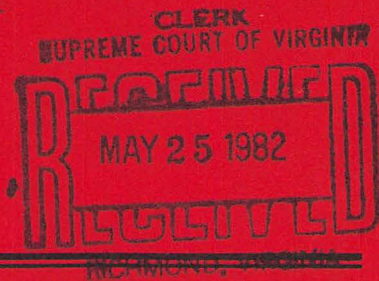


227 VA 55



IN THE  
**Supreme Court of Virginia**

AT RICHMOND

RECORD NO. 812027

WASHINGTON & LEE  
LAW LIBRARY

ROY B. FORBES  
Appellant

v.

MAY 23 1984

JAMES B. KENLEY, M.D.,  
State Health Commissioner

DR. LAURA G. MORRIS  
Health Director, City of Chesapeake

WILLIAM HODDINOTT,  
Supervisor, Chesapeake Health Department  
Appellees

APPENDIX

PAUL M. LIPKIN  
GOLDBLATT, LIPKIN, COHEN,  
ANDERSON, JENKINS & LEGUM, P.C.  
415 St. Paul's Boulevard - Suite 609  
Post Office Box 3505  
Norfolk, Virginia 23514-3505  
BERNARD GLASSER  
GLASSER AND GLASSER  
504 Plaza One Building  
Norfolk, Virginia 23510  
Counsel for Appellant

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APPEAL

TO THE HONORABLE JUDGES OF SAID COURT:

Appellant, Roy B. Forbes, presents this his Appeal from the denial of septic tank permits by the defendant, William Hoddinott, Supervisor of the Chesapeake Health Department, which denial was affirmed by defendant, Dr. Laura G. Morris, Health Director of the City of Chesapeake, Virginia and subsequently affirmed by defendant, Dr. James B. Kenley, State Health Commissioner, by his decision dated June 12, 1979.

In support of said Appeal, petitioner represents unto this Honorable Court as follows:

1. That on or about September 6, 1978, he filed application for permits to install septic tanks on certain lots known, numbered and designated as Lots 13, 40 and 42 on the Plat of "Hickory Ridge" Subdivision of Part of Property of Lemuel H. Pugh, near Hickory, Virginia, in the Pleasant Grove Borough of the City of Chesapeake, Virginia.

2. Said permits were rejected by the defendant,



William Hoddinott, acting for the Chesapeake Health Department on September 13, 1978 for the assigned reason of "evidence of high seasonal water table."

3. That the subject lots are part of a 46 lot subdivision which was approved for residential building sites by the Planning Commission when the area was in Norfolk County prior to the formation of the City of Chesapeake. The lots were approved as "conforming to the applicable regulation relating to the subdivision of land" and the plat was duly admitted to record in the Clerk's Office of the Circuit Court of Norfolk County, Virginia (now the City of Chesapeake, Virginia).

4. That the said 46 lots in this subdivision each contain approximately 15,000 square feet and each abuts on Hickory Ridge Road, a 50 foot wide paved street leading in a westerly direction from State Route #168.

5. That since the development of said subdivision in 1960, there have been erected and now exist 19 substantial owner-occupied homes on 19 of the lots in this subdivision, each of which homes uses septic tanks. None of the owners thereof have had any substantial difficulty therewith.

6. That the petitioner has presented at all stages of the proceedings in this matter, substantial evidence that the lots are suitable for septic tanks.

7. That on appeal from the rejection of the septic tanks to the Health Director of the City of Chesapeake, your petitioner was denied permits.

8. That appellant appealed to the State Health Commissioner and State Health Commission.

9. That on April 16, 1979, a hearing was had before the State Health Department where further evidence was submitted on behalf of appellant.

10. That Dr. James B. Kenley, State Health Commissioner, made findings of fact and conclusion and submitted same to appellant and his counsel under date of June 12, 1979.

11. That appellant respectfully represents unto this Honorable Court that he is aggrieved by the denial of septic tank permits and affirmatively alleges that denial of same is contrary to the evidence presented; that the granting of the permit would create no health hazard and that the decision of the State Health Commissioner ought to be reversed.

WHEREFORE, this Appeal.

ROY B. FORBES

By: \_\_\_\_\_  
Of Counsel

PAUL M. LIPKIN  
GOLDBLATT, LIPKIN, COHEN,  
ANDERSON & JENKINS  
804 Plaza One Building  
Norfolk, Virginia 23510

BERNARD GLASSER  
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DEMURRER

Defendants, James B. Kenley, M.D., et al., by their counsel, the Attorney General of Virginia, demur to the appeal filed in this action because plaintiff has failed to allege compliance with § 9-6.14:16 of the Code of Virginia (1950), as amended, and with Part 2A of the Rules of the Supreme Court of Virginia in the following respects:

1. Appellant filed his appeal with the Circuit Court of the City of Chesapeake on July 26, 1979.

2. James B. Kenley, M.D., State Health Commissioner, as alleged by Appellant in paragraph 10 of his Appeal, rendered his final case decision on this matter on June 12, 1979.

3. Appellant has failed to allege compliance, and, in fact, has failed to comply with, Rule 2A:2 of the Rules of the Supreme Court of Virginia. Rule 2A:2 provides:

Any party appealing from a regulation or case decision shall file, within 30 days after adoption of the regulation or entry of the final order in the case decision, the Agency Secretary in notice of appeal signed by him or his counsel. The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate and a copy of the notice of appeal as mailed to each of the parties.

4. Rule 2A:3(a) requires plaintiff to deliver with the notice of appeal, or within thirty (30) days thereafter, a transcript of the testimony as it was taken down in writing.

5. Defendants have failed to allege compliance with, and, in fact, have failed to comply with, Rule 2A:4 of the Rules of the Supreme Court of Virginia. Rule 2A:4 provides:

Within 30 days after the filing of the notice of appeal, the appellant shall file his petition for appeal with the clerk of the circuit court named in the first notice of appeal to be filed and shall cause a copy of the petition for appeal to be served (as in the case of a bill of complaint in equity) on the Agency Secretary on every other party.

The petition for appeal shall designate the regulation or case decision appealed from, specify the errors assigned, state the reasons why the regulation or case decision is deemed to be unlawful, and conclude with a specific statement of the relief requested.

WHEREFORE, Defendants request that the Court dismiss this action with prejudice.

Respectfully submitted,

JAMES B. KENLEY, M.D.  
State Health Commissioner

By: R. Leonard Vance  
Counsel

Marshall Coleman  
Attorney General of Virginia

James E. Ryan, Jr.  
Deputy Attorney General

R. Leonard Vance  
Assistant Attorney General  
715 Madison Building  
109 Governor Street  
Richmond, Virginia 23219  
(804) 786-1840

FIRST JUDICIAL CIRCUIT  
OF VIRGINIA

WILLIAM H. HODGES, JUDGE  
CHESAPEAKE, VIRGINIA 23320



CIRCUIT COURT OF THE  
CITY OF CHESAPEAKE

July 27, 1981

R. Leonard Vance, Esquire  
Assistant Attorney General of Virginia  
Supreme Court Building  
1101 East Broad Street  
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Paul M. Lipkin, Esquire  
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Re: Roy B. Forbes v. James B. Kenley, M. C. et al  
Law No. 15798-App.

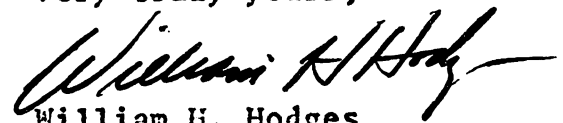
Gentlemen:

✓ I have again reviewed the memoranda submitted by you in the above matter, together with that of the Court Legal Research Assistance Project and have concluded that the defendant's demurrer should be sustained on the grounds that the cause of action is governed by the law in effect at the time the right of appeal arose and not that enacted by subsequent legislation. Accordingly, I will request that Mr. Vance draft an appropriate order in accordance herewith, citing plaintiff's exception, and circulate same to opposing counsel for endorsement. ✓

I apologize for the delay in ruling but apparently the file was returned to the Clerk before final disposition.

With kindest regards, I am

Very truly yours,

  
William H. Hodges  
Judge

WHH:n



ORDER

This appeal of a case decision by the State Health Commissioner denying a septic tank permit is before the court for a ruling on defendants' Demurrer. The court has received argument of counsel and evaluated the briefs and letters of defendants in support of their Demurrer, briefs and letters of plaintiff in opposition to the Demurrer, and the memorandum prepared at the court's direction by the Court Legal Research Assistance Project.

The Court sustains defendants' Demurrer on the grounds that plaintiff's cause of action is governed by the law in effect at the time the plaintiff's right of appeal arose and not by legislation enacted subsequently.

On June 12, 1979, defendant Kenley rendered the case decision which is the subject of this appeal. On July 1, 1979, § 32.1-164.1 of the Code became effective. On July 26, 1979, plaintiff filed his appeal with this court. Plaintiff failed to comply with Rule 2A:2 of the Rules of the Supreme Court of Virginia requiring that a party file within 30 days of the entry of the case decision a notice of appeal with the Agency Secretary. Furthermore, Appellant failed to comply with the requirements set forth in Rule 2A:4 of the Rules of the Supreme Court of Virginia that he file his petition for appeal with the clerk within 30 days after the filing of his notice of appeal. The time requirements of Part 2A of the Rules of Court are mandatory and jurisdictional.

8-31-81  
WBR

The Court does not decide the issue of whether § 32.1-164.1 Code of Virginia (1950), as amended, provides the kind of special statutory form of Court review that makes Part 2A of the Rules of Court inapplicable to Court review of case decisions by the State Health Commissioner on the granting or denial of septic tank permits.

Plaintiff's appeal is dismissed with prejudice and shall be stricken from the docket of this Court.

Plaintiff's exception and objection to the Court's ruling is noted.

Let the Clerk mail a certified copy of this Order to counsel of records.

ENTER: \_\_\_\_\_

*W.H.S.*  
Circuit Judge

DATE: \_\_\_\_\_

*8-31-81*

We ask for this:

Marshall Coleman  
Attorney General

*Leonard Vance*

R. Leonard Vance  
Assistant Attorney General  
715 Madison Building  
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Seen and objected to:

*Paul M. Lipkin*

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Norfolk, Virginia 23510

*Bernard Glasser*

Bernard Glasser, Esq.  
504 Plaza One Building  
Norfolk, Virginia 23510

A COPY, TESTE: IRENE W. WALKER, CLERK

BY *J. Woodward* D.C.

### Assignments of Error

1. The court erred in sustaining the demurrer of the defendants.

2. The court erred in its ruling that Forbes could not avail himself of the law pertaining to appeals in effect at the time he filed his appeal.

3. The court erred in its ruling that Forbes' cause of action was solely governed by the law in effect at the time his right of appeal first arose and not by legislation enacted subsequently thereto but during the appeal period.