

Environmental Appeal Board

APPEAL NO. 96/16- HEALTH

In the matter of an appeal under Section 5 of the *Health Act*, R.S.B.C. 1979, c. 161

BETWEEN: L.W. Perkins **APPELLANT**

AND: Environmental Health Officer **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
David Perry, Chair

DATE OF HEARING: Conducted in writing; concluded November 25, 1996

APPEAL

This is an appeal brought by Larry Perkins against the August 21, 1996 decision of the Environmental Health Officer (the "EHO") refusing to issue a permit to construct a sewage disposal system on Lot 5, Plan 11557, DL 210, Naramata, B.C. (the "Lot").

The authority for the Environmental Appeal Board to hear the appeal is found in section 11 of the *Environment Management Act* and section 5 of the *Health Act*.

BACKGROUND

Mr. Perkins purchased the Lot in 1962 with the intention of building a retirement home on it. The Lot is adjacent to Naramata Creek. Over the years he used the Lot for camping with his family in the summer and made no attempt to develop it until 1981.

In 1981, Mr. Perkins applied for a permit to construct a conventional septic tank system. He was denied on the grounds that the site did not meet the 100 foot setback from the high water mark of Naramata Creek as required by section 18 of Schedule 2 of the Sewage Disposal Regulation, BC Reg. 411/85, as amended (the "Regulation"). Section 18 of Schedule 2 of the Regulation, which deals with the specific requirements for conventional septic tank systems, states:

18. An absorption field shall be located not less than

...

(e) 30 m (100 ft.) from the high water mark

...

All measurements shall be from the nearest trench wall.

In 1995, Mr. Perkins entered into a contract with Chesapeake Services Ltd. ("Chesapeake") to design a sewage disposal system and apply for a permit in the hope that the Regulation had changed since his previous application.

On March 1, 1996, Chesapeake applied for a permit to construct a conventional septic tank system on the Lot. The application was denied, again on the basis that the proposed system did not meet the 100 foot setback.

Chesapeake reapplied on August 8, 1996, after making revisions to its design of the disposal area. The design of the proposed system is based in part on the No-Dak Sewage Disposal Mound, MOH Plate 1978-10 and the Seepage Bed Design MOH PH1027, revised 11/94. The proposed system is intended to service a single family residence.

In a letter dated August 21, 1996, the EHO, Mr. R.A. Savage, denied the application. In the letter he states:

- "1. The proposal does not meet the minimum separation distance requirement of 30m (100') from the natural boundary of Naramata Creek. I do not have the discretionary power under the Sewage Disposal Regulations to relax the 30 metre/100' set back requirement."

The EHO also states:

- "2. This lot lies within an Environmental Control Zone, which, pursuant to Sec. 7(3) of the Sewage Disposal Regulations, does not allow the use of alternate designs for the disposal of sewage effluent."

Section 7 of the Regulation states:

- (1) Where a medical health officer or public health inspector is satisfied that it is impossible for a person to comply with
 - (a) in the case of a conventional septic tank system, sections 1, 16 or 22 of Schedule 2, or
 - (b) in the case of a conventional package treatment plant system, sections 11, 12 or 18 of Schedule 3,

but that the person can comply with all other provisions of the appropriate schedule, he may issue a permit to construct under section 3,...

...

- (3) This section does not apply to a sewage disposal system within an environmental control zone.

Mr. Perkins appeals the EHO's decision to the Environmental Appeal Board.

The hearing before a Panel of the Board was conducted by way of written submissions. Brant Howard, P.Eng., of Chesapeake, provided written submissions on behalf of the Appellant.

ISSUES AND EVIDENCE

The following are the main issues raised in the appeal:

1. Whether the Regulation provides the EHO with the discretionary power to relax the requirement of a 30 metre setback from the high water mark of a body of water.
2. Whether an alternate sewage disposal system can be considered in this instance.

The Panel will address each of these issues in turn.

Issue 1: Does the EHO have the discretionary power to relax the 30 metre (100 foot) setback requirement?

The Appellant submits that the EHO did not correctly apply section 18 of Schedule 2 of the Regulation because he did not take into consideration the flow of ground water between the proposed disposal field and Naramata Creek. The essence of his argument is that the hydrogeology of the site is such that the effluent from the disposal field will not reach the Creek within 30 metres so a permit should be issued.

The Appellant maintains that there is no evidence of a direct connection of flow between the ground water at or near the proposed disposal field and the high water mark of Naramata Creek. He maintains that monitoring of the test hole on the proposed site indicates that the flow path is actually greater than the required 30 metres.

The Appellant bases his argument on the fact that over a 3 month period, during spring runoff, no water was observed in the test hole which was 1.3 metres below the creek level as of July 31, 1996. The Appellant submits that this indicates that there is no flow from the creek to the disposal field and no *direct* flow from the disposal field to the creek. Essentially, the Appellant is arguing that if there is any flow to the creek it is an indirect path to the highwater mark of the creek that is in excess of 30 metres. He notes that a more in-depth study would be necessary to more accurately determine the direction of the flow.

The Panel finds that the intent of section 18 is to protect any water body from potential contamination from a sewage disposal system. Section 18 provides that the measured distance between the absorption field and the high water mark cannot be less than 30 metres from the high water mark. The section makes no reference to measurement of flow paths and it must therefore refer to a simple measurement of surface distance.

The Panel finds that this section sets out a minimum mandatory requirement and does not authorize any exercise of discretion. As such, neither the EHO, nor the

Board on appeal, has the authority to take into consideration the flow of groundwater between the absorption field and the high water mark of Naramata Creek. The Panel finds that the EHO was correct on this point.

Issue 2: Can an alternate sewage disposal system be considered for the Lot?

In his decision refusing the permit, the EHO states that an alternate method cannot be considered for this Lot because it lies within an environmental control zone. There is no dispute that the Lot exists within an environmental control zone designated by the Ministry of Health.

The Panel notes that section 7 of the Regulation titled "Alternate Methods" allows for a relaxation of certain requirements set out in Schedules 2 and 3. However, the distance to a water body is not one of the requirements that can be relaxed and, in any event, the EHO is correct that subsection 7(3) excludes a sewage disposal system within an environmental control zone from consideration under section 7.

The Appellant argues in the alternative that there are other provisions in the Regulation that provide the EHO with flexibility in the approval of systems within environmental control zones. Specifically, he points to section 2(b) of Schedule 4. Schedule 4 sets out the conditions for approval of sewage disposal systems in environmental control zones.

The Appellant alleges that, under section 2(b), a phosphorous reduction sewage disposal system may be approved for a lot in an environmental control zone even though the 30 metre setback to the high water mark is not met.

Before Schedule 4 can be applied, the permit application must fall within one of the categories listed in section 6.1 of the Regulation. Section 6.1 states:

- (1) Without restricting the application of another provision of the regulation or of another Schedule, Schedule 4 applies to sewage disposal systems that are located in an environmental control zone *if* the sewage disposal system
 - (a) is constructed or installed on a lot created after the date Schedule 4 comes into force and is required to have a permit under section 3,
 - (b) requires repair, or
 - (c) must be expanded to meet the standards set out in Schedule 2 or 3.

[emphasis added]

Schedule 4 came into force in 1992. The evidence established that the subject Lot was created some time prior to the Appellant's purchase of the property in 1962. Thus, subsection 1(a) does not apply: the Lot was created *before* Schedule 4 came into force, not "after".

The Panel similarly finds that neither subsections 1(b) nor 1(c) apply in this case. The Appellant's application is for a new system; there is no existing system that

requires repair or expansion. Therefore, the provisions of Schedule 4 are not currently applicable to the Appellant's Lot and it is unnecessary for the Panel to decide whether section 2(b) of Schedule 4 would allow a phosphorous reduction sewage disposal system to be installed on a lot that cannot meet the 30 metre setback.

DECISION

In making this decision, the Panel has carefully considered all of the evidence submitted, whether or not it has been specifically reiterated here.

Given the application before the EHO, the Panel finds that he was correct in refusing to issue a permit. The Panel finds that the Regulation does not provide the EHO with discretionary authority under section 18 of Schedule 2. Therefore, the required 30 metre setback from a high water mark cannot be relaxed.

The Panel further finds that the 30 metre setback problem cannot be solved under section 7.

The Panel notes from the Appellant's submissions that the Ministry of Health and the Ministry of Environment, Lands and Parks are in discussions with respect to approving alternate systems in environmental control zones. Such discussions may lead to changes which may provide a solution for this difficult lot.

The appeal is dismissed.

David Perry, Chair
Environmental Appeal Board

January 14, 1997