

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPEAL OF) APPEAL FILED: SEPT.24, 1986
) HEARING HELD: DEC. 3, 1986
WILLIAM J. MOCKABEE) ORDER ISSUED:

FINDINGS, OPINION AND ORDER

This matter came before the Environmental Appeals Board ("Board") for hearing on December 3, 1986. The Board Chairman Thomas J. Kealy and Board members Harry E. Derrickson, Clifton H. Hubbard, Jr. and Mary J. Sheldrake were present for the entire hearing. The Department of Natural Resources and Environmental Control ("DNREC" or "Department") was represented by Deputy Attorney General Kevin Maloney and the Board was represented by Deputy Attorney General Michael M. Tischer. The Appellant William J. Mockabee and his wife Angelina represented themselves. The Mockabees appeal from the Department denial of approval of a site evaluation report for lot #36-B, South Primrose Lane, Country Village, Ocean view, Delaware.

The Board, on the evidence presented, affirms the Department decision.

SUMMARY OF EVIDENCE

Mr. and Mrs. Mockabee were sworn and testified that they purchased lot #36-B in Country Village in March of 1984 to be their retirement home. They had a percolation test performed on the lot prior to the purchase and the test results were satisfactory. They were unaware of the change in the requirements for granting permits for on site wastewater disposal systems in July of 1985. There are approximately 120 lots in the development and 84 have been sold with about one half of the lots having septic systems. The Department denial of the site evaluation for this lot works a major hardship because of the great expense associated with installing and maintaining the suggested alternative of a permanent holding tank. Mr. and Mrs. Mockabee presented as an exhibit a listing of lots in Country Village provided by their Realtor dated 3/17/86 tending to show that on the approximately 44 listed lots the septic systems either were or would be "in by June ".

A. J. Farling, a registered professional engineer and the manager of the ground water section for DNREC testified under oath that he was familiar with both the lot involved and the development in which it is located. Mr. Farling issued on behalf of the Department the notice of intent to deny approval of a site evaluation report for the subject lot and testified that on the basis of the evaluation performed by the DNREC soil scientist existing regulations would not permit the use of an on-site disposal system on this lot. Farling noted that seven (7) lots in close proximity to the Mockabee lot (lot #36-B) had received permits under the previous regulations

but that all of those applications were received prior to July 10, 1985 and that none of those applications would be able to be granted under the new regulations under which the Department was required to evaluate the Mockabee's application. Mr. Farling related that, under the presently applicable regulations, in the Country Village development there had been eleven (11) permit denials, one (1) "sand mound" type on-site system approved and one (1) septic tank system approved for use on lot #58 (which had significantly different soil types than those identified on the Mockabee lot). Mr. Farling testified that within five to ten years he expected to see failures in the septic systems installed under the old regulations in Country Village. He described such failures as being recognizable by the ponding or presence of contaminating effluent on the surface of the lot.

Johanna Wolfe, a soil scientist employed by DNREC was sworn and testified that she has conducted over five hundred (500) site evaluations and that on July 11, 1986 she conducted, in accordance with the applicable regulations, a site evaluation of the Mockabee's lot in Country Village. Four (4) soil borings were conducted on the lot and it was determined that approximately 90% of the lot was Berryland soil and approximately 10% was Klej soil. The Berryland soils are described as sand to sandy loam texture to 40 inches and very poorly drained. The Klej soils are described as loamy sand texture to 40 inches and somewhat poorly drained. Ms. Wolf described the seasonal high water table as being at or near the soil surface in the Berryland soil and at 20 inches in the Klej soil and testified that, under the applicable regulations, the lot on the basis of her

site evaluation was not suitable for an on-site waste water disposal system. Further Ms. Wolf noted that, in addition to the poor soil quality, under the plot showing the proposed location of the dwelling, the proposed location of the well and proposed drain field, the existing set back requirements of the present regulations are such that, as proposed, there is no acceptable location on this lot for an on-site system.

In addition to the testimony of its two witnesses the Department introduced into evidence (Department Exhibit A) copies of a chronology for this appeal, the application for a site evaluation together with the site evaluation report and the related correspondence culminating in the September 24, 1986 appeal to this Board. Department Exhibit B, a two page computer print out showing the status of permit applications in Country Village and the near by Country Estates development was also received into evidence without objection as was the final Department Exhibit (C) a plot of the lots in Country Village annotated to show the location of the two on-site systems which have been permitted under the currently effective regulations.

In response to questions from members of the Board, it was developed that in addition to the possible alternative of the installation of a permanent holding tank on the subject lot, the area near South Primrose lane where the Klej soils were found could possibly be suitable for a "sand mound" type of on-site system if a subsequent soil evaluation were to show the Klej area to be approximately 25' by 50' in area and if the applicable 100 foot set

back requirement could be met through arrangement for a water supply other than the proposed well. It was also developed that the present regulations (REGULATIONS GOVERNING THE DESIGN, INSTALLATION AND OPERATION OF ON-SITE WASTEWATER TREATMENT AND DISPOSAL SYSTEMS-ADOPTED JANUARY 4, 1985) provide for both formal and hardship variances by special application to the Secretary of DNREC (Section 10.00000-VARIANCES).

FINDINGS OF FACT

The Board finds:

1. That the lot in question is shown on the basis of the site evaluation report prepared by the DNREC soil scientist on July 11, 1986, to be composed of Berryland and Klej soils with a seasonal highwater table at or near the surface and under the applicable regulations to be unsuitable for an on-site wastewater disposal system.

2. That the existing septic tank systems in the Country Village development were either permitted under prior regulations not now effective or were installed under the present regulations on lots with significantly different soil characteristics than those found on the subject property (lot #36-B).

3. That it is possible that a subsequent site evaluation focused more particularly on the klej soil portion of this lot might disclose a sufficient amount of such soil over an area which, with alternate arrangements for water supply to the lot, might possibly

prove adequate to support the authorization of a "sand mound" type of on-site system. On the evidence presented the only acceptable alternative for this lot is the installation of a permanent holding tank.

CONCLUSIONS

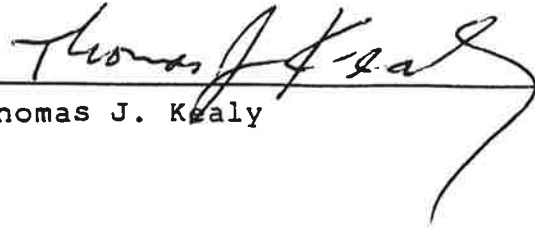
The facts presented in evidence on this appeal mandate the affirmance by the Environmental Appeals Board of the decision of the Department to deny approval of the site evaluation report. The appellant did not show that the Department had applied the applicable regulations arbitrarily or unfairly in any way or that for any reason the regulations under which the Department proceeded were inapplicable to the appellants lot. The appellant claims that the installation of a permanent holding tank is prohibitively expensive and thus works a hardship on them. The applicable regulations as noted above provide a separate procedure for seeking hardship and other variances and that application is not now before this Board. The appellant is encouraged to discuss with Department personnel all possible alternatives for wastewater disposal from this lot and the mechanics for seeking a variance should that be deemed a course of conduct the appellants wish to pursue.

ORDER

On the basis of the evidence presented and for the reasons set forth hereinabove the decision of the Department in denying approval of the site evaluation report for the property of William J. Mockabee

at lot #36-B, Primrose lane, Country Village, Ocean View, Delaware is affirmed.

SO ORDERED



Thomas J. Kealy

Harry E. Derrickson

Clifton H. Hubbard, Jr.

Mary J. Sheldrake


Evelyn Greenwood

Dated: January 8, 1987

at lot #36-B, Primrose lane, Country Village, Ocean View, Delaware is affirmed.

SO ORDERED

Thomas J. Kealy



Harry E. Derrickson

Clifton H. Hubbard, Jr.

Mary J. Shel Drake

Evelyn Greenwood

Dated: January 8, 1987

at lot #36-B, Primrose lane, Country Village, Ocean View, Delaware is affirmed.

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