

BEFORE THE ENVIRONMENTAL APPEALS BOARD

APPEAL OF J. KENNETH FASICK

The Board met on June 24, 1987 at 9:00 a.m. Present were Chairman Thomas Kealy, and members Evelyn Greenwood, Harry Derrikson, Ray Woodward, and Mary Sheldrake. The Board was represented by Deputy Attorney General Ann Marie Johnson, ("Board"). The appellant, J. Kenneth Fasick, ("Mr. Fasick") represented himself. Kevin Maloney, Esquire represented the Department of Natural Resources and Environmental Control, ("Department"). Steven Williams and Phillip Cherry of the Department testified.

Summary of the Evidence

Mr. Fasick's property is located on the west side of U.S. Route 13 at the Village of Garrisons Lake. The house is on the southwest portion of a cul-de-sac at the end of Brighton Place. Mr. Fasick testified that he wanted to dig an agricultural well on his property in order to water an extensive landscape, vegetable and flower garden on his property. He stated that at the time he bought his home, it was his understanding that the well was allowed.

Mr. Fasick pointed out that pursuant to regulations II of the regulations governing the use of water resources and public subaqueous lands ("regulations"), no permit or license is required for a person to "personally install ... a water well ... when the well is to be used by such person or his family for domestic or agricultural purposes, and provided that the work complies with the provision of this Regulation." Section 1.02

Reg. No. II. Thus, if he were to personally install his well, he would not be required to obtain a permit. Mr. Fasick suggested that it was illogical to require him to obtain a permit simply because he was having a contractor install the well with the goal of putting it in "properly."

Mr. Maloney stated that Mr. Fasick had never indicated that he wished to personally install a well. He stated that lots adjacent to the property were served by private wells, not the public water supply. He further argued that even an individual who wished to personally install a well was required to conform to Section 2.02 of Regulation II.

The Department's first witness was Steven Williams, geohydrologist for DNREC, Water Supply Branch. He testified that he didn't see the need for an agricultural well on a lot of the size of Mr. Fasick's property, and it was his opinion that to allow such a well would infringe upon Tidewater's jurisdiction. He stated that he knew of 6-12 applications for agricultural or irrigation wells on similar sized lots, but that none had been granted to his knowledge. He stated that the Department does evaluate the soundness of the denial by the Public Utility, and in this case the denial was based upon cross connection "possibilities."

At this point, Mr. Maloney explained to the Board that pursuant to 16 Del.C. sec. 7931, the Department has concurrent jurisdiction with the Department of Health to approve well permits for private water supply. He put into evidence as Department's exhibit 1, a copy of a memorandum of agreement dated

July 16, 1982 which formalized the standards applied by the Department and the Division of Public Health. It was Mr. Maloney's position that this document governed Mr. Fasick's application, and that it required a letter of approval from the public utility before an application could ever be considered. Mr. Maloney admitted that this memo did not have the force of law. Mr. Fasick objected to the exhibit, and argued that paragraph 4(c) of the memorandum limited its scope to applications for wells to supply heat pumps.

Next, Philip Cherry testified for the Department. Mr. Cherry is the Supervisor of the Water Supply Branch of the Division of Water Resources. He stated that the policy underlying the requirement that an applicant be connected to the public water supply system was that it was easier to monitor a central system. He stated that he relied upon the Department's Exhibit 1 to reach his conclusion on the application. He also stated that he wasn't sure there would be an adverse environmental effect on granting the application, but he was concerned that if Mr. Fasick was given a permit, others would want one as well. He testified that he recognized the vagueness of the statute in this area and that he would welcome some clarification.

Findings of Fact

The Board finds that there is insufficient evidence to indicate that the failure of the Department to approve Mr. Fasick's water well was based upon an actual analysis of Mr. Fasick's property. The Department denied Mr. Fasick's application because there was a public water supply available to which

the Department may require connection, because 16 Del.C. sec. 7910 prohibits cross-connection without Board of Health approval, and because Tidewater Utilities had not approved the application. The letter stated that the latter requirement was a matter of "Departmental Policy." The reasons stated for denial, by Tidewater, were:

The construction and use of private water supply wells within a subdivision served a central public water supply system mitigates the ground water conservation and management effected by that central system.

The availability of water derived from private water supply wells increases the probability of cross-connections to and the resulting contamination of the serving central public water supply systems.

The construction and use of private water supply wells within an area served by a central water supply system has a negative impact on the viability and financial position of that central system.

None of these reasons relate specifically to Mr. Fasick's land. Rather, they appear to be general and somewhat generic policy considerations relating to all potential well users.

Nor do these stated reasons seem to distinguish the application from others which have been granted. The three representative letters sent to Mr. Fasick by the Department which represent other applications which have been approved, are for ground water heat pumps, not agricultural wells. The two form approval letters from Tidewater specifically prohibit the applicant from making any "cross-connections" to any other source of water, so apparently the potential for cross-connection has been addressed by prohibiting it.

The Board further finds that there is insufficient evidence to indicate that the Department, in reviewing Mr. Fasick's application, determined whether the reasons for refusal by Tidewater, were valid. Mr. Fasick testified at the hearing, and noted in his letter to the Board dated April 18, 1987 [Board's Exhibit 1-H], that he was already connected to the public water service and would remain connected for domestic water use. Thus, the requirement that he be connected appears to have been met.

Steve Williams stated that he had evaluated Tidewater's denial for soundness, but stated that Mr. Fasick's application was denied because of the potential for cross-connection. There was no testimony to indicate why the potential was any different in Mr. Fasick's case than in the three other cases where permits had been granted. The Board sees no reason that a prohibition against cross-connection as a condition of Mr. Fasick's permit would not suffice. Mr. Cherry testified that it made good policy sense for water users to be connected to the central system, and said he had relied upon a memorandum of agreement [Department's Exhibit 1] to make his determination. He admitted that he wasn't sure about the particular environmental effect of allowing Mr. Fasick to build an agricultural well, but was concerned that if the Department granted one application, it would have to grant others. He stated that he had recognized the vagueness in the law regarding well permits and would welcome clarification in this area.

In sum, it appears to the Board that Mr. Fasick's application was denied by the Department primarily because Tidewater did

not approve it. This seems, to the Board, to be an arbitrary interpretation of the permit requirement, particularly in light of the fact that an individual who plans to install his own well is not required to obtain a permit.

Conclusions of Law

Regulation No. II, Section 2.02 requires:

Where an approved public water supply system is legally and reasonably available to the area to be served, the Commission may require a connection to that system. When proposed wells are to be located within the jurisdiction or service area of a municipality serving public water the applicant must first obtain a written statement of approval from such municipality before Commission approval is granted.

The Department suggests that it has no discretion when there is no approval by the "municipality". Thus, where there is no approval, there is no authority to entertain the application. If this were the case, however, the Department would have essentially delegated the well permit decision to a private water company. Furthermore, if the Department is correct and it has no discretion to review an application without the letter of approval, then the policy, in effect, cuts off an applicant's right to appeal the determination (as there is no right to appeal the utility's decision.)

The Board concludes that this anomalous result could not have been intended by the regulations. Rather, the Department has an obligation to determine whether the refusal or approval is arbitrary, is based upon conditions existing at the applicant's property, and has some reasonable and specific relationship to the goals of conservation and protection of the public engendered

in the Regulations and Chapter 60, Title 7 of the Delaware Code. The record does not indicate that an analysis of this sort was conducted on Mr. Fasick's application, nor is there an indication that his particular application posed environmental problems as identified by Chapter 60. The determination in Mr. Fasick's case appears to have been based upon Tidewater's failure to approve, without meaningful inquiry as to the grounds of that denial.

Order of the Board

The decision of the Secretary is reversed.

Recommendation and Comments

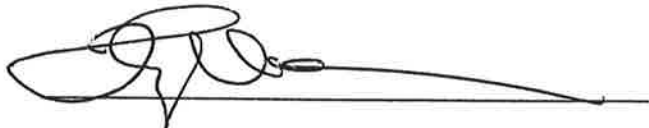
The Board questions whether a "municipality", its interests and concerns are the same as those of a private water company. The Board recommends that the economic well-being of the utility not be the deciding factor in the determination for a well permit.


Finally, the Board does not see the need for commenting further upon the apparent inconsistency in the regulations which allows an individual to install a well himself without a permit, but requires a permit of a person who hires someone else to install the well as the revised Water Well regulation, effective after the date of Mr. Fasick's opinion, requires all well builders to obtain permits.



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 7-22-87
Mary Sheldrake

DATE: July 22, 1987