

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

APPEAL OF:)
HERITAGE HOMES OF DE LA WARR,) Appeal No. 89-15
INC.) May 4 , 1990

FINAL ORDER

This matter came before the Environmental Appeals Board on February 13, 1990. The following Board Members were present: Thomas J. Kealy, Chairman, Clifton H. Hubbard, Richard Sames, and Joan Donoho. Mr. Donald Bloom, owner of the appellant Heritage Homes, Inc., ("Heritage") represented himself. Deputy Attorney General Loren Gordon appeared on behalf of the Department of Natural Resources and Environmental Control ("DNREC"). Deputy Attorney General Ann Marie Johnson advised the Board.

SUBJECT OF THE APPEAL

The question presented for appeal was the applicability of sec. 3.02E of the Regulations Governing the Allocation of Water, (adopted October 2, 1986 and effective March 1, 1987) to the application of Heritage for a water permit. Specifically, Heritage was advised by DNREC that pursuant to sec. 3.02E, it was required to provide a central water supply system for its proposed subdivision. For the reasons stated below, the Board unanimously reverses the Secretary's decision.

SUMMARY OF THE EVIDENCE

The Board submitted the chronology, including the applicant's letter of appeal, as Board Exhibit 1.¹ Mr. Bloom testified on behalf of Heritage. He explained that he was a developer who sought to develop a 42 lot parcel for single family homes in Kent County, Delaware. He testified that he purchased the property in November of 1988. He had a preliminary meeting with Connie Holland, Principle Planner, Kent County, to discuss subdivision of the parcel. He testified, and she confirmed in her testimony, that she did not tell him of the requirements of sec. 3.02E.²

On February 2, 1989, he appeared before the DNREC Development Advisory Board (DAS) and was informed for the first time that he would be required to install a public water supply in his proposed subdivision. In March and April of 1989, Mr. Bloom met with Stephen Williams of DNREC and inquired as to whether or not he could receive an exemption from the central water requirement. Mr. Bloom "was advised that such a decision is made by DNREC's upper level management and that, while he had every right to submit a request, it was unlikely that he would receive one since the proposed lot sizes were less than two acres." DNREC 1,

¹References to documentary evidence will be as follows: Board Exhibit 1 will be designated "Bd. 1"; Appellants' Exhibits as "App. ____"; and DNREC's Exhibits as "DNREC ____, Exh. ____".

²Ms. Holland also testified that she never informs subdivision applicants of such State requirements, nor did she presume to be an expert on such matters.

Chronology. The two acre requirement was endorsed by Acting Secretary Hughes on February 8, 1989, after Mr. Bloom had had his first pre-advisory meeting with DAS. DNREC 1, Exh. P.

Subsequently, on April 17, 1989, Mr. Bloom submitted a letter to Stephen Williams formally requesting an exemption for sec. 3.02E. DNREC 1, Exh. E. On November 7, 1989, Secretary Edwin H. Clark adopted a revised policy which reduced the minimum lot size from two acres to one acre. DNREC 1, Exh. J. On November 16, 1989, the Department sent a letter to Mr. Bloom denying his request for an exemption because of his failure to meet the one acre minimum. DNREC 1, Exh. K. The reasons for denial were that Mr. Bloom's application failed to meet the terms of Department policy.

Mr. Bloom argued that the Department's failure to grant him an exemption was arbitrary. He submitted into evidence a letter to him dated November 16, 1989 from DNREC in which DNREC explained why another subdivision, Pennwood, who had under one acre lots, was not required to put in a central water supply. App. 1. The letter itself states that Pennwood was given a variance because its original plans pre-dated the current water regulations. Mr. Bloom also put a document into evidence which consisted of a handwritten summary of past subdivision water permit applications which was prepared by DNREC. App. 4. It identified other subdivisions that were not required to install central water supply, but which had the "25 or more total planned units" as

required under sec. 3.02E. For these subdivisions a central water supply was only recommended. DNREC was unable to say whether any applicant complied with this voluntary requirement. All of these applications were acted upon prior to January 1, 1988.

Additionally, Mr. Bloom complained that he had no way of knowing that the terms of sec. 3.02E would have applied to him. As he pointed out, at the time he purchased the property, DNREC was not applying sec. 3.02E, because of an opinion of counsel which advised them that they were unable to do so. App. Ex. 2. He admitted that he had not inquired as to the requirements prior to purchasing the property. Finally, Mr. Bloom contended that there is no means of determining what an acceptable water system is. He submitted a letter from Michael Joyce of the Division of Public Health, in support of this argument. App. 3. Mr. Joyce wrote that "Delaware currently has no published standards/regulations on the design of water systems." App. 3.

Phillip Cherry, Manager of the Water Supply Division testified for DNREC. Mr. Cherry explained to the Board why central water systems were advantageous, and elaborated upon the list of such advantages in evidence as DNREC, Exh. D. He emphasized that by digging fewer wells (with a central system as opposed to individual wells on each lot), there was a diminished chance of contamination to the water supply. On cross-examination, Mr. Cherry admitted that heat pump supply wells also could contaminate the water supply and were allowed. He explained that heat pumps are

distinguishable because they are subject to more stringent inspection requirements.

Al Farling, Administrator of the Ground Water Section testified next. Mr. Farling stated that while there may not be published standards for central water systems, there was a "ten state standard" which had been adopted as advisory policy by the Division of Public Health and comprised an informal agreement among State Engineers as to what constituted a safe public water supply system.

Next to testify was Stephen Williams of the Well Permits group. Mr. Williams explained why the subdivisions highlighted in App. 4 had obtained water system approval and were not required to put in central water systems. After the regulations became effective in March 1, 1987, he had requested a legal opinion from DNREC's legal counsel as to the enforceability of the new regulations. The August 28, 1987 opinion stated that sec. 1.02 of the regulations limited the scope of the permit regulation to those water users "withdrawing or claiming to have the authority to withdraw more than 50,000 gallons of water in any 24 hour period from one or more sources combined". App. 2. Relying on that opinion, it was the Department's belief that "the 50,000 gallon" criteria had to be met first, before they could apply the provisions of 3.02E to any applicant. For this reason, all applicants coming within the terms of sec. 3.02 but not sec. 1.02, were strongly advised to install public water supplies, but not required to do so. There

were about 19 instances where a central system was recommended but not required.

Subsequently, on January 4, 1989, Mr. Williams requested a second legal opinion from DNREC counsel. This opinion stated that notwithstanding the "50,000 gallon per day" requirement, that sec. 3.02 could be applied to all applicants. DNREC 1, Exh. M. Mr. Williams testified that after January 4, 1989, sec. 3.02 was applied to subdivisions, but certain exemptions were granted pursuant to policies adopted by the Secretary. The Secretary adopted an exemption policy on February 8, 1989, which imposed, among other requirements, a two acre minimum lot size. DNREC 1, Exh. C. Subsequently, on October 23, 1989 the minimum lot size was reduced to one acre. DNREC 1, Exh. J.

APPLICABLE LAW

The Secretary has the authority to regulate the use of water pursuant to 7 Del. C. sec. 6003(a), which states in relevant part that: "no person shall, without first having obtained a permit from the Secretary, undertake any activity...in any way which may cause or contribute to withdrawal of ground water or surface water or both...." He may adopt regulations pursuant to sec. 6010 of title 7 and he is directed to approve the allocation and use of water in the State on the basis of "equitable apportionment." 7 Del. C. sec. 6010(f)(1).

Section 102 of the Regulations Governing the Allocation of Water ("Regulations"), states that "water allocation permits are

required for all water withdrawals greater than 50,000 gallons in any 24 hour period." Section 1.03 applicability states that

These regulations apply to all water users presently holding a water allocation permit or withdrawing or claiming to have authority to withdraw more than 50,000 gallons of water in any 24 hour period from one or more sources combined and to all persons who in the future wish to withdraw more than 50,000 gallons of water in any 24 hour period from one or more sources.

Section 3 establishes the criteria for permit approval. The last ~~last~~ sentence of sec. 3.01 states in relevant part that:

"This section outlines the criteria used in setting water withdrawal limits." Section 3.02 identifies "regionalization policies" and states that:

the following policies regarding regionalization of water supplies will be followed by the Department in assessing new or renewal allocation permit applications...

- E. New water service facilities: Wherever practicable new water service facilities shall be planned to provide water supply on a regional basis, eventually becoming part of an established regional distribution system. Any new or expanded portion of a housing development with 25 or more total planned units will ordinarily be required to provide a public water supply system.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is little dispute as to the facts. Mr. Bloom acquired his property in November 1988, but did not inquire about DNREC water well requirements until March or April of 1989. By that

time, DNREC believed, based upon the second legal opinion that it had obtained from Counsel, that it could enforce sec. 3.02E without applying the threshold "50,000 gallon" requirement.

DNREC was granting exemptions to this sec. pursuant to a policy adopted by the Secretary. The parties agreed that the policy had not been adopted pursuant to notice and comment proceedings, and therefore was directory rather than having the force of law.


The primary issue before the Board is whether sec. 3.02E applied to the Appellant's application, and if it did, whether the exemptions policies should have been applied to him. As noted above, the thrust of the permits requirements is clear. They are entitled "Regulations Governing the Allocation of Water", and by their own terms, apply throughout to "water allocation permits" See subsecs. 1.02, 1.03, 1.04, 3.01, 4.01, and sec. 5.

The plain language of the regulation states that the scope of the law encompasses "all water withdrawals of 50,000 gallons in any 24 hour period" Sec. 1.02. Additionally, the applicability is specifically stated to be "to all water users presently holding a water allocation permit or withdrawing or claiming to have the authority to withdraw more than 50,000 gallons of water in any 24 hour period". The Board agrees with the first legal memorandum received by DNREC which reads this to be a mandatory threshold requirement. App 2.

The second memorandum, DNREC 1, Exh. M reasons that the water allocation requirements only apply to central water systems serving more than 166 units, and that the provisions of sec. 3.02 are mandatory and apply to any development with more than 25 units. The Board is not persuaded by this memorandum, which appears to ignore the plain language of the statute. See Spielberg v. State, Del. Supr., 558 A.2d 291, 293. (1989) [Where the intent...is clearly reflected by unambiguous language in the statute, the language itself controls.] The second memo suggests that the "Regionalization Policies" requirements in section 3.02 essentially create a second set of mandatory permitting requirements, separate from water allocation permits. This reading is not consistent, however with the introductory language in sec. 3.02 which states that " [t]he following policies regarding regionalization of water supplies will be followed by the Department in assessing new or renewal allocation permit applications." Nor is it consistent with the permissive language of sec. 3.02E, which states that "wherever practicable new water service facilities shall be planned to provide water supply on a regional basis" and that housing developments of more than 25 units "will ordinarily be required to provide a public water supply system."³

³DNREC argues that the Applicant was responsible for knowing the requirements, and therefore was subject to the rule of caveat emptor. However the facts indicate that at the time the Appellant purchased his property, November, 1988, DNREC was still
(Footnote Continued)

While the Board was persuaded that the policy concerns underlying the central water requirements were valid, the current regulations, as drafted, do not give DNREC the necessary authority to carry out these valuable policies. In conclusion, the Board finds that the regulations, as written, only apply to those permit applicants who first meet the terms of sec. 1.03. In so far as the Applicant did not meet that criteria, the Board reverses the Secretary's decision on the grounds that sec. 3.02E was incorrectly applied to his application.⁴



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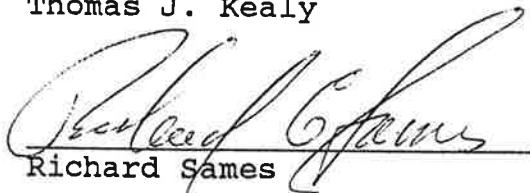
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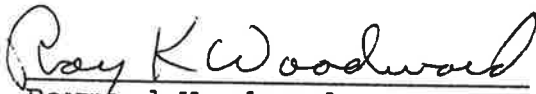
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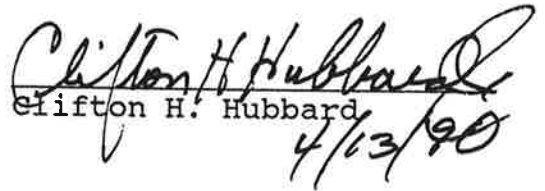
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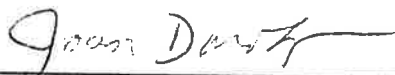
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