

ORIGINAL

BEFORE THE ENVIRONMENTAL APPEALS BOARD

STATE OF DELAWARE

IN THE MATTER OF	)	
	)	
GREGORY & MARY SWIFT	)	Appeal No. 94-02
	)	
	)	

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on July 26, 1994. The Board members present were Clifton H. Hubbard, Jr., Chairman, Robert S. Ehrlich, Diana A. Jones, Charles Morris and Robert I. Samuel. Steven C. Blackmore, Deputy Attorney General, advised the Board. Gregory and Mary Swift were represented by Robert J. Swift, Esquire. Jeanne L. Langdon, Deputy Attorney General, represented the Secretary of the Department of Natural Resources ("DNREC"). For the reasons that follow, the Board remands this Permit for further consideration by DNREC.

SUMMARY OF THE EVIDENCE

The Swifts are residents of Frog Hollow, a three duplex development in Yorklyn, New Castle County, Delaware. They purchased their home from Thomas Payne, the developer who had renovated the Frog Hollow duplexes. Mr. Payne had received a permit from DNREC authorizing the use of an existing sewage disposal system, Permit No. 61-94N ("Permit"). The Permit expires August 8, 1994. The Swifts contended that this Permit should not have been granted under DNREC's regulations because the disposal system is malfunctioning, it is a public health

hazard, and it is located too close to a stream and public well.

This appeal presents the case of an individual justifiably frustrated by a sewage disposal problem and the lack of support from the other participants whose interaction and dependency further confused the situation. The hearing revealed several problems and conflicts among the parties involved in this sewage dispute and a failure to focus on environmental concerns.

Appellants, who are now objecting to the issuance of the Permit, needed an authorized or permitted sewage disposal system to receive a certificate of occupancy for their dwelling. Also, unauthorized disposals of sewage violate 7 Del. C. § 6003.

Mr. Payne, the developer, was required to install a sand mound sewage disposal system to serve the six dwellings in Frog Hollow under New Castle County (the "County") requirements. Mr. Payne decided not to build such a system and to seek a public sewage connection after discovering that the sand mound system would be less than ideal. He pledged to contribute the funds set aside for the sand mound system toward a public sewer connection. He reasoned that a sand mound system should not be installed if public sewer is coming. However, the County has not yet approved the public sewer expansion into the Yorklyn area, although it has taken the first step by committing a portion of the funding in its 1995 budget. The County witness was unable to provide a timetable with any certainty concerning a connection. DNREC also agrees that a public sewer connection is the ultimate solution, however the public sewer would be installed by the County.

Therefore, DNREC considered the Permit as a temporary solution until the County installed a public sewer. However, DNREC cannot force the County to install the public sewer and delays may be involved. Also, the County does not want to assume financial responsibility for temporary sewage solutions.

Mr. Swift is concerned that the "temporary" Permit may be extended for years. He moved in with the understanding that the sewage system would be corrected by January, 1994, the expiration date of the prior permit which DNREC had stated was non-renewable. Mr. Swift was concerned that the existing disposal system would continue to leak sewage on his property.

While a temporary solution pending public sewer was clearly necessary, DNREC's conduct in issuing the Permit and monitoring the sewage disposal system was disappointing since the existing system was inadequate and apparently had been so for years. The preceding permit issued by DNREC for a one year period was issued without an inspection. Bruce Patrick, a DNREC Program Manager, did inspect the sewage system prior to issuance of this Permit but he did not notice any malfunction when the size, design and location of the existing system clearly merited further review. An argument was suggested that the existing system did not need a permit since an expansion in the number of bedrooms in the Frog Hollow dwellings had not occurred. However, this ignores the fact that an inadequate sewage system was polluting the groundwater zone, the earth surface, and occasionally, the stream in the Swift's yard.

Mr. Payne argued that he was caught between a rock and hard place and should not be held responsible since he has followed DNREC and County requirements. However, he merely reacted when forced to act; he did not install a temporary system which would eliminate environmental harm. He testified that Mr. Swift did not make him aware of the severity of the problem, but he should have known a problem existed.

The testimony and photographs of Mr. Swift and the testimony of his expert witness, Russell A. Rebertus, who has a doctorate in soil science, convinced the Board that the Frog Hollow sewage system was inadequate and malfunctioning and posed a health hazard. Mr. Rebertus' testimony clearly indicated that the cesspool was malfunctioning and sewage was being discharged without proper treatment or renovation.

#### FINDINGS OF FACT

1. The existing sewage disposal system is a cesspool on the Swifts' property which measures approximately 10'x 6'x 6'. It is located within the flood plain created by a stream approximately 45' away. See Swift Exhibits 4-9. The cesspool was occasionally pumped out by Mr. Payne when requested by DNREC.

2. Public sewage is the best, permanent solution to the sewage problem in Frog Hollow and the Yorklyn area. DNREC and the County should devote their energies toward achieving this solution promptly.

3. DNREC did not correctly evaluate the cesspool or permit application. The Permit authorizes a cesspool which was not a

viable sewage disposal system since it is malfunctioning, not large enough, located in a flood plain, too close to the stream and a potential health hazard.

4. Many years ago, the cesspool was originally installed with an outflow pipe directed into the stream. This was eventually plugged but sewage continues to seep out through the walls or bottom of the cesspool, probably into soil saturated with ground water. The fluid in the cesspool apparently maintains equilibrium depending upon the sewage in-flows and dispersion into and pressure from surrounding ground water. Sewage from the cesspool has diffused into the nearby surface depressions on Mr. Swift's property. See also Swift Exhibits 8-13.

5. The improvements made by Mr. Payne to the cesspool as required by DNREC's Permit conditions did not improve the cesspool. For example, the alarm one foot from the top did not go off even during flooding from the stream since the porous surface allowed sewage to escape into the zone of ground water saturation.

6. Until public sewer arrives, an adequate, operable temporary solution should be provided for Frog Hollow residents. An immediate solution would be to pump the cesspool every day or two. The best temporary solutions appear to be a connection to the sewage treatment plant at the Yorklyn CCA (which may help that system function more efficiently) or to install temporary holding tanks. These solutions will take several days or weeks

to achieve, but DNREC should require an operable temporary solution and impose timetables (subject to its penalty jurisdiction) to insure prompt completion. At that time, the cesspool should be abandoned in accordance with DNREC's regulations.

#### CONCLUSIONS OF LAW

The cesspool is an inadequate sewage disposal system which does not comply with Delaware's environmental laws or DNREC's regulations. See Title 7, chapter 60 and § 5.07040 concerning authorization to use an existing system from DNREC's On-site Waste Water Treatment and Disposal Systems Regulations. This cesspool on the Swifts' property should be abandoned after an operable temporary solution is installed, which according to the testimony should not take more than three weeks.

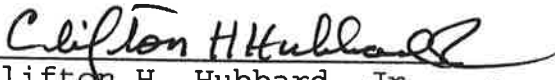
The Board was disappointed that it took a homeowner, Mr. Swift, several months and a hearing before the Board to convince DNREC and the others that this cesspool was inadequate. The impression was that DNREC hoped to avoid this malfunctioning sewage system. While public sewer is the ultimate solution, until a public sewer is installed, DNREC should not belittle sewage discharges and the resulting environmental harm. DNREC's attitude does not instill public confidence. The testimony and photographs of Mr. Swift, and the testimony of his expert witness, Russell A. Rebertius, who has a doctorate in soil sciences, showed that the cesspool was inadequate and malfunctioning, located too close to the stream and posed a

health hazard worthy of DNREC's attention.

Perhaps more upsetting was the testimony that numerous sewage disposal systems in the Yorklyn area were also inadequate and thousands of inadequate or malfunctioning systems exist statewide. DNREC's implied inability to evaluate and address existing sewage systems, including those which are inadequate and malfunctioning, does not satisfy the legislative intent behind Title 7, chapter 60 which should be liberally construed to preserve the environmental resources of the State. See 7 Del. C. § 6020. If, as the testimony indicated, there are over a thousand inadequate or malfunctioning sewage disposal systems discharging sewage directly into Delaware lands and waters, then DNREC should promptly address this serious issue.

CONCLUSION

For the preceding reasons, the Board remands this Permit to the Secretary with instructions to take further action consistent with this opinion. While this appeal only concerned the Permit, which expires on August 8, 1994, the Board instructs DNREC to require a viable sewage system at Frog Hollow which does not harm the environment. This decision is unanimous.

  
Clifton H. Hubbard, Jr.  
Chairman  
7/30/94

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Robert S. Ehrlich

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Diana A. Jones

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DATE: August \_\_\_\_\_, 1994



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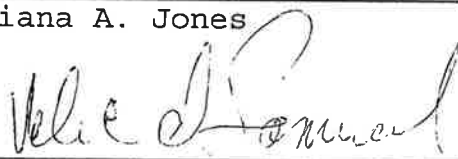
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DATE: <sup>July</sup> ~~August~~ 30, 1994

(RS)

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*Charles E. Morris*  
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Robert I. Samuel

DATE: August 29, 1994