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M E M O R A N D U M

TO: Glen O. Fortney, Acting Director
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State Department of Health

FROM: Howard E. Krauskopf H.E.K
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DATE: December 11, 1980

RE: Septic Tank Permit Moratorium

This informal opinion is in response to your request for information regarding the propriety of a local board of health's denial of new septic tank permits in a given area. Your question was framed in the following manner:

> "Under present public health laws of this state, in instances where inspections and/or surveys by local or state sanitarians disclose a failure rate of 25%, or more, of the individual on-site sewage systems in a given area, be it a subdivision or similar parcel of land, can a local board of health place a 'moratorium' on that defined area to prevent the installation of any more on-site sewage disposal systems within said defined area?"

Several separate and distinct issues must be considered in rendering an opinion with regard to the question as posed.

I. Initially, the question is whether local boards have the power to impose such a moratorium. West Virginia Code §16-13-24, which outlines the state law on Sewage Works of Municipal Corporations and Sanitary Districts, instructs that Article 13 is to be liberally construed. Additionally, in dealing with the regulation of public health, great latitude is allowed officials whose duty it is to oversee public health matters. The reasonableness of their actions seems to be the key limiting factor.

The State Department of Health, through its Director, has a duty to prevent pollution by sewage discharges and may exercise

powers necessary to effectuate this duty. See West Virginia Code §16-1-10(15 & 20). Item 20 specifically requires the Director to enforce all health laws and the rules and regulations promulgated by the State Board of Health.

Section 4.1.5 of the State Board of Health's Small Sewage and Excreta Disposal Systems Regulations (hereafter 'Regulations') adopted in 1975, states that when the Director is convinced that a proposed small sewage system is unsatisfactory due to soil or geological conditions, he shall deny the permit.

Section 6.2.7 of the Regulations direct that no septic tank shall be permitted when these same soil or geological conditions exist.

The power to make these decisions would seem to be properly delegated to the local boards of health under the provisions of West Virginia Code §16-2A-3, which states that municipal boards of health shall direct, supervise and control all matters relating to the general health and sanitation of their areas, and "shall possess and exercise such power in relation thereto as may be exercised and is possessed by the state board of health or the director" in matters within the local board's jurisdicition.

> "The legislature may, in the exercise of its police powers, enact laws for the protection of property and the promotion of the public health of a community, and these powers may be lawfully delegated to an administrative agency to see to their faithful execution."

Mountaineer Disposal Service, Inc. v. Dyer, 156 W.Va. 766, 197 S.E.2d 111, (1973).

The Code additionally provides that the local boards have a duty to protect the general health and supervise and control the sanitation of their respective counties and municipalities and "to enforce the laws of this State pertaining to public health, and the rules and regulations of the state board of health," insofar as they are applicable to the locality. (W.Va. Code §16-2A-3)

Although nothing in the Code expressly states that high levels of pollution in a designated area will give rise to a Health Department duty to refuse issuance of future permits, this power can be found by implication in the broad language of the Code and in the specific requirements of the regulations. West Virginia Code §16-1-7 states, "[T]he State Board of Health shall have the power

to promulgate such rules and regulations...as are necessary and proper to effectuate the purposes of this chapter and prevent the circumvention and evasion thereof... ." Subsection 2 of that section refers specifically to the Director's powers over sewage facilities, whether publicly or privately owned, and Subsection 3 speaks specifically to subdivisions, reserving power to the state to restrict such developments which might endanger the public health, the sanitary condition of the streams, or sources of water supply... ." [W.Va. Code §16-1-7(a)]

The regulations contain provisions which give Health Department officials the power to deny permits based upon a general, area-wide, failure or inability to comply with other applicable environmental laws. For example, section three of the regulations, entitled, "Sewage and Excreta Disposal Requirements", provides that all systems must be installed and operated in such a manner that will not:

1) attract insects and rodents;

2) endanger or contaminate individual or public water supplies;

3) give rise to a nuisance; or

4) violate any other laws or regulations governing water pollution, sewage or excreta disposal. (emphasis added)

(Regulations §§3.6.1, 3.6.2, 3.6.3, 3.6.4.)

No permit may legally be issued unless the system under consideration complies with, or will comply with, all applicable provisions of the Regulations, including that provision requiring compliance with all other environmental laws. See Regulations §4.1.3. If the failure rate of existing sewage systems in a particular area, for topographical reasons or otherwise, is high enough that compliance with other applicable environmental laws would be impossible, the State Director of Health would have a clear duty to deny future permit applications received from that area on an individual basis. Section 7.10 indicates that all lots in a subdivision which contain individual on-site systems must also comply with all applicable provisions of the regulations. Section 8.1 provides for an across-the-board imposition of all the requirements contained in the Regulations to any and all types of small sewage and excreta disposal systems.

The Regulations strongly imply that the Director has a duty to evaluate, as one of the criteria in application reviews, probable compliance with other applicable environmental laws. The Code gives the Director broad powers to prevent pollution by sewage discharge. Case law supports a liberal construction of the statute. For example, State v. Bunner, 126 W.Va. 280, 27 S.E.2d 823, (1944), held that as a

general matter, rules and regulations promulgated by a legally constituted Board of Health will be construed as valid wherever possible, so long as they appear reasonably calculated to achieve the results intended by the Legislature. State ex rel Ballard v. Vest, 136 W.Va. 80, 65 S.E.2d 649 (1951), held that statutes enacted for the protection of the public should be given a liberal construction. With regard to the Legislature's power to delegate regulative functions, State v. Grinstead, ___W.Va.___, 206 S.E.2d 912 (1974) indicated that the constitutional powers of that body are particularly broad in matters of health. It would seem clear that the Director might legally utilize the powers delegated to him to require that local boards of health give consideration to area-wide environmental conditions before issuing permits.

From the foregoing considerations, it would appear the local boards of health, using the power given the Director by the West Virginia Code and the Health Department Regulations, and in turn given to the local boards by W.V.C. §16-2A-3, can indeed deny septic tank permits on an individual basis, using a 25% failure rate of existing small sewage systems due to geological conditions for the area from which new permit requests originate, as the "indication" which would "convince" the director of the area's "unsuitability" for additional septic tank construction.

The next logical step appears to be that a local board could deny new septic tank or sewage system permits for a period of time in the defined high failure rate area on the basis of general geological conditions, or alternatively stated, the local board may impose a moratorium on any new sewage system permits on the basis that it is predictable that all permit applications from a defined high failure rate area will be denied due to unsuitable soil conditions, geological formations or topography.

II. The next concern is the constitutional notion of "due process of law", the elements of which are notice and an opportunity for a hearing prior to the operation of law which could deprive a person of life, liberty or property.

The Regulations, at §4.1.2, require granting of a hearing upon request by any person whose application for a permit has been denied. Section 3.5 of the Regulations requires notice to those who are constructing, installing or maintaining inadequate sewage systems, however, there are no notice guidelines for those who are considering purchase of property or construction of such sewage facilities in an area upon which a moratorium has been imposed. Therefore, a procedure should be formulated and instituted whereby parties to each prospective property transfer in a moratorium area would receive notice of the breadth and effect of such a moratorium.

These hearing and notice requirements are dealt with herein as a caution to the department concerning the possibility of suits, based on constitutional grounds, being brought by aggrieved property owners against the department.

A blanket moratorium risks impinging upon these due process guarantees associated with property rights. The guarantee of a hearing to satisfy due process requirements is seriously threatened by blanket denials, as opposed to individual permit considerations. Normally there must be a provision for review of unique or untraditional proposals and an opportunity for appeal. The opportunity for an individual to have some type of hearing procedure must be built-in to any moratorium plan or general policy of the department in this area.

III. Another area of consideration regarding moratoriums is the extent to which they can prohibit the activity without allowing for, or at least envisioning, an alternative or solution which would be forthcoming at some point in the future, so as to return the substantial value and use of the land to the property owner. The legal categorizing of this problem falls under the term "taking".

Certain districts in other states have imposed moratoriums similar to the one in question herein, however, all of them have included the atlernative wording necessary to prevent, in effect, rendering the owner's property worthless for the only use possible under local zoning laws. See, in the matter of Joe Lavergne, A.J. Corvin and Clary Holm v. State Department of Washington, Department of Ecology, PCHB #99 & 455-A, 7 January 1975, and, Camelot Builders, Inc. v. Urban Board of County Supervisors of Fairfax County, Virginia, Chancery #38968, 5 July 1973.

These cases, and others similar in nature, impose moratoriums "....until such time as certain specific curative steps are undertaken.....", or "...until it can comply with its NPDES Permit.....", or "until such time as the City has achieved compliance with effluent limitations.....", etc. In other words, they all envision a time when the property owner will be able to exercise property rights inherent in ownership of said property and to realize the financial expectations to which the property owner is entitled by virtue of financial expenditures.

The Fifth Amendment of the United States Constitution, as applied to the States by the Fourteenth Amendment, in part, prohibits a "taking" of private property without just compensation. Questions in the courts relating to whether or not a governmental agency has significantly interfered with basic rights of a property

owner have included analysis of the State's "police powers" in matters of health, morals and safety of the public by reasonable regulation of certain harmful activities - balanced against infringement on legitimate ownership interests such as investment expectation, possible alternative use of the property or alternatives to the prohibitied activity, and general impact on the owner's use of the property.

The courts advise that these situations are always to be considered on a separate and individual basis since the characteristics of each situation may have a different bearing on the ultimate constitutional validity of the state's action.

The general trend of law is to support public health action even though it diminishes the value of a person's land. When a regulation is enacted in order to prevent harm, it is a proper exercise of police power and there is no right to compensation for diminution in value of the property. New Jersey Builders Ass'n v. Department of Environmental Protection, 404 A.2d 320, 169 N.J. Super. (1979).

But only necessity justifies the exercise of police power to take private property without compensation and even then the "taking" must not totally prevent the owner's beneficial use of the property.

According to the U.S. Supreme Court's holding in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978), the test in these situations is whether the collective benefits to the public outweigh the specific restraints on the individual. When a taking occurs, compensation must be given; when police power is exercised to control and regulate property for the public good, no compensation need be paid. The point at which police power regulation becomes so oppressive that it amounts to a taking depends on the circumstances of each case.

> "The distinction between the exercise of police power and condemnation is the matter of degree of damage to the property owner. In the valid exercise of police power reasonably restricting use of property, damage suffered by the owner is incidental, but where the restriction is so great that the landowner ought not bear such a burden for public good, the restriction amounts to a constructive taking, even though actual use or forbidden use has not been transferred to government so as to be a taking in the traditional sense. Whether a taking has occurred depends on whether the restriction practically or substantially renders land useless for all reasonable purpose." Just v. Marinette County, 201 N.W.2d 761, 56 Wis.2d 7, (1972).

Frustration of "investment-backed expectations" may amount to a taking. Penn Central Transportation Co. v. New York City, supra. In Penn Central the Court held no taking had occurred because there was no interference with the property owner's "primary expectation concerning the use of the parcel". But it is precisely this "primary expectation" by the owners of residentially zoned property which would be destroyed by a blanket sewage moratorium which contains no view towards its eventual termination.

In a situation where property has little or no value except residential, the permanent elimination of that use by state action would appear to constitute a "taking".

However, property owners do not have a vested right to create or maintain a public or private nuisance, and they may ultimately be subjected to the common-law remedies the law provides. See Kasparek v. Johnson County Board of Health, 288 N.W.2d 511 (Iowa Sup. Ct., 1980).

Kasparek, supra, is a case decided this year in Iowa which deals with a problem almost identical to the subject of this opinion. In Kasparek, a municipal ordinance restricted the availability of septic tank installation permits to residential lots of five acres or more because of past failure of septic systems. A patchwork of sold and unsold lots within a subdivision made it practically impossible to set up five acre lots. The court ruled that even the exercise of police power may amount to a taking if it totally deprives a property owner of the substantial use and enjoyment of his property. The local health board had determined that percolation tests of the area indicated that the soil was incapable of adequately absorbing additional sewage discharge and the ban imposed upon the site did not anticipate nor allow for a lifting of the moratorium depending upon a future remedy for the situation.

A ban which effectively and permanently prohibits the only zoned use of a property owner's land is not reasonably necessary to the effectuation of a substantial public purpose. See National Land & Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965).

If alternatives exist which would allow a reduced or secondary use of the property, in a rural area for instance where sewage considerations are not so critical, or if the property owners are merely deprived of the most beneficial use of their property, or if the moratorium was only temporary and anticipated a remedy for the situation, then a moratorium would be defensable and the burden to prove the ban unreasonable, arbitrary, capricious, or discriminator is upon the one asserting the invalidity. See Board of Supervisors v. Miller, 170 N.W.2d 358, (Iowa 1969).

IV. Our final concern herein has to do with the established principal that an administrative agency is required to follow its own regulations. The department's regulations prescribe procedures for consideration and denial of permit applications on an individual basis. They do not embrace a proposed blanket ban which is the subject of this opinion. The department may wish to promulgate regulations which allow blanket denials based upon a specified area failure percentage or other such criteria.

It is advised that unless the department has some overriding need to impose a blanket ban and a willingness to test the validity of that action in the courts, the department should continue to review, on an individual basis, permits of the type in question in this opinion, as required by its own regulations.

If the department does find an absolute need to invoke such a moratorium, it must include, as discussed earlier, some mechanism which will trigger the lifting of the moratorium upon satisfaction of a requirement which is expected to be completed in the future, according to criteria specified within the moratorium.

Conclusion

1. Local boards of health have the power, in certain situations, to impose general area sewage permit moratoriums through delegation of power from the legislature to the State Department of Health and thence to local boards of health.

2. Constitutional "due process" requires notice and an opportunity for a hearing with regard to governmental actions which effectively deny individuals the use of their property.

3. It may be inferred that sewage moratoriums can be imposed, provided they satisfy due process requirements and include reference to envisioned alternatives which, upon satisfactory completion thereof, will allow property owners to regain basic property rights consistent with area zoning requirements and other such restrictions. Alternative property uses would also satisfy this requirement, however, the line between diminished value and rendering property useless through governmental action is subject to case by case interpretation and should be carefully considered by the acting government agency.

4. Agencies are required to adhere to their own regulations. However, necessity may prompt an agency to promulgate regulations consistent with its needs. At present the Department of Health has no formally promulgated authority to impose sewage moratoriums.

Any new regulations promulgated with regard to the subject of this opinion should be drafted in such a manner so as to insure due process and Fifth Amendment protections for those to be affected.

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