

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

APPEAL OF
WILLIAM and ANNA ROUNDS

June 7 , 1989

No. ~~88-09~~
88-09

This matter came before the Environmental Appeals Board on January 10, 1989. A quorum of the Board was present: Thomas Kealy, Chairman; Evelyn Greenwood; Clifton H. Hubbard, Jr.; and Ray K. Woodward. Deputy Attorney General Ann Marie Johnson advised the Board. The appellants' spokesperson was Mrs. Rounds. Deputy Attorney General Jean Langdon appeared on behalf of the Department of Natural Resources and Environmental Control ("DNREC").

SUBJECT OF THE APPEAL

The question presented for appeal was whether the denial of the application of Mr. & Mrs. William T. Rounds for an on-site septic system was legally valid. For reasons stated below, the Board AFFIRMS the Secretary's decision.

SUMMARY OF THE EVIDENCE

The chronology was submitted into evidence as Board's Exhibit No. 1. It indicated that Mrs. Rounds applied for a site evaluation in May of 1988. On June 1, 1988 John Burns, a soil scientist with DNREC, conducted a soil evaluation. Pursuant to that evaluation, Mr. Burns determined, among other things, that

the seasonal high water table was five to ten inches below the soil surface (Board's Exhibit 1 Tab C). As a result of Mr. Burns' analysis, DNREC issued a "Notice of Intent to Deny Approval of an On-site Disposal System" which was signed by A.J. Farling and dated June 14, 1988. A letter stating the substance of Mr. Burns' soil evaluation was also sent to the Rounds (BD.EX. 1, Tab D). Pursuant to the Notice of Intent to Deny, the Rounds paid the stipulated fee for an administrative review. Apparently, this means that additional staff at DNREC will review the results of the septic permit application. A letter from R. Wayne Ashby on October 3, 1988 indicated that the review upheld the Notice of Intent to Deny. At Tab G of Board Exhibit 1, there is a fact sheet that seems to indicate some review by Deborah A. Greer, Senior Secretary of Ground Water Management Section. It is unclear when this review was conducted. The letter dated October 3, 1988 which denied the evaluation stated three reasons for the denial. First, the soil on the site was "Elkton" soil. Second, Elkton soils are classified as "clayey," and "poorly drained." Third and most importantly, the water table was indicated to be from five to ten inches below the surface and therefore did not meet the requirement which calls for at least twenty inches (BD.EX. 1, Tab H). The alternatives suggested to the Rounds were the possibility of a sandfilter or a "FAST" type system, or to hire a Class D site evaluator to evaluate the other portions of the parcel not evaluated by the Department. Mrs. Rounds appealed the decision on October 31, 1988. In her

exhibit, Appellant No. 1, Mrs. Rounds documented the numerous findings of DNREC. First, she contacted Mr. Rizzo, a soil scientist in Bridgeville, Delaware. Mr. Rizzo testified at the hearing that while he found the soil to be of a different type than that identified by Mr. Burns, he agreed that the soil type appeared to be inadequate for a septic system. In a November 2, 1988 letter to Mrs. Rounds he indicated that there was evidence of a seasonal high water table within twenty inches of the surface. He also suggested the installation of two or three monitoring wells, or pisometers, in order to measure the water table over time.

Mrs. Rounds hired William W. Pleasants, of Bethel, Delaware as an engineering consultant. She also hired S.C. Virginski, Sr. to conduct perk tests on the property. The results of these perk tests are in the Rounds Exhibit 1 at AMR-6. Additionally, she hired B & B Mechanical Co. to install three well monitors. She received four readings from the well monitors from November 30, 1988 through January 3, 1989. The results of these readings are in Appellants' Exhibit 1 at AMR-8.

Derrick McDowell, soil scientist employed by DNREC, stated that he is a recipient of the preliminary monitoring well reports. He testified that he had not personally reviewed the site but would do so prior to the test conclusion. He read into the record average rain data comparing the year of 1988 to the thirty-five year average. The yearly average over a thirty-five year period is 43.96 inches of rain and, during the year of 1988

there was 37.13 inches of rain. Thus, he concluded that this was a "dry" year.

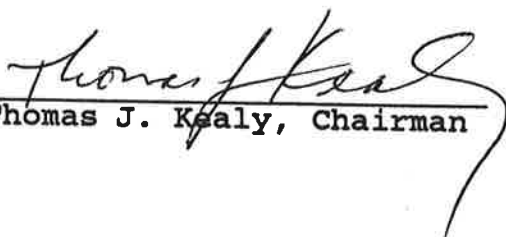
Mr. Pleasant presented water table variability data for a nearby site taken from a United States Geological Service report. He indicated that for a five (5) year period covered in the report the maximum water table variation in January was 3.5 feet and the one year maximum variation was four (4) feet. Since the preliminary test well data on the Rounds' property for the period from November 30, 1988 to January 3, 1989 showed the water table to be greater than six (6) feet from the surface, he felt it was likely that the seasonal high water table could be greater than twenty (20) inches below the surface (as required in the regulations for a standard septic system). However, he admitted on cross-examination that the site was about three (3) miles from the Rounds' property, that he did not know the soil type nor the ground elevation and that the test apparently measured the rise and fall of aquifer water rather than "surface" water.

For DNREC, Lyle Jones, Program Manager of the Program Branch, testified that although he had no proof of having reviewed the Rounds' file, he was reasonably sure he had reviewed it. He stated that the Rounds' application was denied because the evidence indicated that the seasonal high water table was within twenty inches of the ground surface. He stated that he was generally familiar with the area in which Mrs. Rounds' site was located but he had not visited the site. Moreover, he stated that he was relying solely on Mr. Burns' tests and the documents

in evidence for his conclusions. He admitted that in accord with normal procedure the option of a pisometer test was never given to the Rounds at any time prior to final denial of the application. However, it was made clear that once the test well measurements were completed (April - May, 1989) the Rounds could reapply for a permit based on this new information.

FINDINGS OF FACT AND CONCLUSION OF LAW

The Board finds that there is insufficient evidence to refute DNREC's denial based upon Depth to Limiting Zone, or the Seasonal High Water Table, on the Rounds' property, and the Secretary's decision in this case is affirmed.



Thomas J. Kealy, Chairman

Clifton H. Hubbard, Jr.

Evelyn Greenwood

Richard C. Sames

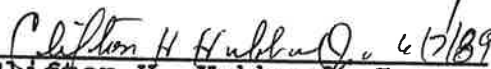
Ray K. Woodward

Mary Sheldrake

FINDINGS OF FACT AND CONCLUSION OF LAW

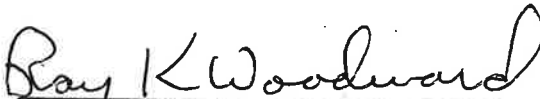
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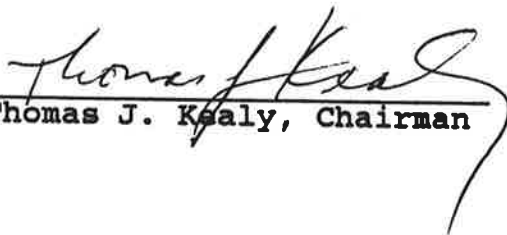

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