

BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE

APPEAL OF)
PHILIP EDDINGER)

OPINION AND ORDER

This matter came to a Hearing before the Environmental Appeals Board on October 9, 1986. Present were Chairman Thomas J. Kealy and members Clifton Hubbard, Richard Sames, and Evelyn Greenwood. Brenda Sammons, Esquire, represented the appellant. The Department of Natural Resources and Environmental Control ("Department") was represented by Deputy Attorney General Kevin Maloney. The Environmental Appeals Board ("Board") was represented by Deputy Attorney General Barbara MacDonald. Mr. Eddinger appealed the Department's denial of his application for a permit to install an on-the-site wastewater disposal system (a septic system) on his lot in the Joy Beach development on Rehoboth Bay. The Board affirms the Department's decision.

SUMMARY OF EVIDENCE

Philip Eddinger, the appellant, testified that he is the owner of two contiguous lots in the Joy Beach development which together form a single lot 100 by 100 feet. He purchased the lot in 1981 for \$13,500. Approximately 85% of the lots in the development are currently developed. A house and lot in the development can sell for as much as \$90,000. Without a septic system, the lot is essentially valueless. Mr. Eddinger believes

that the cost of installing and maintaining a holding tank does not allow this to be a viable option. Mr. Eddinger testified that before the implementation of the new regulations in July of 1985, he had had two percolation tests done on the property by a certified percolation tester. However, he never applied for a permit using the results of his percolation tests because the results of the tests were unfavorable. He was not aware of the change in regulations in July of 1985. Mr. Eddinger testified that he believed that one of his close neighbors had recently obtained approval from the Department to install a "sand mound" type septic system and introduced into the evidence a letter from this neighbor regarding her application.

Lyle A. Jones, a soil scientist for DNREC, testified that the site evaluation done by a Department soil scientist found standing water on the lot at 34 and 35 inches below the soil surface. The evaluation found, in two other borings, mottling near the soil surface and at 14 inches below the soil surface. The lot is covered by fill of very low permeability. The finding of mottling at or near the soil surface indicates a seasonal high water table at this level, making the property ineligible under Department regulations for a septic system. Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems, 6.0600 (July 1, 1985) ("Regulations"). Further, the Regulations (6.05000) require that septic system disposal areas be set back at least 100 feet from any shellfish waters; since the Eddinger property is located on

Rehoboth Bay and is only 100 feet deep, it is not possible for the property to meet this requirement.

Al Farling, the manager of the Ground Water Section of the Division of Water Resources of the Department, testified that the Department had not granted any applications for septic systems to be installed in the Joy Beach development since the implementation of the new regulations. Mr. Farling testified that one resident had obtained a permit under the old regulations which was installed after June 30, 1985, and that another resident had obtained permission to replace an existing septic tank.

FINDINGS OF FACT

The Board finds:

1. The lot in question is located on Rehoboth Bay, a shellfish water, and measures 100 by 100 feet.
2. The results of the soil evaluation conducted by Department soil scientists on May 28, 1986, show that the seasonal highwater table on the lot is at or near the soil surface.
3. The Department has not granted any permits for the installation of septic systems in the Joy Beach development under the regulations which became effective June 30, 1985.

CONCLUSIONS OF LAW


The facts mandate affirmance of the Department's decision. The appellant did not show that the Department had applied the applicable regulations arbitrarily or unfairly in any way. The appellant requests the Board to order the Secretary to amend its regulation requiring a 100 foot setback from shellfish waters for

a septic system disposal areas. No facts were presented which would permit a conclusion that the Regulations were not properly enacted or are beyond the scope of the Department's authority to protect the environment under 7 Del. C. c.60.

ORDER

The decision of the Secretary denying appellant's application for a permit to install an on-site wastewater disposal system is affirmed.

SO ORDERED



Thomas J. Kealy, Chairman

Evelyn Greenwood

Clifton Hubbard

Richard Sames

Ray Woodward

Dated: October 23, 1986

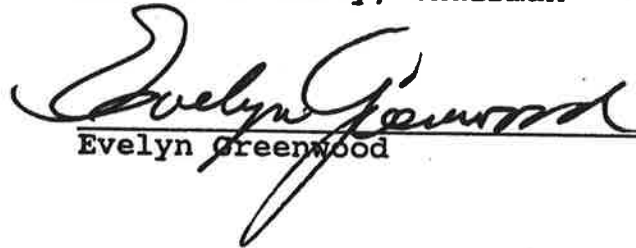
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10/20/86

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