolation test because the area to be tested was under water two to three inches. On her second visit to the premises on April 26, 1983 in the afternoon, she observed approximately 75% of the rear portion of the property still underwater. However, she was able to conduct her boring and percolation tests at that time. She encountered free water at 19" that rose to 7" below the surface. The percolation test results thus revealed mottles at 19".

2. Dr. John Carey. Dr. John Carey (Ph.D.) of the Department, also conducted field work on the subject premises. He conducted a site investigation on June 15, 1984, in the morning and testified that the area was mapped as Woodstown sandy loam by the Soil Conservation Service. He discussed three general types of soil and classified the subject property as worse than Woodstown, which is only a moderately well-drained soil. A conventional type system could not be put in a Woodstown soil.

In order for a system to work in this type of soil, the system would have to be placed above the ground. With respect to an elevated sand mound system, it was this witness' testimony that since the property was observed to be flooded in the spring for a matter of weeks, then this would not be an abnormal situation and the ground would become saturated rather quickly and the entire above-ground system would be subject to collapse.

Upon cross-examination, the witness granted that the observations of standing water were only based on two visits and were not necessarily on the lot in the interim or since. He

granted that there are systems which have been designed which could work, but that they probably would not meet the regulations. Dr. Carey would express no firm opinion as to whether fill might be used on this lot, as it may have been used on other lots to assist in constructing a system that would meet the septic tank requirements. Further, the witness indicated that there is, under the existing regulation, the opportunity to interpret either the existing water table or the water table as indicated by mottles. A mixed criteria is still used to some extent within the water pollution branch; however, the witness indicated that he prefers to use the mottle measure and made such a recommendation to Mr. Zimmerman, who made the final decision denying the request.

3. Robert Zimmerman. Mr. Zimmerman is an environmental engineer and the Supervisor of the Water Pollution Branch. He has been with the Department since August of 1975 in various levels of responsibility up until his present position. The witness discussed alternative systems which would provide an equivalent level of protection to the environment. He grants that the regulations were established in 1978 and had in mind the conventional systems. Alternative systems could provide an equivalent level of protection where soil conditions are worse, such as the situation here. The elevated sand mound system is one such system.

The witness did evaluate the plans and specifications and the soils work that had been done by Ms. Dewson and Dr. Carey. The witness said that he made the final determination as to whether such a system would be acceptable under the regulations. He

Department. He indicates that prior to the final denial letter in July of 1984, he had no indication that the Department felt that a system could not be designed to meet the regulations. The Downs believed that if they would modify the plans with small details, that the system would then be acceptable. The witness indicates that there are conventional systems on either side of his lot. He suggests that the property which Ms. Dewson viewed upon her initial inspection was that of their neighbor to the rear. With respect to the flooding, the witness indicates that any flooding that may have existed was the result of an excessive amount of rain for that area. He says that the lot previously had been a plowed soybean field. On the back lot line there was a plow furrow which directed water onto their property. That has since been leveled.

5. William Downs. This witness is the co-owner of the property. He indicates that he removed the plow furrow using a backhoe. He also offered information with respect to other systems which he believed were similar upon which permits had been granted.

#### DECISION

HAVING reviewed the evidence, including the live testimony as well as considering the exhibits presented and the stipulated exhibits in the record, we herein REVERSE the decision of the Department and GRANT the application for a sand mound system. We find that due to the nature of its construction it will not cause

expressed concern that even with the mound system, when the water table came up at least to the surface and possibly when it flooded the property, the stability of the mound would be in question. He grants that there are other properties for which mound permits have been granted where the water table is also very close to the surface.

The witness indicated that mottling should not be the sole indicator of the water on a property. Further, he says that the Department did engage in discussions with the Downs' and their engineers with respect to the design of the system. This included several changes which were made at the request of the Department. In fact, this type of scrutiny has increased over the last several years due to increased staffing. It is apparent that the increased level of effort may have worked to the detriment of the Downs application. Later certain questions were asked of Mr. Zimmerman with respect to the Department's reliance upon soil types as mapped. He indicated that the lines on the map can be very imprecise, and where there is no on-site inspection, the Department relies upon the information submitted by the applicant. The use of the soil survey is relied upon as a screening device. He grants that there have been occasions where permits may have been issued for sites that may not have been the soil as listed on the application.

4. Edgar M. Downs, Jr. Mr. Downs and his brother are the owners of the lot in question. They placed a dwelling on the property which was moved onto the property in September of 1982. He makes reference to the substantial amount of correspondence which is reflected in the file, between McCann Surveyors and the

or contribute to a state of pollution on the property. On its own merits the application meets Regulation No. 2 which governs the operation of the sewage disposal systems.

This decision is stayed pending an appeal to the Courts for judicial review.

Thomas J. Ford  
Ray K. Woodward  
Henry H. Humm  
Dorothy A. Greenwood  
Cecil H. Hubbard Jr. 11/5/84

In accord with the request of the Department of October 11, 1984, the board grants a stay of this decision pending an appeal to the courts for judicial review.

Thomas J. Ford  
Ray K. Woodward  
Henry H. Humm  
Dorothy A. Greenwood  
Cecil H. Hubbard Jr. 11/5/84

