

BEFORE THE ENVIRONMENTAL APPEALS BOARD

STATE OF DELAWARE

APPEAL OF GORDON ROBERTSON, M.D.

OPINION AND ORDER

This matter came to a hearing January 8, 1986 at 2:00 p.m. Present were Chairman Thomas J. Kealey and members Holger H. Harvey, Clifton H. Hubbard, Jr., and Ray Woodward. Deputy Attorney General Barbara MacDonald represented the Board. Dr. Robertson was self-represented. Deputy Attorney General Peter Hess represented the Department of Natural Resources and Environmental Control ("DNREC"). Dr. Robertson appealed DNREC's denial of his application for a permit to install an on-sight wastewater disposal system on certain property in the Joy Beach Development on Rehoboth Bay. DNREC's denial was based on its finding that the property did not meet the standards set forth in §6.000 of the DNREC's "Regulations Governing the Design, Installation and Operation of On-sight Wastewater Treatment and Disposal Systems," effective July 10, 1985.

Summary of the Evidence

Dr. Robertson testified in his own behalf that other property owners in the Joy Beach Development had in the past been granted septic system permits and had such systems installed. He further testified that two of his neighbors in Joy Beach had had such systems installed subsequent to the adoption of the new regulations July 10, 1985. However, Dr. Robertson was unable to state whether those neighbors had been granted their permits prior to July 10. Dr. Robertson testified that the drainage in Joy Beach, contrary to the findings by Lyle A. Jones, the DNREC evaluator, is not poor and that even after a heavy rain the property drains immediately. However, Dr. Robertson agreed that the water table is high and that in fact the whole area sometimes floods.

Dr. Robertson alleged that DNREC has applied stricter standards in its regulations governing installation of septic systems as opposed to the sewage treatment regulations applied to municipalities such as Rehoboth Beach. Dr. Robertson testified that he had read that the Rehoboth Beach sewage disposal plant, after being rebuilt, would still discharge 15% suspended material into Rehoboth Bay.

Dr. Robertson introduced into evidence an article "What's a Swamp Worth?" by David L. Harden of DNREC which discusses the natural value of fresh water wetlands as tertiary treatment for discharged sewage. Dr. Robertson was unable to say whether these benefits extended to salt water marshes such as the hay marsh adjacent to his property.

Dr. Robertson testified that his property is the last lot in Joy Beach on both the West and the South sides. Therefore, Dr. Robertson argued that in calculating the 100 feet which the regulations require a septic system to be distanced from wetlands he should be entitled to calculate the entire breadth of the road, rather than one half thereof.

Finally Dr. Robertson testified that he proposed to install special water-saving devices in the house he wishes to build on the property, so that the actual flow of wastewater from the house would be only approximately 2,000 gallons per month, rather than the 400 gallons per day estimated by the DNREC. Dr. Robertson argued that the DNREC should have taken this reduced flow into consideration prior to denying the permit.

Mr. Gene Bookhammer testified for Dr. Robertson that he is the developer who developed the Joy Beach Community. He testified that he was aware of problems with the septic systems of some of the other residents of Joy Beach but these problems had been corrected. He was not aware whether any systems had been installed at Joy Beach under the new regulations.

Mr. Lyle A. Jones testified on behalf of DNREC that he is a soil scientist employed by DNREC and that he conducted a soil evaluation of the Robertson property. He testified that he found very sandy and poorly drained soil with compacted fill resulting in permability of moderate or worse. His test showed that the seasonal high water table was at most 29 inches below the surface, but he testified that he believed it to be higher due to external signs such as water marks. Mr. Jones testified that he could not be sure where the seasonal high water table was because of the deep layer of fill on the soil. Mr. Jones testified that the whole area of the Joy Beach Development and beyond will flood in a severe storm and that during floods waste water from septic systems will flow directly into the ocean.

Mr. Jones further testified that no matter where a sewage disposal system were to be located on the Robertson property it could not meet the DNREC requirement that such a system be at least 100 feet from wetlands and bodies of water. Mr. Jones said that this was the case even if the full width of the roads bordering the Robertson property were calculated as part of the property.

Mr. Zimmerman testified for the DNREC that he is the head of the Water Resources Section. He stated that the figure relied upon by Dr. Robertson of 15% suspended material in treated sewage disposed of by the town of Rehobeth Beach is incorrect and that the correct figure is .0015%. He further stated Dr. Robertson is not foreclosed from building on his property by the denial of the septic system permit application in that Dr. Robertson could install a holding tank or could attempt to get the Joy Beach Community hooked up with the County's central sewer system. Mr. Zimmerman also testified that the DNREC would be willing to consider experimental or alternative systems proposed by Dr. Robertson, so long as those systems meet the standards required by the regulations for such experimental or alternative systems.

Findings of Fact

The Board finds that:

1. It is not possible to locate a septic system on the Robertson property which would not be within 100 feet of either wetlands or bodies of water. This is the case whether or not the entire width of the road adjacent to the Robertson property are calculated as part of the property.
2. That the drainage on the Robertson property is poor and that the entire area is subject to flooding which would result in the direct flow of untreated sewage from a septic system into the ocean.
3. That there is no evidence that the DNREC has granted septic system permit applications to Joy Beach residents subsequent to the effective date of the new regulations.

Conclusions of Law

The finding that no septic system installed on the Robertson property could not comply with the DNREC regulation's requirement of a 100 foot distance between a septic system and wetlands or water mandates a conclusion that the Secretary did not err in denying Dr. Robertson's permit application.

Dr. Robertson's allegations of inconsistency and discrimination are not persuasive. He was not able to show that the regulations had been unevenly applied since their adoption. Further, he relied upon an erroneous figure for what he claimed to be the permitted percentage of suspended material in treated sewage discharged by the city of Rehoboth Beach.

The fact that DNREC apparently recognizes the benefit of fresh water swamps for tertiary sewage treatment does not mean that DNREC is required to take a presence or absence of salt water wetlands into consideration when granting or denying a

permit application for a septic system. The DNREC has a valid interest in protecting such wetlands from pollutants and the evidence in the record is not sufficient to support a conclusion that the DNREC's regulations are unreasonable in this regard.

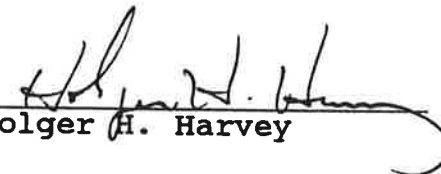
Similarly the Board cannot conclude that the DNREC erred in failing to take into account Dr. Robertson's representation that his proposed house would, through the use of special devices, produce a lower than average flow of wastewater, in that there was no evidence to suggest that the amount of raw sewage produced by the household would be diminished. However, this proposed decreased flow is pertinent to the question of whether the cost of a holding tank would be so high as to prohibit this alternative from being a reasonable one for Dr. Robertson. Dr. Robertson has calculated a cost of approximately \$500 per month for having the tank pumped out, using the higher flow figure of 400 gallons per day. Should Dr. Robertson's actual flow be the much lower figure of 2,000 gallons per month his actual cost should be significantly decreased.

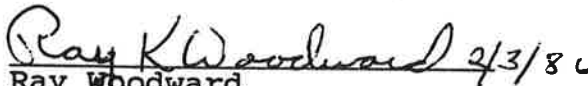
ORDER

For the foregoing reasons, the decision of the Secretary is affirmed.

SO ORDERED:


Thomas J. Kealey
10 Feb 1986


Holger H. Harvey


Ray Woodward
2/3/86


Clifton H. Hubbard, Jr.
1/27/86


Evelyn Greenwood

2/12/86
Date