

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

APPEAL OF)
CROWLEY ASSOCIATES REALTY)

ORDER

This matter came to a hearing before Thomas J. Kealy, Evelyn Greenwood, and Ray Woodward, designated by the Environmental Appeals Board for the purpose of holding the hearing pursuant to 29 Del. C. §10125. The hearing was held Wednesday, July 23, 1986 at 10:00 a.m. Larry W. Fifer, Esquire, represented the appellant, Kevin Maloney, Deputy Attorney General, represented the Department, and Barbara MacDonald, Deputy Attorney General, represented the Hearing Officers. Appellant brought this appeal from a decision of the Secretary, Department of Natural Resources and Environmental Control, denying appellant a permit to install an in-ground wastewater disposal system (septic system) on a lot in the Golf Village development, in Sussex County.

SUMMARY OF THE EVIDENCE

Mr. David Tidwell testified on behalf of the appellant that he is a resident of Golf Village, has lived in his home since 1980 and is unaware of any problems with conventional septic systems on his property or on any of the other properties in Golf Village. Mr. Tidwell testified that the lot in question (Lot 14) is as high as any of the other lots and is densely wooded. Mr. Tidwell, a real estate broker, testified that in his opinion a

lot in this development which is ineligible for a septic system permit has no value. Mr. Tidwell also testified that he believes that other properties in Golf Village have been granted permits to build conventional septic systems within the last year, although he is unaware of the exact date.

Mr. Thomas Crowley testified that he purchased 28.5 lots in the Golf Village development from the developer in 1976. Of the original 28 1/2 lots which he owned he now owns seven, one of which is Lot 14. He has never had any other problems with septic systems in Golf Village and has always previously been able to obtain a septic permit. His sale of the other lots was always contingent upon the buyer obtaining a permit. Lot 14 is heavily wooded and has ditching in front. In comparison to some of the other lots, lot 14 is on high ground. It is adjacent to the golf course and is therefore more valuable than other lots. In his opinion, the lot cannot be sold without a septic permit, since no other lot in the development is served by a holding tank, and requiring a holding tank would render the lot useless.

Mr. A. J. Farling testified for the Department. He is the manager of the Ground Water Section, and acting supervisor of the On-site Wastewater Disposal Branch. However, he testified that the application for Lot 14 was received and processed before he became involved with the Wastewater Disposal Branch. Thus, he did not deny Mr. Crowley's permit application. However, he testified that he has seen the application and accompanying material, including the soil evaluation, and in his opinion

installation of the system system would be inappropriate on that lot.

Roy Parikh testified that in February of 1986 he was the engineer in charge of the On-site Wastewater Disposal Branch and that he signed the Letter of Intent to Deny sent to Mr. Crowley concerning Lot 14. His reason for denying the permit application was that the soil evaluation showed that seasonal highwater table was at or near the soil surface on that lot. Mr. Parikh testified that although these particular tests were done at a time when the water table was high and, in fact, that water was standing on the lot, the seasonal highwater table is not determined by the actual water table level on the day of the test, but instead is determined by the color of the soil so that test results remain consistent throughout the seasons.

Donald K. Short testified that he is a resource control specialist for the Department. He reviews septic tank permit applications. He is familiar with the soil evaluation done on Lot 14. That soil evaluation showed "Elkton" type soil, which is characterized by a water table 20 inches or less from the surface and by low permeability and a high clay content. He testified that to his knowledge Elkton soil is never appropriate for installation of an inground septic system.

Lyle K. Jones, a soil scientist with the Department, testified that he visited the lot to conduct the soil evaluation and conducted three soil borings both outside and within the proposed disposal area. He found poorly drained Elkton soils

with a high clay content. He testified that Elkton soils are generally found in isolated pockets, so that one particular lot may be ineligible for a septic system while its neighbors have appropriate soil. He did not conduct any more soil borings since all remaining areas of the lot were covered with standing water, indicating a seasonal high water table at the soil surface. He testified that the application for a septic permit was denied because of the seasonal highwater table found on the lot. He testified that a system installed in an area with a seasonal highwater table may cause the discharge of pollutants into the water table through backing-up or overrunning. Such problems may occur without being noticeable from the surface. On cross-examination Mr. Jones testified that the Department had not monitored any wells, did not know of any well failures or septic system failures in Golf Village. He testified that there is no visible evidence of pollution occurring in Golf Village. He testified that the deepest test boring taken on Lot 14 was 29 inches deep but that the result would not be different if the test boring had been any deeper. He testified that the Department does not take into account the sea level or the amount of vegetation or trees on properties since these are not indicators of the water table on property.

RECOMMENDED FINDINGS OF FACT

1. The soil evaluation conducted February 12, 1986 found Elkton soils, characterized by poor drainage and low permeability on Lot 14 and further found the seasonal highwater table to be at

or near the soil surface in all three soil borings conducted on the lot.

2. These findings would not be different if the soil evaluation had been conducted at a different time of year.

3. Although this permit application is evidently the first application relating to Golf Village which the Department has denied, there is no evidence that the prior permit applications which were granted were not either (a) made under and in compliance with the "old" regulations in effect prior to June 30, 1985, or (b) made under and in compliance with the current regulations.

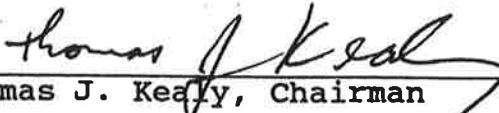
4. There is no evidence that the Department failed to apply its regulations or applied the regulations arbitrarily in this case.

RECOMMENDED CONCLUSIONS OF LAW


The "Regulations Governing the Design, Installation, and Operation of On-site Wastewater Treatment and Disposal Systems," effective June 30, 1985, Regulation 6.06000 requires site evaluations to demonstrate a depth to limiting zone of at 20 inches or more for property to be eligible for any type of on-site septic system. Regulation 6.06038. Regulation 2.01420(a) defines a seasonal highwater table as shown by the depth in the soil at which mottling first occurs as a limiting zone. Thus, under the applicable regulations, the results of the soil evaluation mandate a finding that the property in question is not eligible for an on-site septic system. There is no evidence that the results of the soil evaluation are inaccurate.

RECOMMENDED DECISION


The Hearing Officers recommend that the Secretary's decision be affirmed.



Thomas J. Kealy, Chairman


Evelyn Greenwood


Ray Woodward

Dated: October 22, 1986


RICHARD C. SAMOS


Clifton H. Hubbard, Jr.