

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE

APPEAL OF:  
NORMAN and GRACE O'DAY

No. 88-07

April 25 , 1989

FINAL ORDER

This matter came before the Environmental Appeals Board on December 22, 1988. A quorum of the Board was present, including the following Board Members: Thomas J. Kealy, Chairman, Evelyn Greenwood, Richard Sames, and Ray Woodward. Mr. Harry M. Fischer, III appeared on behalf of the appellants, Norman and Grace O'Day ("O'Days"). Deputy Attorney General Jean Langdon appeared on behalf of the Department of Natural Resources and Environmental Control ("DNREC"). The Board was advised by Deputy Attorney General Ann Marie Johnson.

SUBJECT OF THE APPEAL

The question before the Board on appeal was straight forward. The O'Days appealed the denial of their request for an on-site disposal system on their property located in Kent County, Delaware; specifically, the O'Days were denied of use of a permanent holding tank. For reasons stated below, the Board AFFIRMS the Secretary's denial.

SUMMARY OF THE EVIDENCE

The parties stipulated to the admission of the underlying facts in this matter. The O'Days originally purchased a large

farm of 67 acres in 1951. In 1985, they divided off one acre of this farm and sold off the rest of the acres. The deed for this remaining acre was recorded on October 30, 1985. The O'Days retained the remaining acre for their use when they return from Florida during the winter months and was intended to be used for only three to four months a year. The O'Days' application for an on-site septic system was denied, however, because of inadequate soil conditions on the site. Moreover, the O'Days were unable to "grandfather" this lot under the regulations because the regulations adopted in January 1985 for on-site septic systems deny the use of a permanent holding tank for all properties recorded after April 7, 1984. Thus the O'Days filed their deed too late to come within the Grandfather Clause which otherwise could have allowed a permanent holding tank option.

Testifying for DNREC, Gerard L. Esposito of Division of Water Resources, stated that to make an exception in the O'Days' case would be unfair to many individuals whose permits have been denied under the same section. He stated that the purpose of the section was to discourage the subdivision of large parcels owned for a period of time by landowners and putting on-site septic systems on them, when soils are inadequate to support such systems. He stated that there were alternatives left open to the O'Days, albeit expensive ones. The first was a sand filter system which operates like an elevated sand mound. The second was a rural area variance. It was later developed in testimony that a rural area variance was not really an option open to the

O'Days because they no longer own the other additional acreage on the property.

Mr. Esposito stated that one problem with possible deed restrictions was that the Department did not have adequate resources to enforce such restrictions. Moreover, holding tanks in his view encouraged abuse such as landowners trying to pump out the system on their own.

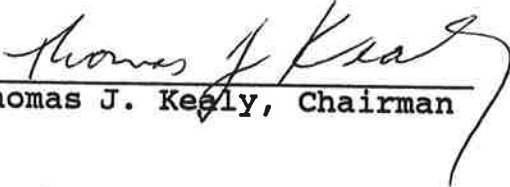
FINDINGS OF FACT AND CONCLUSION OF LAW

The Board finds that the Secretary appropriately applied the requirements of Section 5.13030 of the Regulations Governing the Design, Installation and Operation of On-site Waste Water Treatment and Disposal Systems. The parties did not dispute that the requirements of Section 6.06038 of the regulations were not met. The Board also finds that the O'Days did not record their property before April 8, 1984 as required by regulations. In light of this fact, the Board agrees that the O'Days did not meet the letter of the law.

Although the Board is sensitive to the difficulties created by the cut-off date for the O'Days and the lack of inexpensive alternatives for the O'Days, the Board agrees with the Department that it would be unfair to the many applicants who had already been denied such applications to make an exception in this case. The Board is satisfied there are important and adequate rationales for the rule's strict enforcement.

STATEMENT OF BOARD ACTION

The Board affirms the Secretary's decision.

  
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Thomas J. Keely, Chairman

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Evelyn H. Greenwood

  
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Richard C. Sames

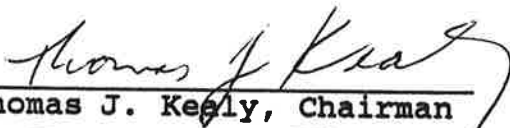
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Ralph Woodward

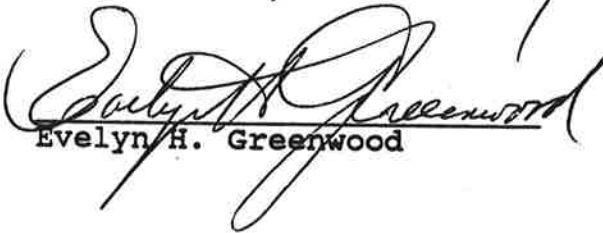
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Clifton Hubbard, Jr.

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