COMMONWEALTH OF PENNSYLVANIA

BEFORE THE

ENVIRONMENTAL HEARING BOARD

SUSSEX, INCORPORATED,	:	DOCKET NO. 82-238-M
	:	
Appellant	:	
	:	Pennsylvania Sewage Facilities Act
	:	(Act 537) 35 P.S. §§750.1 et seq.
v.	:	25 Pa. Code Chapters 71, 73
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
Appellee	:	

A D J U D I C A T I O N

By the Board: This adjudication was originally drafted by Theodore Baurer, Examiner, from the record, and is issued after the Board's review, with modifications.

Dated: July 27, 1984

Syllabus

Developer appeals from a DER refusal to approve a proposed revised plan for on-lot sewage disposal within one section of developer's subdivision, which plan had been submitted pursuant to the Pennsylvania Sewage Facilities Act, 35 P.S. §750.1 et seq. Approval was denied on the basis of inadequacy of soil conditions to support the number and configuration of the lots projected for the subdivision section. Five previously submitted plans for other sections of the subdivision had been approved by DER prior to submission of the plan at issue. Substantial expenditures had been made by the developer in construction of the subdivision prior to its first submission of the plan to DER. Upon rejection of this plan, a revised plan was compiled and submitted. DER' rejection of this revised plan forms the subject matter of this appeal.

This Board's review of a DER action is to determine whether DER committed an abuse of discretion or an arbitrary or capricious exercise of its duties or functions. The burden of proving that DER abused its discretion or exercised its duties or functions arbitrarily lies with the appellant. 25 Pa. Code §21.101(c)(1). The

testimony given at the hearing was conflicting and ambiguous regarding soil suitability. Although the data was only marginally supportive of the conclusion that the soils were not suitable for their intended use as on-lot sewage disposal sites, DER is obliged to exercise its independent judgment and is justified in adopting a conservative and cautious approach. The appellant has failed to meet its burden of proof. It has shown nothing more than an honest difference of opinion among experts and the existence of a more conservative approach by DER at the time of its disapproval of the plan at issue than at the time of its approval of plans submitted for other sections of the subdivision. The Board therefore finds that DER acted reasonably and neither abused its discretion nor exercised its duties arbitrarily or capriciously.

Appellant cannot prevail upon its argument that prior DER approval of plans submitted for five other sections of the proposed subdivision estops DER from withholding approval of the plan at issue. In enforcing governmental enactments DER is exercising a governmental function, so that even had its agent been mistakenly indulgent or lax in enforcing the laws, DER cannot now be prevented from performing its duty of enforcing the statutes. Further, the establishment of an estoppel requires a showing of reasonable reliance upon some statement of the party sought to be estopped. Prior DER approval of plans for other sections of the subdivision does not amount to a statement which could be said to induce reasonable reliance. The great likelihood of change in DER standards, practices and procedures in the period between approval of the earlier plans and rejection of the plan at issue, coupled with the intervening decision of this Board in an unrelated case holding that mistaken indulgence by a commonwealth employee creates no prescriptive rights in a regulatee, precludes a finding that the appellant's reliance was reasonable. In addition, the record indicates that many of the costs incurred by appellant in alleged reliance upon DER approval pre-dated submission of the revised plan to DER, in some cases by several years. Therefore, the Board holds that estoppel does not lie against DER in this matter.

INTRODUCTION

This matter comes before the Board as an appeal from DER's refusal to approve an Act 537 revision to the Official Plan for East Hanover Township, Dauphin County.

The proposed revision concerns Section 6 of the Fairfield Subdivision in the said township. Appellant, the developer, has previously had five other sections of Fairfield approved. Approval of Section 6 has been withheld on the grounds of inadequacy (or marginal inadequacy at best) of the soil conditions to support the number and configuration of lots projected for the site, in view of both the short- and long-term sewage disposal needs of the development.

The appeal charges DER with arbitrary and capricious decision-making constituting an abuse of discretion, and charges further that DER's disapproval of the proposed plan revision was unreasonable and discriminatory. DER cites its statutory responsibility to ensure the adequacy of the site to provide for on-lot septic systems as proposed, and seeks further testing at the site as a prerequisite to reconsideration of its decision.

A hearing on this matter was held on November 18, 1983 before Board Member Anthony J. Mazullo, Jr. Post-hearing briefs were filed by appellant and DER on December 30, 1983 and February 3, 1984, respectively. On March 6, 1984 the record was transmitted to the Board-appointed Hearing Examiner, Theodore Baurer, for adjudication. 71 P.S. §510-21(e).

FINDINGS OF FACT

1. Appellant is Sussex, Incorporated ("Sussex"), a Pennsylvania corporation with a business address at 1719 North Front Street, Harrisburg, Pennsylvania 17110, and doing business, inter alia, as a residential land developer. Messrs. John Purcell, Jr., and John Purcell, Sr., are, respectively, the President and sole shareholder of the corporation.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the state agency charged with the duty and responsibility of administering the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §§750.1 et seq. ("the Act"), and the supporting Regulations, 25 Pa. Code Chapters 7, 73 ("the Code"), promulgated thereunder, as hereinafter cited.

3. The Fairfiled Subdivision in East Hanover Township, Dauphin County, covers more than 100 acres and comprises six sections (Exhibit A-1), the first four of which were approved prior to January, 1978, and the fifth during 1979 (Exhibit A-5).

4. This appeal concerns Section 6 (Exhibit A-2), which covers 13.5 acres more or less and comprised originally nine lots, two of which have been joined to others and a third eliminated entirely, thereby reducing the present number of lots to six (designated as Nos. 22, 46, 47, 48, 69 and 71); the first four numbered of these cover approximately one acre each and therefore account for approximately one-third of the total Section 6 acreage.

5. No plans exist for either a public sewerage system or public water supply system for Section 6 or for the vicinity of the Fairfield Subdivision, and none are planned within the next ten years, the closest existing sewer line, the Beaver Creek Interceptor, lying approximately six or seven miles to the west. (N.T. 21).

6. Red Fox Lane, a road traversing Sections 5 and 6, was completed by early 1980, prior to the submission of any plan for Section 6 to DER. (N.T. 107.)

7. Deep-probe soil evaluation testing in Section 6 had been carried out in August 1978 by Edward J. Gaydos, who at the time was Sewage Enforcement Officer ("SEO") for East Hanover Township (Exhibit A-3); similar testing was performed in May 1980 by Bruce P. Willman, an employee of then-SEO R.E. Wright Associates (Exhibit A-4).

8. Present during the latter tests was Charles D. Ferree, Jr., Sanitarian of DER's Bureau of Water Quality Management, who expressed no difference of opinion with Willman's observations at the time (N.T. 25), but who recalled at the Hearing only some "discussion as to whether or not long-term sewage disposal needs were (being) met" and possibly also some talk regarding changes in the numbers and configurations of the lots. (N.T. 123.)

9. Willman concluded that the six lots in Section 6 had suitable sites on each of them for on-lot septic systems, using the elevated sand mound concept (N.T. 20); he also testified that he "could make a recommendation to accept" the information he had developed and to have the plan approved on that basis. (N.T. 32.)

10. The first Planning Module for Section 6, comprising the original nine lots (Nos. 21, 23 and 70 in addition to those listed at Fact #4, above), was approved by the Township and was submitted to DER on or about July 29, 1980, and thereafter disapproved by DER.

11. Following a number of changes in the number and configuration of lots comprising Section 6, a "final" revision was submitted to relevant County and Township authority during late 1981 and early 1982, and to DER in March of 1982.

12. In November 1981, a Dauphin County Subdivision/Land Development Review Report noted general compliance of the plan with regulations, and in March 1982, the East Hanover Township Planning Commission recommended approval of the plan.

13. On May 7, 1982, Mr. Ferree wrote to the East Hanover Township Supervisors, setting forth various reasons why the Planning Module for Section 6 was unacceptable (Exhibit A-8); Ferree also suggested (at Paragraph 9 thereof) that additional soil tests should be conducted, in view of the marginal suitability for sewage disposal

of six of the original nine lots, and the unsuitability of the remaining three.

14. On May 20, 1982, Gerald R. Grove of Grove Associates, an engineering and surveying firm, responded to Ferree's objections, and submitted additional and revised information (Exhibit A-9); Grove acknowledged reduction of the original nine lots to six, as set forth at Fact #4, above.

15. Ferree's assertion, at Paragraph 7 of his May 7, 1982 letter (Fact #13), regarding the failure of Robert Sherrick, the current SEO, to have verified or approved, as of that date, the suitability of soils in Section 6 for on-lot sewage disposal, as one reason for his finding of unacceptability of the March 1982 "final" Planning Module for Section 6 (Fact #11) erroneously cited 25 Pa.Code §71.34(d) instead of 25 Pa.Code §71.15(c)(3) as authority for his finding; the required approval was not actually forthcoming until Sherrick's letter of July 6, 1982 (Exhibit C-1), which itself referenced a plan (Exhibit A-2) that had only been provided by Sussex on or about June 22, 1982; Ferree's code citation error was corrected in DER's Post-Hearing Brief (at 27).

16. On June 10, 1982 (Exhibit A-6), and again on November 3, 1982 (Exhibit A-10), the Section 6 sites were revisited and retested. Those present on the June date included Ferree (Exhibit C-2, N.T. 132-3), Grove, Merrill Kunkle (an independent consultant to Sherrick), Sherrick, and E.Lester Rothermel (Exhibits A-7, C-3) (a DER Soil Scientist). Those present on the November date included Ferree, Rothermel and William H. Farley, Ph.D. (Exhibit C-4), Chief of the Soil Science Section of DER's Division of Local Environmental Services.

17. The consensus among Grove (N.T. 88), Kunkle (N.T. 53), and Sherrick (N.T. 66) was that the six Section 6 sites were suitable for on-lot sewage disposal. The consensus among Farley (Exhibits A-10, C-4, N.T. 184-5), Ferree (Fact #16), and Rothermel (Exhibits A-7, C-3, N.T. 157-60) was that marginal to severe limitations existed regarding soil suitability for on-lot sewage disposal at the various sites, both as to depths to limiting zone and as to slopes.

18. On September 8, 1982, DER disapproved the plan (25 Pa.Code §71.15); this disapproval is the subject matter of the instant appeal. (Exhibit C-2.)

19. DER's disapproval was based generally on its finding of "inadequate suitable soils ... for the installation of on-lot sewage disposal systems" (Id.); this, plus the further factor of non-existent and unplanned-for public sewer and water facilities (Fact #5), led to the determination that "both the short- and long-term sewage needs have not been adequately addressed ..." (Exhibit C-2), and that therefore the plan was "not consistant (sic) with the purpose of (the Act)." (Id.)

20. More specifically, DER asserted (in its Pre-Hearing Memorandum filed January 27, 1983) as reasons for the inadequacy of the soils: preclusion of conventional subsurface systems on all lots owing to insufficient depths to limiting zone*; preclusion of alternate subsurface systems on Lots 21, 22 and 47, owing to slope restrictions and insufficient depths to limiting zone*; steep slopes or radically variant depths to limiting zone on Lots 46, 48, 69 and 71 necessitating multiple probing to ascertain even marginally acceptable profiles; and DER's belief that as to the latter four lots the feasibility of installation of elevated sand mound systems is so marginal as to be demonstrable only through specific identification of the system boundaries, both as to primary and replacement or repair systems, at the planning stage.

21. Alone among the experts testifying at the Hearing, Mr. Willman reported Comly and Brinkerton "to be the predominate (sic) soils from the soil profile descriptions that (he) evaluated" (N.T. 24), but these two were included among several soil types which Mr. Ferree had characterized as having "severe limitations for use of on-lot systems ..." (Exhibit A-8, Paragraph 10), the others including Atkins silt loam and Armagh. Appellant's own site map (Exhibit A-2), however, indicated the presence in Section 6 of all of the above except Comly, and included as well Weikert shaly silt loam the slope of which (25-40%) "would preclude any use for on-lot sewage disposal" (Exhibit A-8, Paragraph 10), plus Berks shaly silt loam of varying slope which, given "sufficient solid depth" would be "suitable for an elevated sand mound trench system or unsuitable for an on-lot sewage disposal system." (Id.)

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*The relevant Pa.Code sections cited at these points in DER's Pre-Hearing Memorandum are no longer operative; see Fact #25, infra, for the amended code citations now regulating depth to limiting zone and slope requirements for these subsurface systems. 25 Pa.Code Ch. 73; 13 Pa.Bull. 508 (January 22, 1983) at 518, 519.

22. Probe data developed by several investigators between August 1978 and November 1982 and offered in evidence (Exhibits A-2, A-10) indicate considerable variance in depths to limiting zone across most of Section 6, with many locations having depths less than the twenty inches required by the Code (Fact #25). Lots 22, 47 and 48 in particular featured depths to limiting zone varying both above and below twenty inches, not only between probe pits but also within individual pits. (See also Exhibit A-7, summary at page 6.)

23. Significant differences of opinion were expressed among the experts who testified, regarding the preferred mode of reporting depths to limiting zone in instances where the boundary being measured was describable as "wavy" or "irregular". Hence it became possible, depending on how one chose to interpret such data where the "waviness" or "irregularity" happened to fluctuate about the twenty-inch mark, to report depth to limiting zone as of its highest point, its lowest point, or its range of points. (N.T. 39-40, 57-8, 61, 153, 159.)

24. Most of the probe data referred to above (Fact #22) also included considerably variable slopes, with measurements at Lots 22, 46, 47 and 48 particularly prone to equalling or exceeding the maximum 12% slope permitted by the Code (Fact #25).

25. Owing to the marginal nature of the probe data relating to depths to limiting zone and slopes (Facts #22-24), the Planning Module for Section 6 can properly and does in fact contemplate only elevated sand mound systems for each lot. This is in accordance with the requirements of 25 Pa.Code §73.51(a)(2), wherever the depth to the top of the limiting zone is less than sixty inches, it being noted as well that 25 Pa.Code §73.51(a)(3) bars any system "where less than 20 inches of suitable undisturbed mineral soil exists". Further, it is required that for elevated sand mound trenches or beds, the maximum slope of undisturbed soil for such absorption areas be no more than 12% or 8%, respectively. 25 Pa.Code §73.55(a)(1),(2).

26. Elevated sand mound trenches require a larger absorption area than other types of on-lot septic systems. (N.T. 41.) For the homes contemplated in Section 6, Willman generally used a figure of 1000 square feet. (Exhibit A-2, N.T. 42.)

27. The evidence has been inconclusive in establishing that adequate areas exist on the Section 6 lots to provide for elevated sand mound trenches.

28. The existence of marginal and variable soil conditions in Section 6 raises a distinct possibility of malfunction of on-lot septic systems installed thereon.

29. Any malfunctions of on-lot septic systems in Section 6 would pose a distinct danger of contaminating the ground-water from which, according to the development plans (Exhibit A-2), each house would draw its water supply.

30. The evidence has been inconclusive in establishing that adequate areas exist on each lot in Section 6 to provide suitably for a replacement area in addition to the primary elevated sand mound system. Although such replacement areas are not explicitly required for elevated sand mound systems by the Code, Sussex recognized at least the desirability of including such areas and did, in fact, indicate proposed locations for them on its section map (Exhibit A-2).

31. The evidence has been inconclusive in establishing that the siting of elevated sand mound systems on each of the six lots of Section 6, as proposed (Id.), is feasible, and suggests rather that the soil conditions are at best marginal for the use contemplated.

32. The use of on-lot septic systems in Section 6 as proposed may not meet the short- and long-term sewage disposal needs of the development.

33. Sussex assertedly expended approximately $52,000 in expectation of DER approval of the Section 6 Planning Module. (N.T. 104-5.)

34. The evidence fails to establish that DER ever acted, whether by word or deed, in such a manner as to encourage Sussex in its expectations relative to DER approval of the Section 6 Planning Module.

35. Cancelled checks and paid invoices covering expenses assertedly incurred by Sussex in anticipation of DER approval of the Section 6 Planning Module (Sussex Pre-Hearing Memorandum, Supplement) clearly indicate that the bulk of such expenditures predated the submission of Sussex's first plan to DER in 1980 (Fact #10), with virtually all of them predating March 1982, when the "final" revision was submitted to DER (Fact #11).

DISCUSSION

A. Introduction

The issues to be faced in adjudicating this Act 537 appeal derive principally from bare marginality of agreement between the measured soil characteristics in Fairfield Section 6 and the legal criteria of suitability of these soils for their intended use as on-lot sewage disposal sites. The soil characteristics in question include soil types, depths to limiting zone and slopes (Facts #20-25). The factor of marginality of agreement between measurements and legal standards becomes all the more critical where, as here, the collective testimony of seven experts provides us with strongly conflicting interpretations of the data and their significance.

In view of the marginal data provided for its evaluation, DER's obligation* to make its own independent judgment on the development plan became even weightier than it might otherwise have been, inasmuch as the Act clearly authorizes DER "to approve or disapprove official plans for sewage systems" (35 P.S. §750.5(e)), and the Code mandates that DER "shall either approve or disapprove the plan or revision" (25 Pa.Code §71.16(c), emphasis added). Neither the Act nor the Code permits DER to equivocate when confronted with marginal field data or conflicting and perhaps ambiguous expert interpretations of the data.

DER being thus barred by law from fence-sitting on the matter, the principal issue then becomes whether DER's having come down on one side rather than the other - in having withheld approval of the development plan for Section 6, required additional testing as a pre-requisite to reconsideration of the plan, and insisted that the plan provide adequately for both primary and replacement septic systems on each lot - was reasonable, was neither arbitrary nor capricious, and did not constitute an abuse of its discretion.

A secondary issue raised by Sussex concerns the question whether DER is estopped from withholding its approval of the proposed plan for Section 6 either by virtue of its prior grant of approval for Sections 1 through 4, and especially Section 5 where the same or similar marginal soil conditions assertedly prevailed as in Section 6, or because of Sussex's having expended substantial development

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*35 P.S. §750.5(d)(3),(e); 25 Pa.Code §§71.14(a)(6),(b) and 71.16; Township of Heidelberg v. DER, EHB Docket #76-150-D (issued October 21, 1977).

funds in asserted reliance upon the said approval, which it expected would be forthcoming.

Sussex's approach in addressing these issues is to argue, first, that "(e)ach of the six lots (in Section 6) contains on it a location that meets the standards and criteria of the (Code) for such (on-lot sewage treatment) system." (Sussex Post-Hearing Brief at 3.) Moreover, according to Sussex, estoppel lies against DER "in the absence of clear evidence that the soils were unsuitable." (Id. at 12.)

DER's response relies on its obligation (supra) to exercise its own independent judgment and, cognizant of both the marginal soil conditions and the contradictory interpretations of the field data, to adopt "a conservative and cautious view towards additional development by trying to assure that enough suitable soil is available to support one system per proposed lot, as well as a replacement area." (DER Post-Hearing Brief at 1.) Regarding Sussex's claim of estoppel, DER's position is that Sussex's line of argument based on prior approval of the earlier sections "negates the need for the planning approval process and would make (DER's) review of proposed developments a futile and useless exercise." (Id. at 2.) Further, the decisions to build Fairfield in sections and to offer them piecemeal for review, as well as to incur costs of infrastructure development in anticipation of approval of Section 6, were (in DER's view) independent business decisions of the developer, which cannot create an estoppel, nor "create any obligation in (DER) to disregard its duties of protecting the environment and ensuring that whatever sewage disposal method is chosen can be implemented and will provide a long-term solution to the needs of the development." (Id. at 2-3.)

We agree with DER, that its "decision in this matter represents an environmentally responsible balance between its statutory duties and (Sussex's) decision to further develop in an area of marginal suitability." (Id. at 3.)

B. The Principal Issue: Reasonableness of DER's Decision

The burden of proving that DER abused its discretion or exercised its duties or functions arbitrarily lies with Sussex as the appellant.*

*25 Pa.Code §21.101(c)(1); Eagles' View Lake, Inc. v. DER, EHB Docket #76-086-W(issued April 4, 1978); Raymond E. Diehl v. DER, EHB Docket #78-037-B(issued May 14, 1979).

A mere difference of opinion, or even a demonstrable error in judgment, is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER or other decision-making body can be shown to have occurred. (Garrett's Estate, 335 Pa. 287 (1939).) The most Sussex has been able to demonstrate in this case is a difference of honest opinion among honestly differing experts, an equally honest disagreement between the parties, and the existence of a more conservative approach by DER in 1982 than in 1979 to the discharge of its duties and functions vis-a-vis environmental regulation. At the very outset, then, it follows that Sussex has failed to meet its burden of proof against DER.

We have been at some pains, in introducing this Discussion, to stress the factor of marginality of agreement between field probe data relevant to soil conditions, and legal criteria for the intended use of the soils in Section 6. This factor, plus the high degree of variability of soil condition and quality throughout the area combined to militate strongly in favor of DER's insistence on "a conservative and cautious" (supra) approach in its evaluation of site suitability for the proposed development.

Given this combination of marginality and variability of soil parameters as attested to with particular regard to soil types, depths to limiting zone, and slopes (Facts # 20-25 and Exhibits and N.T. cited therein), and cognizant of the relevant Code requirements (Fact #25), it develops that the only type of on-lot septic systems which could legally be considered in Section 6 were elevated sand mounds. In several instances even these would necessarily have been limited to elevated sand mound trenches rather than elevated sand mound beds.

Moreover, such elevated sand mound systems typically require absorption bed areas (for homes as contemplated in Section 6) of the order of 1000 square feet (Fact #26). Areas of this magnitude, as laid out on the section map (Exhibit A-2), appear in several instances (but particularly as regards replacement areas for Lots 22, 69 and 71 and the primary area for Lot 69) to have necessarily infringed upon soils of objectionable types. (See Fact #21.) Yet

Sussex's attitude seems to have been typified by the following exchange which took place on Redirect Examination of Mr. Willman:

> Q. But your recommendation is that the lots have an area where soils are suitable and meet the requirements, and that give you enough confidence to make a recommendation as to the lot or as to the subdivision in general?
> A. That is correct, yes.
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> N.T. 48 (Emphasis added)

In other words, the presence of an area - any area - where the legal requirements appeared to have been met, as via field data produced by any one probe yielding results favorable to Sussex's cause, seems in Sussex's opinion to have comprised sufficient compliance with the Code as to have justified DER's approval:

> Thus it can be seen that almost all of the evidence adduced at the hearing shows the soils to be suitable on each of the six lots. DER admits the suitability of four of the lots. As to the other two, it does not find them unsuitable, but only thinks more testing is called for.
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> Sussex Post-Hearing Brief at 12 (Emphasis added)

Not only does Sussex's argument quoted immediately above tend to denigrate the validity of DER's call for additional testing, but it also misstates DER's position regarding the "suitability of four of the lots."

DER's actual position regarding the four "suitable" lots is to the effect

> that of six proposed lots covering a total of 13.5 acres (N.T. 109), four of the lots (Nos. 22, 48, 47, 46) are crowded into an area covering approximately one-third of the total acreage (Exhibit A-2). Each of these lots is further limited in terms of useable area by the existence of Weikert soils in their bottom quarter, a soil normally associated with shallow depth to bedrock and steep slopes. (Exhibit A-2, N.T. 183).
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> DER Post-Hearing Brief at 11 (Emphasis added)

DER distinguishes its own view of the matter of suitability from that of Sussex by pointing out that the question

> is not whether there is one spot per lot where an acceptable soil profile can be found, but rather whether enough acceptable soil with uniformly acceptable depths to limiting zone exists over an area with acceptable slope that is large enough to accommodate the bed or trench of at least one elevated sand mound as a primary system, and one as a replacement system. The testimony as a whole does not resolve this issue.
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> Id. (Emphasis in the original)

Further to this point is Sussex's misquotation (Sussex Post-Hearing Brief at 7) of Mr. Ferree's statements regarding suitability of the original nine lots, in his letter of May 7, 1982 (Exhibit A-8, Paragraph 9). Sussex quotes Ferree as having characterized the final six lots (Nos. 22, 46, 47, 48, 69, 71) as "suitable for elevated sand mound systems", omitting the qualifier in his actual statements as to each of the lots, where in each instance he wrote, "Lot X, if sufficient suitable area is available, is suitable for an elevated sand mound trench system." The emphasis we have here added stresses the portion of Ferree's statement which Sussex omitted in its brief, as to each of the named six lots, but which lies at the heart of Ferree's, and DER's, ultimate recommendation for more testing, viz., to determine "if sufficient suitable area is available" to support the designated systems.

Sussex goes on to insist (Sussex Post-Hearing Brief at 12) that "(m)ore testing, in light of the solid evidence already obtained, and especially at the planning stage, is not reasonable." But we think, to the contrary, that in light of Ferree's well-reasoned qualification regarding suitability (supra), more testing is eminently reasonable, and preferably at the planning stage rather than later on, "at the permitting stage, leaving open the possibility that no permit could be issued or that a malfunction would have to go uncorrected." (DER Post-Hearing Brief at 2.)

We therefore find that DER acted reasonably and neither abused its discretion, nor exercised its duties and functions arbitrarily or capriciously, in disapproving the proposed Plan Revision for Fairfield Section 6, requiring that additional testing be conducted as a prerequisite to reconsideration of the revision, and insisting that the plan provide adequately for both primary and replacement septic systems on each lot.

C. The Secondary Issue: Estoppel

Sussex argues that DER, having previously approved five other sections of the Fairfield Subdivision, one of which (Section 5) ostensibly contained soils "worse than those in Section 6" (Sussex Post-Hearing Brief at 13), thereby gave Sussex "good reason to believe that (Section 6) would be approved because of the prior approvals and the similarities of the soil", notwithstanding that "(a)ll of the systems in the prior subdivision are functioning

properly, except for one which has been repaired, that was installed in an area where the soils were unsuitable." (Id., emphasis added.) In addition, acting on the presumption thereby created, Sussex then went ahead and spent "at least $51,800.00 ... for improvements to Section 6 in anticipation of DER approving of the subdivision." (Id.)

Taking this argument at face value and interpreting it in the light most favorable to Sussex, what it amounts to is a line of reasoning which says that: (1) DER erred in its earlier actions, at least in regard to its approval of Section 5; (2) DER was therefore bound by its previous error to deliberately run the risk of repeating the mistake in spite of the prior experience and in spite of its negative findings regarding the suitability of soils in Section 6, for the sake of consistency if for no other reason; (3) Sussex was, by the same token, justified in gambling a substantial sum of money on the chance that DER would knowingly repeat its earlier error; (4) Sussex was equally justified in relying on DER to approve the plan for Section 6, in the face of its prior sad experience as to Section 5, and despite at least questionable findings as to Section 6; (5) DER was and is, therefore, estopped from carrying out its reasonably determined decision (Section B, supra), and may not fail to approve the proposed Plan Revision for Fairfield Section 6.

The troubles with this rationale are manifold: First and foremost is a ruling enunciated by the Commonwealth Court of Pennsylvania to the effect that, "in enforcing these environmental enactments DER is exercising a governmental function, so that even had its agents been mistakenly indulgent or lax in enforcing the laws, DER cannot now be prevented from performing its duty of enforcing the statutes." (Lackawanna Refuse Removal, Inc. v. DER, Pa. Cmwlth., 442 A.2d 423, 426 (1982).) Or as we wrote in an earlier case, "mistaken indulgence by, or errors of a commonwealth employee create no prescriptive rights in a regulatee." (Fossil Fuels, Inc. v. DER, EHB Docket #80-222-H (issued June 19, 1981), at 132.)

Thus DER is not bound to repeat past errors of enforcement, nor to run the risk of such repetition, simply for the sake of consistency of performance or to justify a developer's misplaced reliance.

Secondly, as DER correctly pointed out (in Fossil Fuels, supra), the establishment of an estoppel requires reasonable reliance, by the party seeking to estop, upon some statement of the party sought

to be estopped, to the detriment of the former. "The only 'statement' upon which (Sussex) ... relied was the fact that prior approvals had been given to Sections 1-5, and that (DER) failed to give (Sussex) 'notice' that Section 6 would be ... disapproved." (DER Post-Hearing Brief at 32.) In other words, Sussex relied not on a true "statement" but on an extrapolation from past conduct to future expectation, an expectation the failure of which to come to fruition was not heralded by some form of "notice". We cannot agree that this mere expectation constitutes a "statement" in the sense intended by any reasonable definition of estoppel. Nor do we see where any special form of "notice" of impending disapproval was required, since it was and is explicit in both the Act and the Code that the possibility of either approval or disapproval - and no other outcome - is inherent in the act of submitting the proposal to DER. (35 P.S. §750.5(e); 25 Pa. Code §71.16(c); Introduction supra.)

In addition, we have already pointed out that, to the extent that the element of "reliance" was based on Sussex's unreasonable assumption regarding DER's anticipated course of action regarding Section 6, such "reliance" was not "reasonable". This point is accented by the testimony of Mr. Purcell, Sussex's President:

> Q. ... (D)id you or did the corporation rely to any extent upon the fact that prior subdivisions had been approved, the planning had been approved by both the Township and DER?
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> A. Oh, yes, absolutely. I think it is only reasonable to assume that when five previous plans of the same section are approved that there would be very little problem with the final plans. I mean, everything is the same. All the indications we were getting as we were going along that I could see was that everything was the same. There was no reason to believe it wouldn't be approved.
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> N.T. 105-6

The trouble with Mr. Purcell's reasoning in thus answering his counsel's question is, in our view, that the assumption is not "reasonable" in that two (not five) previous submissions of plans had been made six years and three years prior to the instant submission, making it quite reasonable to assume - contrary to Mr. Purcell - the great likelihood that changes in DER standards, practices and procedures would have occurred during the intervening years, and experience with the prior sections would have accumulated likewise, so that everything might not be "the same." In fact, Fossil Fuels (supra) was adjudicated in 1981, prior to Sussex's submission

of its "final" plan for Section 6 in 1982, and the portion quoted above from that case ought certainly to have served as "notice" of a more conservative policy on the part of DER, backed up by this Board.

No evidence has been offered, in sum, regarding any statement or suggestion of DER or any of its agents or employees indicating that everything would or could be "the same" as it had been in 1979, or justifying in any way Sussex's asserted "reliance" on approval of the Section 6 plan by DER.

Finally, the monetary "detriment" asserted by Sussex appears, upon examination of various checks and invoices, copies of which were included in a Supplement to Sussex's Pre-Hearing Memorandum, to represent expenditures predating (by several years in many instances) the filing of the Plan Revision for Section 6. (Fact #35.) Indeed, construction of Red Fox Lane, the road traversing Sections 5 and 6, is itself covered by invoices included in the Supplement, and dating back to 1979, when (or possibly early in 1980) the road was completed. (N.T. 107.) Mr. Purcell testified that almost $41,500 was expended for the portion of the road attributable to Section 6. (N.T. 104.) That Sussex suffered financial losses is not in dispute, but

> (Sussex) apparently made ... business decisions to design and build the infrastructure (e.g., roads) for the entire subdivision prior to submission or approval of all sections. These business decisions ... on (Sussex's) part do not create an estoppel against (DER).
>
> DER, Post-Hearing Brief at 2

Thus, as DER correctly points out,

> the costs (Sussex) is complaining about were incurred approximately three years prior to submission of (sic) (DER) of the request for approval of Section 6. (Their) "reliance" on as-yet unrequested action can certainly not be viewed as reasonable or as forming any basis for an estoppel.
>
> Id. at 33
> (Emphasis in the original)

We hold, therefore, that estoppel does not lie against DER in this matter.

D. Conclusion

The foregoing considerations lead this Board to rule that DER neither abused its discretion nor arbitrarily exercised its powers or functions in this case. DER's refusal to approve the proposed Plan Revision for Fairfield Section 6 was based on reasonable grounds and

was in accordance with the relevant statutes and regulations. DER's requirements for further testing and for adequate provision in any future proposal for both primary and replacement septic systems on each lot are similarly based on reasonable grounds and in accordance with law.

Sussex's plea of estoppel, we hold is entirely without merit and is therefore summarily rejected.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this appeal.

2. The burden of proof in an appeal by a private party from a DER refusal to approve a proposed Act 537 Plan Revision is upon the appellant. (25 Pa. Code §21.101(c)(1)). This burden has not been carried by Sussex, the appellant in this matter.

3. This Board's review of a DER action is to determine whether DER committed an abuse of discretion or an arbitrary or capricious exercise of its duties or functions.

4. In the review of an Act 537 Plan Revision, DER must decide upon, inter alia, the adequacy of the proposed sewage disposal method and the suitability of the soils where on-lot sewage disposal is proposed.

5. DER must consider the immediate and long-range disposal needs of a development, including suitable replacement areas for on-lot sewage disposal systems.

6. DER did not act arbitrarily or capriciously in requiring appellant to verify the existence of adequate suitable areas for primary and replacement disposal systems on each proposed lot, in light of the marginality of the soils and the slopes thereof.

7. It was not an abuse of discretion, nor was it an arbitrary or capricious exercise of its duties and functions, for DER to disapprove the pro-

posed Plan Revision for Section 6 of the Fairfield Subdivision, or to require that additional testing be conducted as a prerequisite to reconsideration of the plan, or to insist that the plan provide adequately for both primary and replacement septic systems on each lot.

8. DER is not estopped from disapproving appellant's proposed Plan Revision for Section 6 by the virtue of prior approval of the other five (5) sections of the development.

9. Under the facts of this appeal, estoppel does not lie against DER on the basis of any statements made by DER or any of its agents or employees, nor does estoppel lie on account of expenditures of money by Sussex for the development of Section 6 prior to DER's decision in this matter, or in anticipation or expectation of approval of the proposed Plan Revision.

O R D E R

AND, NOW, this 27th day of JULY , 1984, the appeal of Sussex, Incorporated is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 27, 1984