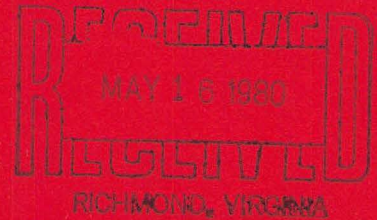


223VA423

CLERK
SUPREME COURT OF VIRGINIA



IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 790956

STATE BOARD OF HEALTH OF THE
COMMONWEALTH OF VIRGINIA, et al.,

Appellants,

v.

JOSEPH E. GODFREY, et al.,

Appellees

APPENDIX I

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

Counsel for Appellants

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BILL OF COMPLAINT

COME NOW, the Complainants, Joseph E. Godfrey and Adlyne Godfrey, husband and wife, by counsel and would state to the Court as follows:

1. That Complainants are the owners of two certain tracts or parcels of land situated, lying and being in Cedar Mountain Magisterial District, Culpeper County, Virginia, as shown on a plat of Curry T. Guinn, Jr., CLS, containing 26.93 acres more or less. Said plats are hereto attached as collective exhibit "A".

2. That some time prior to December 10, 1976, the Complainants entered into a contract for purchase and sale of said real estate with one George V. Miller, which said contract was contingent upon and subject to the furnishing of percolation tests and the guaranteeing to the purchasers that the purchasers be able to obtain a building permit on the said tract or parcel of land. That in order to obtain a building permit on said

parcels or tracts of land it was necessary to obtain the appropriate approval from the Commonwealth of Virginia, Department of Health, by and through the Culpeper County Health Department for the installation of a septic tank and drain field on said parcels of land. 0002

3. That on or about March 9, 1977, the contract purchaser through Robert John Miller applied for a permit to locate and install a septic tank and tile field. On April 26, 1977, Joseph Godfrey, one of your Complainants filed an application to obtain approval for the installation of a septic tank and drain field on another location on the tracts or parcels of land which is the subject matter hereof.

4. That by subsequent action of the Culpeper County Health Department the applications of March 9, 1977, and of April 26, 1977, were denied. This denial was contained in a certain letter dated May 20, 1977, from R. S. Legard, M.D. Director of the Culpeper County Health Department to Mr. Joseph Godfrey, one of your Complainants, a copy of which is attached as Exhibit "B".

5. That thereafter Joseph Godfrey, by his attorney duly perfected an appeal to the State Health Commission pursuant to the applicable appeal procedure which said notice of appeal was contained in a letter from B. Waugh Crigler, Esquire, counsel for Joseph Godfrey, dated May 12, 1977, to the State Health Commissioner, a copy of which is attached as Exhibit "C".

6. That subsequent thereto George V. Miller, the contract purchaser, individually and by his attorney, presented certain evidence from T. A. Houston, Geologist, to the Culpeper County Health Department, which said additional information was rejected by said department by letter dated June 17, 1977, from Stanley Borders, registered sanitarian, to Peter W. Steketee, Esquire, counsel for George V. Miller. That thereafter on June 29, 1977, pursuant to appropriate notice, a hearing was held in

the fifth floor conference room of the James Madison Building, in Richmond, before Samuel A. Graham, Jr., M.D. Assistant Commissioner, local health services of the State Health Department, the purpose of which hearing was to review the decision of the Culpeper County Health Department dated May 10, 1977. A copy of the transcript of the proceedings and Mr. Houston's report are attached as Exhibit "D".

0003

7. That by letter dated July 28, 1977, from the defendant, James D. Kenley, M.D., State Health Commissioner to Joseph Godfrey, one of your Complainants herein, the action of the Culpeper County Health Department in denying the applications for installation of a septic tank and the tile drain field on the property of your Complainants was sustained, and it is this action of the Commonwealth of Virginia, Department of Health and James D. Kenley, M.D., individually and acting as State Health Commissioner from which your Complainants now take their appeal to this Court. A copy of the decision below is hereto attached as exhibit "E".

8. That the action of the Commonwealth of Virginia Department of Health and of James D. Kenley, M.D., Commissioner was not in accordance with constitutional right, power of privilege or immunity; was not in observance of required procedure and such non-observance was not merely harmless error; and the decision was not based upon substantial evidence to support the findings of fact as therein contained. Additionally, the actions of the defendants and each of them was arbitrary, capricious and unreasonable to such an extent that Complainants constitutional rights to both substantive and procedural due process were violated as in derogation of the Constitution of the United States of America and the Constitution of the Commonwealth of Virginia.

9. The actions of the defendants and each of them constitute an unconstitutional taking of property of the Complainants without due process of law and is tantamount to condemnation without compensation, in derogation of the Constitution of the United States and the Constitution of the Commonwealth of Virginia.

10. The Complainants, by virtue of the conduct of the defendants, and each of them, jointly and severally, have suffered irreparable harm and are without an adequate remedy at law. 0004

WHEREFORE, Complainants pray the Court to review the action of the defendants, Commonwealth of Virginia Department of Health and James B. Kenley, M.D. State Health Commissioner; enjoin the enforcement of the decision of the Commonwealth of Virginia Department of Health and James B. Kenley, M.D., State Health Commissioner; to vacate and set said decision aside; and remand the matter to the Commonwealth of Virginia, Department of Health for further proceedings; and, in so remanding said case to direct the said Commonwealth of Virginia Department of Health and James B. Kenley, M.D., State Health Commissioner, to reverse the decision of the Culpeper County Health Department and to issue a permit for the installation of a septic tank and drain tile field on such location as the Court may the evidence may deem appropriate; and to enjoin the defendants and each of them from acting in any manner inconsistent with the rulings and decisions of this Court.

And the Complainants will forever pray.

JOSEPH E. GODFREY and ADLYNE GODFREY

By: B. Vaughn Pugh

LEA, DAVIES, CRIGLER & BARRELL
P. O. Box 712
Culpeper, Virginia 22701
(703) 825-6000

and

Peter W. Steketee, Esquire
SMITH & DAVENPORT
P. O. Box 521
Manassas, Virginia 22110

Counsel for Complainants

Filed in the Clerk's Office the 26th day of August, 1977

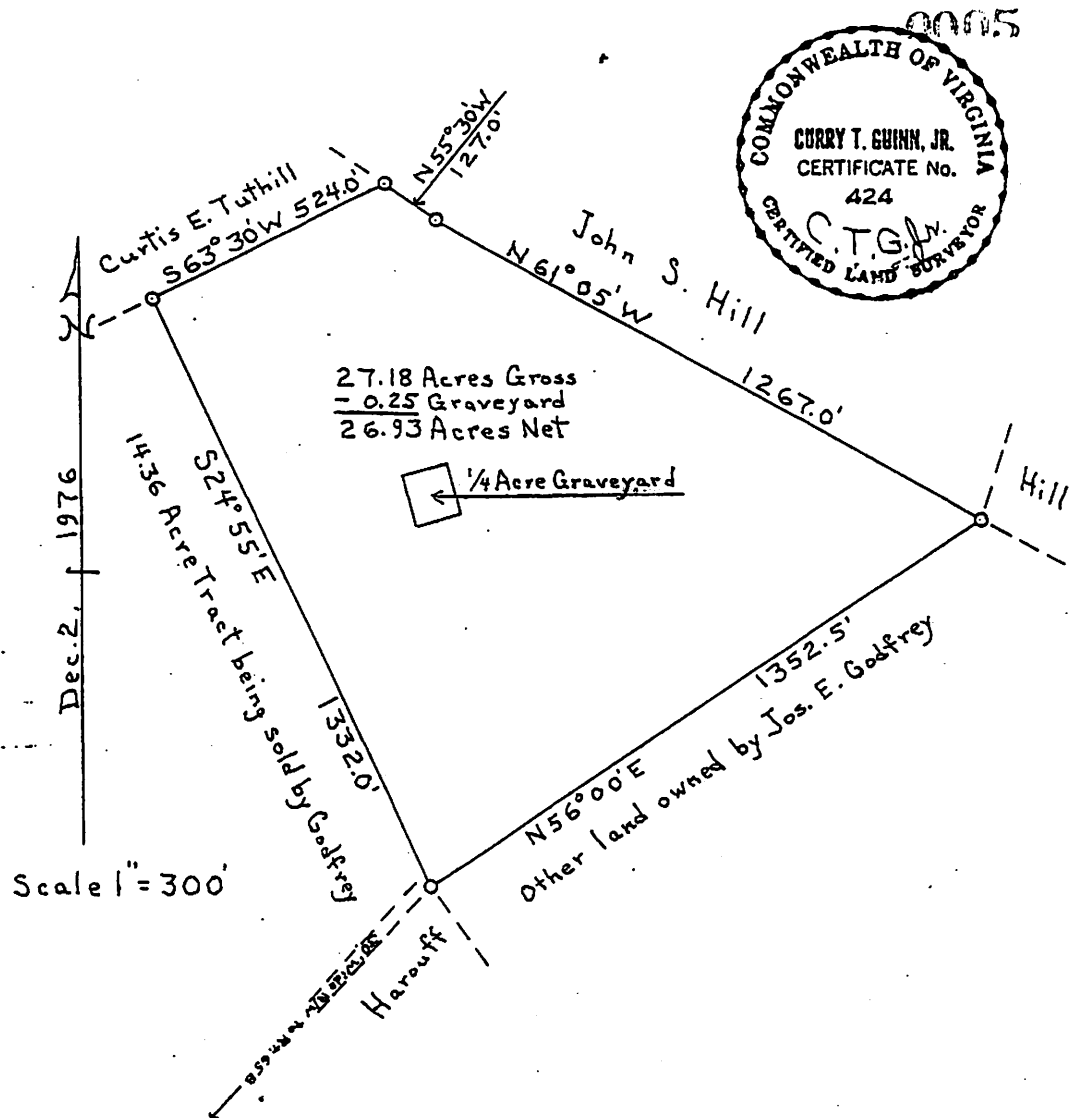
Writ Tax \$ 5.00
Fee 25.00
Deposit
Total Paid \$ 30.00

Tel:

/s/ Dorothy A. Faulconer Clerk

Dorothy A. Faulconer D. C.

Plat of a tract of land "cut" from Joseph E. Godfrey's "Walnut Grove" located north of Rt. 658 on the south side of Mt. Pony, in Cedar Mt. Magisterial District, Culpeper County, Virginia.



Filed in Culpeper County,
Circuit Court Clerk's

Office August 26, 1977

Donna C. Campbell, Dep. Clerk

Plat of a tract of land "cut" from Joseph E. Godfrey's "Walnut Grove", located north of Rt. 658 on the south side of Mt. Pony in Cedar Mt. Magisterial District, Culpeper County, Virginia.

Survey of a tract of land "cut" from Joseph E. Godfrey's "Walnut Grove", located north of Rt. 658 on the south side of Mt. Pony, in Cedar Mountain Magisterial District, Culpeper County, Virginia.

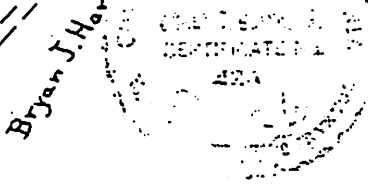
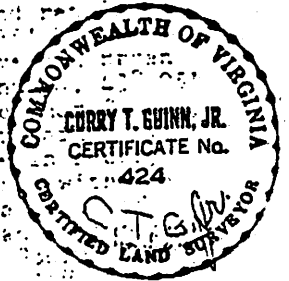
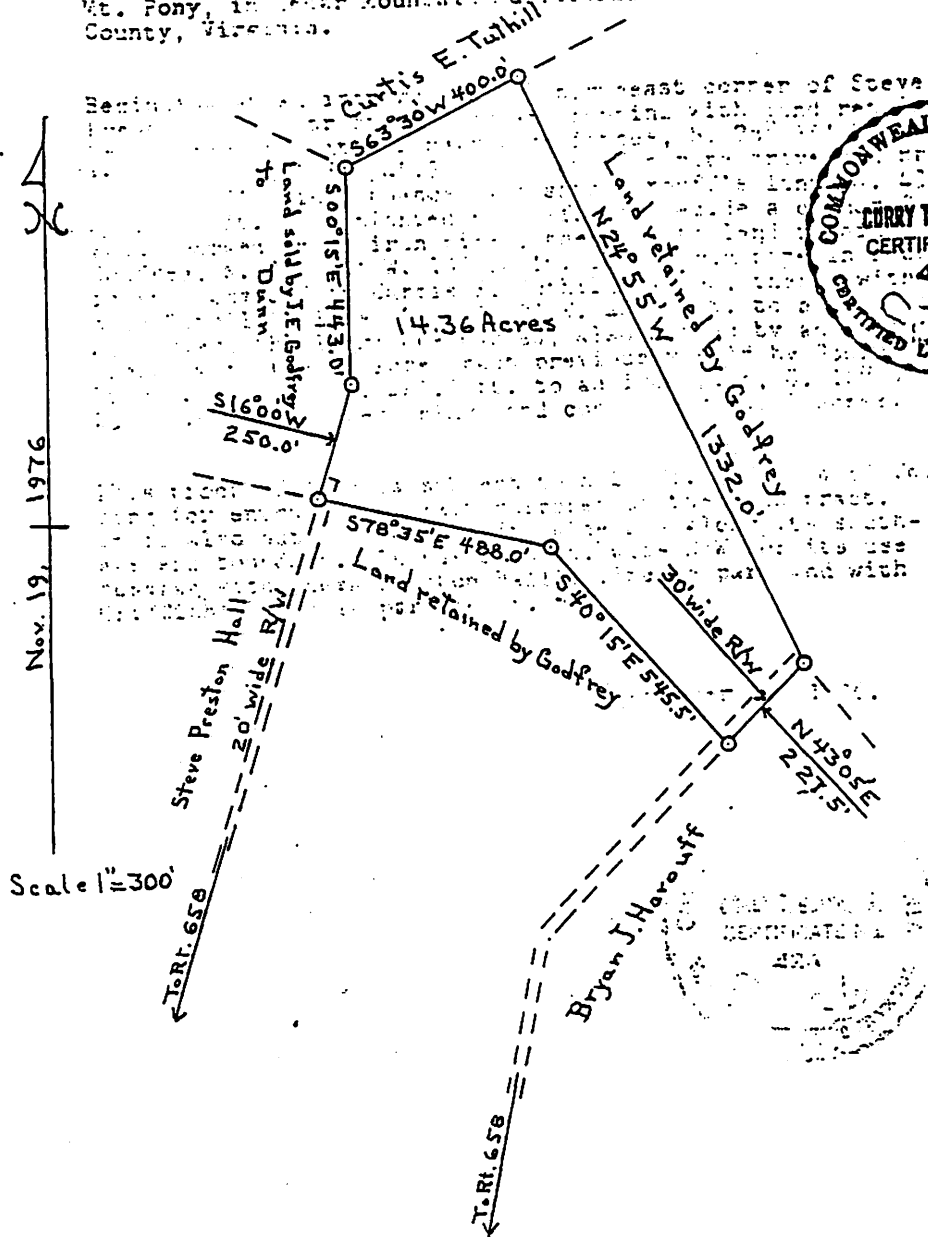


Exhibit 'B'

CULPEPER COUNTY HEALTH DEPARTMENT
CULPEPER, VIRGINIA 22701

0017

COOPERATION WITH THE
STATE DEPARTMENT OF HEALTH

May 10, 1977

Mr. Joseph Godfrey
8929 Burwell Rd.
Noakesville, VA 22123

Dear Mr. Godfrey:

This letter is in reference to the administrative appeal held at the Culpeper County Health Department on May 10, 1977. The results of the hearing is to confirm the rejections by the Culpeper County Health Department of the three proposed sites on the Godfrey property. The rejections are identified by date of application. These dates are December 10, 1976, March 9, 1977, and April 26, 1977.

These sites were examined by the Culpeper County Health Department Sanitarian, the Sanitation Supervisor, the Regional Sanitation Supervisor, and the State Health Department Soil Scientist. We would also like to point out that on site #1 on the R.B. Thomas proposal that the Thomas recommendation advised installation of drainfields at seven feet. The Health Department borings on this site indicated hard rock at forty-two inches, with one boring showing hard rock at fifty-six inches.

Please strike out the recently added note on the December 10, 1976 application which states, "This area is shown as site #2 on Hawkins Plat". This note was incorrectly added recently to aid in identifying the applications.

Yours truly,

R. S. LeGarde M.D.
R. S. LeGarde, M.D.
Director

RSL/jlc

cc: Mr. T.C. Lea, Attorney at Law
Mr. H. Bodkin, Regional Sanitarian
Mr. Robert J. Miller

Filed in Culpeper County
Circuit Court Clerk's

Office August 26, 19 77

Donna C. Longkins *Dep.*
Clerk

IN THE CIRCUIT COURT OF CULPEPER COUNTY

JOSEPH E. GODFREY and
ADLYNE GODFREY, husband and
wife,

0008

Complainants,

vs.

IN CHANCERY NO.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HEALTH
RICHMOND, VIRGINIA 23219

Serve: JAMES B. KENLEY, M.D.
State Health Commissioner
Department of Health
Richmond, Virginia 23219

and

Kenneth M. Haggerty, D.D.S.
Member, State Board of Health
4500 Old Dominion Drive
Arlington, Virginia 22207 and,

Fletcher J. Wright, Jr., M.D.
Member, State Board of Health
49 S. Market
Petersburg, Virginia 23803 and,

John H. Van Hoy, O.D.
Member, State Board of Health
P. O. Box 218
Chase City, Virginia 23925 and,

Wm. R. Hill, M.D.
Member, State Board of Health
401 W. Grace
Richmond, Virginia 23220 and,

Mr. A. Gibson Howell
Member, State Board of Health
Louise Obici Memorial
Suffolk, Virginia 23434 and,

Mr. J. Curtis Nottingham
Member, State Board of Health
1236 Richmond Road
Williamsburg, Virginia 23185 and,

Clarence W. Taylor, Jr., M.D.
Member, State Board of Health
Box 97
Shawsville, Virginia 24162 and,

Brig. Gen. James M. Morgan, Jr.
Member, State Board of Health
Office of Dean

VMI
Lexington, Virginia 24450 and,

Mrs. Fostine G. Riddick, R.N.
Member, State Board of Health
Claim Department Nursing
Hampton Institute
Hampton, Virginia 23668

and

JAMES B. KENLEY, M.D.
STATE HEALTH COMMISSIONER
DEPARTMENT OF HEALTH
RICHMOND, VIRGINIA 23219

Defendants.

0009

AMENDED BILL OF COMPLAINT

COME NOW, the Complainants, Joseph E. Godfrey and Adlyne Godfrey, husband and wife, by counsel and would state to the Court as follows:

1. That Complainants are the owners of two certain tracts or parcels of land situated, lying and being in Cedar Mountain Magisterial District, Culpeper County, Virginia, as shown on a plat of Curry T. Guinn, Jr., CLS, containing 26.93 acres more or less. Said plats are hereto attached as collective exhibit "A".

2. That some time prior to December 10, 1976, the Complainants entered into a contract for purchase and sale of said real estate with one George V. Miller, which said contract was contingent upon and subject to the furnishing of percolation tests and the guaranteeing to the purchasers that the purchasers be able to obtain a building permit on the said tract or parcel of land. That in order to obtain a building permit on said parcels or tracts of land it was necessary to obtain the appropriate approval from the Commonwealth of Virginia, Department of Health, by and through the Culpeper County Health Department for the installation of a septic tank and drain field on said parcels of land.

3. That on or about March 9, 1977, the contract purchaser through Robert John Miller applied for a permit to locate and install a septic tank and tile field. On April 26, 1977, Joseph Godfrey, one of your Complainants filed an applica-

tion to obtain approval for the installation of a septic tank and drain field on another location on the tracts or parcels of land which is the subject matter hereof.

4. That by subsequent action of the Culpeper County Health Department the applications of March 9, 1977, and of April 26, 1977, were denied. This denial was contained in a certain letter dated May 20, 1977, from R. S. Legard, M.D., Director of the Culpeper County Health Department to Mr. Joseph Godfrey, one of your Complainants, a copy of which is attached as Exhibit "B".

5. That thereafter Joseph Godfrey, by his attorney duly perfected an appeal to the State Health Commission pursuant to the applicable appeal procedure which said notice of appeal was contained in a letter from B. Waugh Crigler, Esquire, counsel for Joseph Godfrey, dated May 12, 1977, to the State Health Commissioner, a copy of which is attached as Exhibit "C".

6. That subsequent thereto George V. Miller, the contract purchaser, individually and by his attorney, presented certain evidence from T. A. Houston, Geologist, to the Culpeper County Health Department, which said additional information was rejected by said department by letter dated June 17, 1977, from Stanley Borders, registered sanitarian, to Peter Wm. Steketee, Esquire, counsel for George V. Miller. That thereafter on June 29, 1977, pursuant to appropriate notice, a hearing was held in the fifth floor conference room of the James Madison Building, in Richmond, before Samuel A. Graham, Jr., M.D., Assistant Commissioner, local health services of the State Health Department, the purpose of which hearing was to review the decision of the Culpeper County Health Department dated May 10, 1977. A copy of the transcript of the proceedings and Mr. Houston's report are attached as Exhibit "D".

7. That by letter dated July 28, 1977, from the de- 0011
fendant, James D. Kenley, M.D., State Health Commissioner to
Joseph Godfrey, one of your Complainants herein, the action of
the Culpeper County Health Department in denying the applications
for installation of a septic tank and the tile drain field on
the property of your Complainants was sustained, and it is this
action by the Commonwealth of Virginia, its Department of Health,
by and through its members: James B. Kenley, M.D., Kenneth M.
Haggerty, D.D.S., Fletcher J. Wright, Jr., M.D., John H. Van
Hoy, O.D., Wm. R. Hill, M.D., Mr. A. Gibson Howell, Mr. J.
Curtis Nottingham, Clarence W. Taylor, Jr., M.D., Brig. Gen.
James M. Morgan, Jr., Mrs. Fostine G. Riddick, R.N., and by and
through its Commissioner, James D. Kenley, M.D., individually
and in his capacity as Commissioner, from which your Complain-
ants now take their appeal to this Court. A copy of the
decision below is hereto attached as Exhibit "E".

8. That the action and resultant decision of the Com-
monwealth of Virginia, its Department of Health, by and through
its members: James B. Kenley, M.D., Kenneth M. Haggerty, D.D.S.,
Fletcher, J. Wright, Jr., M.D., John H. Van Hoy, O.D., Wm. R.
Hill, M.D., Mr. A. Gibson Howell, Mr. J. Curtis Nottingham,
Clarence W. Taylor, Jr., M.D., Brig. Gen. James M. Morgan, Jr.,
Mrs. Fostine G. Riddick, R.N., and by and through its Com-
missioner, James D. Kenley, M.D., individually and in his capa-
city as Commissioner, were not in accordance with constitutional
right, power of privilege or immunity; that the action and
resultant decision were not in observance of required procedure
and such non-observance was not merely harmless error; that this
action and resultant decision were not based upon substantial
evidence to support the findings of fact as therein contained
and, in fact, ignored the evidence presented; that the actions

and resultant decision of the defendants, were arbitrary, capricious and unreasonable to such an extent that Complainants' constitutional rights to both substantive and procedural due process were violated in derogation of the Constitution of the United States of America and the Constitution of the Commonwealth of Virginia; that the actions and resultant decision of the defendants, constitute an unreasonable and unconscionable taking of the Complainant's property without procedural and substantive due process, without compensation therefore, tantamount to condemnation, being a denial of the equal protection of the laws, in derogation of the Constitution of the United States of America and the Constitution of the Commonwealth of Virginia.

9. The Complainants, by virtue of the conduct of the defendants, and each of them, jointly and severally, have suffered irreparable harm and are without an adequate remedy at law.

WHEREFORE, Complainants pray the Court:

1. To review the action of the defendants, Commonwealth of Virginia, its Department of Health, by and through its members: James B. Kenley, M.D., Kenneth M. Haggerty, D.D.S., Fletcher J. Wright, Jr., M.D., John H. Van Hoy, O.D., Wm. R. Hill, M.D., Mr. A. Gibson Howell, Mr. J. Curtis Nottingham, Clarence W. Taylor, Jr., M.D., Brig. Gen. James M. Morgan, Jr., Mrs. Fostine G. Riddick, R.N., and by and through its Commissioner James D. Kenley, M.D., individually and in his capacity as State Health Commissioner; and

2. To enjoin the enforcement of the decision of the Commonwealth of Virginia, its Department of Health by and through its members: James B. Kenley, M.D., Kenneth M. Haggerty, D.D.S., Fletcher J. Wright, Jr., M.D., John H. Van Hoy, O.D., Wm. R. Hill, M.D., Mr. A. Gibson Howell, Mr. J. Curtis Nottingham,

Clarence W. Taylor, Jr., M.D., Brig. Gen. James M. Morgan, Jr., Mrs. Fostine G. Riddick, R.N., and by and through its Commissioner, James D. Kenley, M.D., individually and in his capacity as State Health Commissioner; and

3. To vacate and set said decision aside; and

4. To remand the matter to the Commonwealth of Virginia, Department of Health, for further proceedings; and, in so remanding said case

0013

5. To direct the said Commonwealth of Virginia, its Department of Health, by and through its members: James B. Kenley, M.D., Kenneth M. Haggerty, D.D.S., Fletcher J. Wright, Jr., M.D., John H. Van Hoy, O.D., Wm. R. Hill, M.D., Mr. A. Gibson Howell, Mr. J. Curtis Nottingham, Clarence W. Taylor, Jr., M.D., Brig. Gen. James M. Morgan, Jr., Mrs. Fostine G. Riddick, R.N., and by and through its Commissioner, James D. Kenley, M.D., individually and in his capacity as State Health Commissioner, to reverse the decision of the Culpeper County Health Department and to issue a permit for the installation of a septic tank and drain tile field on such location as the Court by the evidence may deem appropriate; and,

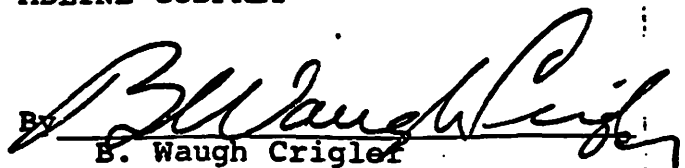
6. To enjoin the defendants and each of them from acting in any manner inconsistent with the rulings and decisions of this Court; and,

7. To provide such additional relief to your Complainants as may seem appropriate to this Court.

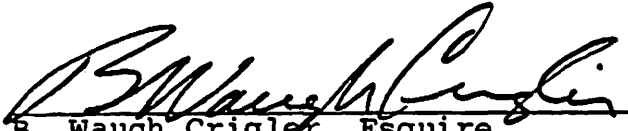
And, is duty bound, the Complainants will forever pray

....


JOSEPH E. GODFREY and
ADLYNE GODFREY

By 
E. Waugh Crigler
Counsel for Complainants

0014


B. Waugh Crigler, Esquire
Lea, Davies, Crigler & Barrell
P.O. Box 712
Culpeper, Virginia 22701
(703) 825-6000

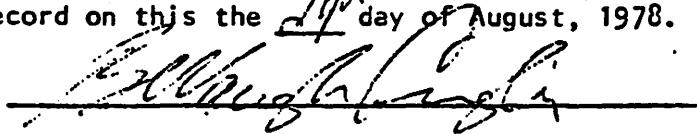
and


Peter Wm. Steketee, Esquire
Smith and Davenport
P.O. Box 51
Manassas, Virginia 22110

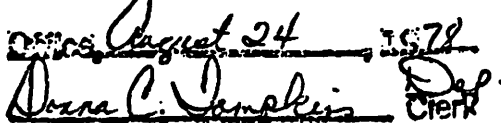
Counsel for Complainants

CERTIFICATE

I hereby certify that a true copy of the foregoing amended complaint was mailed to all Counsel of Record on this the 27th day of August, 1978.



Filed In Culpeper County
Circuit Court Clerk's

Office August 24, 1978
 Dep.
Clerk

MOTION FOR RECONSIDERATION

Defendant, the Commonwealth, by counsel, respectfully moves that this honorable Court reconsider and reverse or otherwise alter two decisions reached by the Court at its hearing held on December 22, 1978, on this matter.

At the December 22, 1978, hearing, the Court ruled that the oral evidence of witnesses would be taken in this matter. This is an appeal under the Administrative Process Act, § 9-6.14:1, et seq., of the Code. The State Health Department Agency Record in this matter has been filed in the Court record. Defendants move that the Court reconsider its decision to take the testimony of witnesses, and that the Court consider this matter on the basis of the State Health Department Agency Record alone.

Secondly, on December 22, 1978, the Court ruled that it would entertain evidence and argument concerning the installation of a septic tank at any location on the 40 acre site owned by complainants. As indicated by Exhibit 25 in the Agency Record, defendants have rendered a final case decision, in the context of the Administrative Process Act, on only two sites on the 40 acre tract. Respondents move that the Court reconsider its decision to consider argument on those sites which have not been the subject of a final case decision by the State Health Commissioner.

Respectfully submitted,

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

0016

By: R. Leonard Vance
Counsel

Marshall Coleman
Attorney General

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

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Reconsideration was mailed, postage prepaid, to B. Waugh Crigler, Esq., P.O. Box 712, 122 W. Cameron Street, Culpeper, Virginia 22701 and Peter W. Steketee, Esq., Smith and Davenport, P.O. Box 51, 9253 Lee Avenue, Manassas, Virginia 22110, on this 9th day of February, 1979.

R. Leonard Vance

Filed In Culpeper County
Circuit Court Clerk's

Office, February 13, 1979
Linda M. Furr Deputy Clerk

MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION

I. :

THE COURT SHOULD NOT HEAR
EVIDENCE ON THE ENTIRE 40 ACRE SITE

The doctrine of exhaustion of remedies is one of the most basic principles of administrative law. "The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." 1A Michie's Jurisprudence, Administrative Law, § 17, p. 213.

The administrative remedies have not been exhausted in this case. The State Health Commissioner rendered the final agency decision which is the subject of this appeal on July 28, 1977. A true copy of his decision is attached to this memorandum. It is clear from reading his decision that he rendered a final decision on only two locations on a tract of approximately 40 acres. As his decision indicates, and as the record shows, an appeal could have been taken at that time to a third location on the 40 acre tract. No appeal has been taken to the State Health Commissioner on individual

sites on the remaining 40 acres. Under present law, the only matter properly before this Court is the Commissioner's denial of two sites indicated in his case decision of July 28, 1977.

II.

THE COURT SHOULD NOT ACCEPT EVIDENCE BEYOND THE AGENCY RECORD

0018

Section 9-6.14:17 of the Virginia Administrative Process Act establishes the issues to be reviewed by the Court in this matter and sets forth the mechanism by which the Court is to determine fact issues. The determination of fact issues "is to be made upon the whole evidential record provided by the agency if its proceeding was required to be concluded as provided in § 9-6.14:8 or 9-6.14:12 of this chapter or, as to subjects exempted from those sections, pursuant to constitutional requirement of statutory provisions for opportunity for an agency record of and decision upon the evidence therein." "When the decision on review is so to be made on such agency record, the duty of the Court with respect to issues of facts is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of facts could reasonably find them to be as it did."

The State Health Department held a formal hearing in this matter, as it was required to do by Article 3, Section E of the Sewage Regulations (Exhibit 57 in the Agency Record). Section E states "an appeal in the form of a formal hearing shall be granted by the State Health Commissioner at the Madison Building if request is made in writing by certified mail and within sixty days of the denial of the permit." The Commissioner was required by regulation to convene a formal hearing in this matter and he did so. The transcript

of that hearing is contained in the agency record and is set forth in its entirety in Exhibit 22 of the record. Section 9-6.14:7 clearly indicates that where a state agency is required to hold a hearing and create an agency record, the duty of the court with respect to issues of fact is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of facts could reasonably find them to be as it did.

0019

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

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum in Support of Motion for Reconsideration was mailed, postage prepaid, to B. Waugh Crigler, Esq., P.O. Box 712, 122 W. Cameron Street, Culpeper, Virginia 22701 and Peter W. Steketee, Esq., Smith and Davenport, P.O. Box 51, 9253 Lee Avenue, Manassas, Virginia 22110, on this 9th day of February, 1979.

R. Leonard Vance

ORDER

1. On the 22nd day of December, 1978, this matter came on for hearing before the Court upon the Commonwealth's Motion to Dismiss.

2. Having heard and considered the argument of counsel for both parties, it is hereby ORDERED and ADJUDGED that the Motion to Dismiss be overruled for the reason that plaintiffs, pursuant to Rule 2A:2 of the Rules of the Supreme Court of Virginia, have filed their notice of appeal with the Agency Secretary and their Petition for Appeal with this Court within the time limits set forth in the Rules.

3. The Court determines that this matter will not be heard and argued on the basis of the State Health Department agency record, provided to the Court by defendant pursuant to Part 2A of the Rules, alone. The Court will permit either party to offer such oral testimony of witnesses as the Court may determine to be admissible under the rules of evidence.

4. Furthermore, at the hearing on this matter, the Commonwealth moved that this Court hear argument only upon the validity of respondents' denial of a septic tank permit on two specific locations identified in respondents' final case decision rendered July 28, 1977, and that the Court not entertain evidence or argument concerning the installation of a septic tank at any other location other than that identified in the final case decision. The Court denies the Commonwealth's Motion

and, notwithstanding the fact that the agency has rendered a final case decision on only two locations on complainants' 40 acre tract and not on the remaining 40 acres, the Court will accept evidence and argument concerning the installation of a septic tank and tile field at any location on the 40 acre tract.

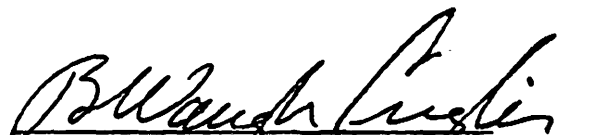
IT IS SO ORDERED.

Entered: 2-15-79


Harold H. Purcell, Judge

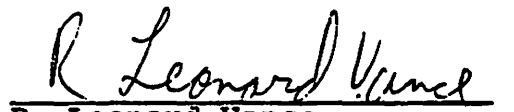
Seen:

Copy del.
2/16/1979


B. Waugh Crigler, Esq., p.q.
Lea, Davies, Crigler & Barrell
P.O. Box 712
122 W. Cameron Street
Culpeper, Virginia 22701

Seen and agreed to with respect to paragraphs
1 and 2 above and objected to with respect
to paragraphs 3 and 4 above.

Copy mailed
2/16/1979


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

VIRGINIA: In Culpeper County Circuit Court Clerk's Office:

I, Dorothy A. Faulconer, Clerk of the Circuit Court in and for the County and State aforesaid, do certify the foregoing to be a true copy of the Order which was entered on the 28th day of March, 1979 and is filed and recorded in this office in Chancery Order Book No. 34.

Given under my hand and the seal of the Court, this 4th day of April, 1979.

-2- Teste: Dorothy A. Faulconer, Clerk

BY: Patricia M. Payne

O R D E R

THIS CAUSE CAME on to be heard upon the Complainant's Bill of Complaint, upon the Defendant's Demurrer thereto and the Complainant's Amended Bill of Complaint, upon the Defendant's Answer, upon Motions duly heard and ruled upon, upon the stipulation of the parties hereto to the introduction of the administrative record of the Department of Health, upon the Hearing held in this matter on February 26, 1979 and upon the testimony of George V. Miller and Joseph Godfrey taken therein, and upon argument of counsel.

UPON CONSIDERATION WHEREOF, the Court finds that the Commonwealth of Virginia, Department of Health, through its local and state agents was arbitrary, capricious and unreasonable, denying the permit of the installation of a septic tank, which is the subject matter of this action, in accordance with the recommendations of T. A. Houston, and ~~that the ruling of the Department of Health from which the Complainants appealed was not supported by substantial evidence~~, and, in consideration of said findings, it is therefore

ORDERED, ADJUDGED and DECREED that the Commonwealth of Virginia, Department of Health and its local agencies, be and are hereby directed to issue to the Complainants or to whomever they may direct, a permit for the installation of septic and

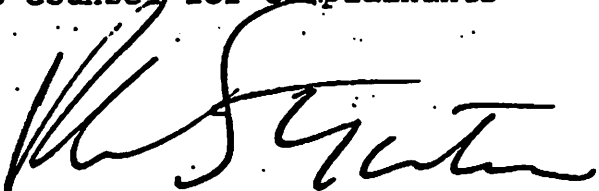
and drainfields in conformity with the recommendations of T. A. Houston dated May 31, 1977, together with exhibits attached thereto, which said documents are part of the agency record filed herein. It is further the Order of this Court that said permit shall issue forthwith, and that the Clerk of this Court be instructed to place this cause among those causes ended.

ENTERED this 28th day of March, 1979.


J U D G E

WE ASK FOR THIS:

B. WAUGH CRIGLER
122 West Cameron Street
P.O. Box 712
Culpeper, Virginia 22701
Co-Counsel for Complainants


PETER WM. STEKETEE
SMITH AND DAVENPORT
9253 Lee Avenue, P.O. Box 51
Manassas, Virginia 22119
Co-Counsel for Complainants

SEEN AND _____:

R. LEONARD VANCE
ASSISTANT ATTORNEY GENERAL
715 Madison Building
109 Governor Street
Richmond, Virginia 23219

NOTICE OF APPEAL

TAKE NOTICE that, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, defendants appeal the final order entered by the Circuit Court of Culpeper County on March 29, 1979, to the Supreme Court of Virginia. The transcripts of the hearings held before the Court in this matter are to be filed with the other papers in the case.

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

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed, postage prepaid, to B. Waugh Crigler, Esq., P.O. Box 712, 122 West Cameron Street, Culpeper, Virginia 22701, and Peter W. Steketee, Esq., Smith and Davenport, 9253 Lee Avenue, P.O. Box 51, Manassas, Virginia 22110, on this 3rd day

of April, 1979
Filed in Culpeper County
Circuit Court Clerk's

Office, April 4, 1979
Jatricia M. Payne Deputy Clerk

R. Leonard Vance

Commonwealth of Virginia



0025

OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
1101 EAST BROAD STREET
RICHMOND, VIRGINIA 23219
804-786-2071

MARSHALL COLEMAN
ATTORNEY GENERAL

April 5, 1979

B. Waugh Crigler, Esq.
122 West Cameron Street
P.O. Box 712
Culpeper, Virginia 22701

Re: Godfrey, et al v. Commonwealth, et al
Culpeper County Circuit Court
In Chancery No. 8740

Dear Waugh:

Enclosed herewith is the permit for a sewage disposal system required by Judge Purcell's order dated March 28, 1979, and issued on March 29, 1979, in the above-captioned matter. Please note that the permit consists of (1) an LHS-121 form signed by Dr. Kenley, State Health Commissioner, and by myself, (2) Judge Purcell's order of March 28-29, 1979, and (3) the Houston report.

If you have any questions, please call me at (804) 786-1840 or write me at 715 Madison Building, 109 Governor Street, Richmond, Virginia 23219.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Leonard".

R. Leonard Vance
Assistant Attorney General

Enclosure

cc: Honorable D. A. Faulconer, Clerk
Peter W. Steketee
State Health Department
Culpeper County Health Department

4:27:142

Filed in Culpeper County
Circuit Court Clerk's

Office, April 6, 1979
Heda M. Furr Deputy Clerk

(1) Void after 12 months. (2) Automatically cancelled should fact... (3) Automatically cancelled should fact...
FHA/VA ☐ Yes ☐ No Date 3-29-79 Case No. _____
Applicant Joseph Godfrey, et al Address c/o B. Waugh Crigler, Esq. 122 West Cameron Street Culpeper, (Mailing Address) VA 22701 Phone 703-825-6000
Applicant Robert J. Miller Address _____ (Mailing Address) Phone _____
Location See Court order. State Route 3 to right on # 658; 1.9 miles turn right on private road, 0.3 miles to end. 0026
(Subdivision, Street or Road Name, Section or Lot No.)
Use: ☐ Dwelling ☐ Other _____ Automatic Washing Machine ☐ Yes ☐ No Consumption _____ gal. per day
☐ Potential ☐ Bedrooms _____ Garbage Disposal Unit ☐ Yes ☐ No (☐ Actual ☐ estimated Water)
See Court order Additional wastes _____
WATER SUPPLY (Existing) Class _____ Approved ☐ Yes ☐ No Other _____
(To be installed) Class _____ Cased _____ ft. to be grouted _____ ft.
See Court order (Unless supported by positive evidence Class III is to be considered as to be installed.)
SOIL STUDY Naturally drained, suitable by sight ☐ Yes ☐ No Technical Classification _____ (If Known)
Estimated Percolation Rate: 1-10 ☐ 11-25 ☐ 26-50 ☐ > 51 ☐ Percolation Test Required ☐ Yes ☐ No ☐ Rate _____
(Minutes per inch) See Court order (Minutes per inch to nearest 10 minutes)
Depth to Grey Mottles _____ inches (estimate over 4 ft.) OTHER _____
Surface drainage required ☐ Yes ☐ No OTHER DRAINAGE _____
HOUSE SEWER LINE Size _____ inches. Type of material required _____ . Distance from Water Supply _____ feet. See Court order
DETAILS OF CONSTRUCTION Watertight Septic Tank of _____ Material _____ Liquid Capacity _____ gallons. See Court order
Inside Dimensions Length _____ feet. Width _____ feet. Liquid Depth _____ feet. Depth of Air Space _____ feet. order
SUBSURFACE ABSORPTION FIELD Number of square feet required _____ Type aggregate required _____ See Court order
Depth of aggregate from base of tile to bottom of ditches _____ inches. Allowable fall _____ to _____ inches.
Total aggregate minimum depth _____ inches or more. Depth of drainfield to be _____ inches from surface of original ground.
Distance from well to septic tank _____ feet; distance from well to drainfield _____ feet.
Sketch of Premises (including adjacent properties if pertinent, Showing Location of Lot Line, Buildings, Water Supplies, Sewage Disposal Systems, and Other Possible Sources of Contamination of Water Supplies, by Indicating Distances and Slope with regard to one another.
This permit is issued in accordance with an order issued on March 29, 1979, by the Circuit Court of Culpeper County, Honorable Harold Purcell, presiding, in the case of Godfrey v. Commonwealth, In Chancery No. 8740. A certified copy of Judge Purcell's order is attached hereto and made a part of this permit. The Court specifically ordered the Commonwealth to issue "a permit for the installation of septic and drainfields in conformity with the recommendations of T. A. Houston dated May 31, 1977" The document containing the recommendations of T. A. Houston dated May 31, 1977, with exhibits is attached to the Court's order and to this permit and is also made a part of this permit.
The Court having refused the Commonwealth's request at the March 29, hearing with permission to view the installation of the septic tank and drainfield, State Health Department personnel are prohibited under the terms of the Court's actions from entering onto the Godfrey property to observe the installation of the septic tank and drainfield.
The State Health Department continues to take the position that this septic tank and drainfield will fail and will create a public health hazard. The Commonwealth has appealed the Court's order to the Supreme Court of Virginia.
For further information relating to this permit, review the attached order of the Circuit Court, recommendation of T. A. Houston, and the file on this case in the Circuit Court of Culpeper County.
_____ feet
Owner or his agent must notify N/A Health Department, Phone N/A when installation is ready for inspection. If any Sewage Disposal System, or part thereof, is covered before being inspected by the Health Department, it shall be un-der at the direction of the Health Director or his agent. CONDITIONS DISCOVERED DURING INSTALLATION MAY REQUIRE ADJUSTMENTS OF STEM DESIGN. Changes from above specifications require Health Department approval before being made.
Based on the above information, the undersigned recommends that this permit be issued.
4/4/79 Approved R. L. Linnard, Jr. Date 4/4/79 Signed State Health Commissioner
(Registering Authority) (Sanitarian of Health Director)
5-121 REV. 12/71 Virginia State Department of Health ORIGINAL
-156-

CRANE - SNEAD & ASSOCIATES, INC.
RICHMOND, VIRGINIA
0027
15

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CULPEPER

JOSEPH E. GODFREY, et al

vs.

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF HEALTH, et al

COMPLETE TRANSCRIPT of the testimony and other
incidents in the above when heard on February 26, 1979,
before The Honorable Harold H. Purcell, Judge.

APPEARANCES:

B. Waugh Crigler,
122 W. Cameron St., Culpeper, Va. 22701;
and
Peter W. Steketee,
9253 Lee Ave., Manassas, Va. 22110,
Counsel for the Complainant;

R. Leonard Vance, Assistant Attorney General,
Madison Bldg., Richmond, Va. 23219,
Counsel for the Defendant.

I N D E X

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DIRECT

CROSS

George Bernard Miller

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22

Joseph E. Godfrey

43

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Reported and dictated by NBL

Typed by NNL

1 February 26, 1979

2
3 THE COURT: All right, gentlemen, this is
4 the case of Godfrey vs. The Commonwealth. Proceed
5 with your evidence, or you may make an opening
6 statement if you so desire.

7 MR. CRIGLER: Your Honor, on behalf of
8 Joseph Godfrey I would like to make an opening
9 statement to the Court.

10 THE COURT: All right, sir.

11 MR. CRIGLER: I, along with Pete Steketee
12 from Manassas, represent Mr. Godfrey and the con-
13 tract purchaser of the property, and this is a
14 review of the decision made by the State Health
15 Department concerning a disapproval of locations
16 for septic tanks on property that totals about 220
17 acres, but which for purposes of discussion before
18 the Health Department concerned itself with approxi-
19 mately 41 acres of that land.

20 We would intend at this hearing, Your Honor,
21 to stipulate the record along with the Assistant
22 Attorney General, and as a part of our evidence we
23 would call Mr. Miller, the contract purchaser, and
24 Mr. Godfrey, whose testimony will relate to their
25 contact and their negotiations with the State Health

1 Department preliminary to the Health Department's
2 refusal of the permit.

3 THE COURT: What are the issues, Mr. Crig-
4 ler?

5 MR. CRIGLER: The sole issue, Your Honor,
6 I believe is whether, number one, whether there was
7 enough evidence to support the conclusion of the
8 Health Department; and, number two, whether the
9 Health Department acted arbitrarily or unreasonably
10 in denying the permits on this property. I think
11 both of those issues are properly before the Court.
12 And, also under the Court's previous ruling we
13 would intend to introduce evidence as to the entire
14 property as well as to the 41 acres which was the
15 subject of the original request.

16 THE COURT: All right, sir.

17 MR. CRIGLER: That's basically our position.

18 THE COURT: What's the position of the
19 Department of Health?

20 MR. VANCE: Your Honor, the Health Depart-
21 ment's position is that the property that's in
22 question here will not support a septic tank. As
23 a part of my opening statement I would just like to
24 briefly point out to the Court how a septic tank
25 works and to comment on matters which I think that

1 the Court will hear evidence on today either orally
2 from the witnesses or in the alternative from the
3 record.

4 Your Honor, the way a septic tank works is
5 depicted on the diagram that we have up here. A
6 septic tank consists merely of a large concrete box
7 in which sewage from a house goes, and then it goes
8 from there, after it stays there and biologically
9 degrades over a period of time, into a series of
10 drain lines where it is distributed in the soil.
11 The sewage from the house is disinfected through
12 reactions that take place in the soil itself.

13 Your Honor, this diagram shows what the
14 actual drain lines themselves look like once they
15 are installed into the soil. We have a drainpipe
16 laid on some gravel, and then we have the soil
17 around that. In order for a septic tank to dispose
18 of the sewage, the sewage has got to come through
19 the drain line, filter out through the rock and
20 into the soil, and as a consequence of this natural
21 biological process as it goes on all the pathogenic
22 organisms, bacteria, and these things are destroyed.

23 In order for a septic tank to work properly
24 a septic tank can't be under water, rather the tiles
25 can't be under water. These tiles here have to be,

1 most of the year, in a situation where the water
2 doesn't actually rise up above them. If the water
3 rises up above them, the system can't operate.

4 Now, it's the Health Department's conten-
5 tion, based on the record, we think that the record
6 evidence shows that under the circumstances of this
7 septic tank the water will rise up above the tile
8 lines themselves and the septic tank simply won't
9 work.

10 Now, the Health Department has had the
11 responsibility for about 100 years for regulating
12 the disposal of sewage in the state. Section 32-9
13 of the Code, which goes back into the 1800s, autho-
14 rizes the Health Department to issue septic tank
15 permits, and then it goes on to say that a person
16 can't even obtain a building permit until after the
17 Health Department has issued a septic tank permit.
18 The Health Department, when it looks at these septic
19 tank permit applications, has the sole objective of
20 determining whether or not this particular soil plot
21 will accept the sewage from the septic tank.

22 Now, we are in an unusual situation here
23 in Culpeper County. Culpeper County has some soil
24 that I think the record will show has these kinds
25 of characteristics: You have areas in the county

1 where surface soil, at very thin layers, covers a
2 layer of clay anywhere from right at the surface to
3 six to ten feet deep. No one contends that this
4 clay can contain a septic tank, I don't think that
5 is going to be a contention of the plaintiff in this
6 matter. The question is whether or not the material
7 underneath this clay will accept a septic tank.

8 Underneath the clay is a layer of soil
9 that varies in depth, and this is called weathered
10 diabase, this is basically rock that is just crum-
11 pled through natural geological processes, and
12 sometimes this weathered diabase will accept a
13 septic tank system, and sometimes it doesn't. The
14 evidence in the record will show that there are
15 septic tanks in Culpeper County right now which have
16 the drain lines in the weathered diabase.

17 Underneath the weathered diabase is a layer
18 of solid rock. Obviously solid rock is not going
19 to accept a septic tank. As the Health Department
20 sees it, the issue is going to be whether or not
21 it's going to be possible to put a septic tank in
22 this weathered diabase.

23 Now, Your Honor, the State Health Commis-
24 sioner issued his final opinion in this matter that
25 is the subject of this appeal on July 28th, 1977.

1 The agency record has been provided by the State
2 Health Commissioner to the Court, as the agency is
3 required to do under the rules of court, and this
4 final agency decision is Exhibit 25 in the agency
5 record.

6 Your Honor, you will note that the record
7 is tabulated, and there is an index in the beginning
8 of it. Exhibit No. 25 in the agency record is a
9 letter of July 28th, 1977 from the State Health
10 Commissioner to Mr. Godfrey ruling that two specific
11 sites are not suitable for the installation of a
12 septic tank. The third site was not appealed from.

13 Your Honor, the law that should be applied
14 in this case, the Health Department contends, is
15 found in the Virginia Administrative Process Act,
16 it's in Article 4 of the Administrative Process Act,
17 and is set forth at Section 9-6.14:15 of the Code
18 and following.

19 THE COURT: Let me see that.

20 MR. VANCE: Now, the Administrative Process
21 Act sets out certain issues that the Court will
22 review in going over an appeal of an agency decision.
23 One of the first questions that the Court would have
24 to look at is whether under 9-6.14:15 this is an
25 agency decision which results from a test or inspec-

1 tion.

2 Now, the act says that when an agency deci-
3 sion is based upon a test or an inspection, that it
4 appears to say that the court review is limited to
5 claims of fraud, arbitrariness, or a lack of enabling
6 legislation to allow the agency to even make a deci-
7 sion in that area in the first place. We would ask
8 the Court to consider whether or not this is one of
9 those decisions that is based purely on a test or
10 inspection. The Health Department would take the
11 position that this is a decision based upon a test
12 and inspection of the soil on the plaintiff's prop-
13 erty.

14 The second question, Your Honor, will be
15 that if the Court rules that all of the remaining
16 law under the A.P.A. in the situation where those
17 exclusions don't apply, if the remaining law is to
18 be considered whether there is substantial evidence
19 in the record to support the Health Department's
20 contention that this soil will not support a septic
21 tank.

22 Your Honor, we are going to go over briefly
23 some of the evidence that's in the record. Counsel
24 for the other party has the record, and we have a
25 tabulated copy of the record also provided to any

1 witnesses that may come up.

2 Your Honor, at this time we would respect-
3 fully renew our motion that no oral evidence be
4 taken, and also our motion that the Court restrict
5 evidence to the two sites which were disapproved
6 of by the State Health Commissioner in his final
7 agency decision.

8 THE COURT: All right, sir.

9 MR. CRIGLER: Our first witness, Your Honor,
10 is George Miller.

11
12 GEORGE BERNARD MILLER, a witness called by
13 the attorneys for the complainant, first being duly sworn,
14 testifies and states:

15 DIRECT EXAMINATION

16 BY MR. STEKETEE:

17 Q Mr. Miller, give us your full name.

18 A George Bernard Miller.

19 Q Where do you live?

20 A I live down in Manassas now on Occaquan
21 Club Road.

22 Q That's in Prince William County?

23 A Yes, sir.

24 Q Some time ago you entered into a contract
25 with a Mr. and Mrs. Joseph Godfrey, did you not?

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RICHMOND, VIRGINIA
PHONE 648 - 2801

0037
11.

G. B. Miller - Direct

1 A Yes.

2 Q Concerning certain property here in Culpeper

3 County?

4 A Yes, sir.

5 Q I believe I can get a stipulation from the

6 defendants that the condition of that contract was in fact

7 that there be some health permit approval for that property.

8 A Yes.

9 Q Did you then go out and see if you could

10 obtain a Health Department permit?

11 A I did, sir.

12 Q Would you please tell the Court how you

13 went about doing that.

14 A I went in to get my papers down here for

15 a building permit, and then I went up to meet with Mr. Burke,

16 who I knew for several years, and I asked him about a health

17 permit for that. And, he said: I know of the property, but

18 I don't think we have time to really go down there and run a

19 perk test down on that land down there, but you go down there

20 and look around and I will go down there with you, or I will

21 meet you down there at a later date to see where you want to

22 put it at.

23 Q The land we are talking about was the land

24 that was part of the contract and is what is in issue today,

25 isn't it?

G. B. Miller - Direct

12.

1 A Yes, sir.

2 Q You just go right ahead and tell the Judge
3 what happened then.

4 A I told him that I was going to move up
5 against the mountain where it was real steep at and where
6 there was good drainage at because I wanted to be way up on
7 the mountain off the road away from everybody. I wanted to
8 raise horses in there, and I was going to put a stable and
9 everything clean back where it would be out of sight off the
10 road and off the road about half a mile. He said that it
11 had never been tested back there, and he also said: We did
12 test some of the front lots for somebody else, but we didn't
13 get a very good perk at that point.

14 Mr. Burke didn't come down at that time,
15 he sent another gentleman down by the name of Mr. Borders.
16 Mr. Borders came in there, and he met me there, and when I
17 showed him where I wanted it, why he had a little bit of an
18 auger there about that long and he drilled down with that
19 and come up and he said: That don't look good to me, that
20 don't look good to me, I don't think we can get a septic
21 tank in this land here.

22 Well, I told Mr. Borders: I have been a
23 contractor for 40 years, and I have built houses all through
24 Culpeper County, and I have got a license to put in septic
25 tanks in three or four different counties, I have drilled

1 down for them further myself with my backhoe, and when you
2 get down to five or six feet deep there is sand there that is
3 white almost like building sand, and it's just layers of it
4 down there, and whenever you pour water in it it will go out
5 as fast as you pour it in there with a 5-gallon bucket, and
6 it will take a septic tank.

7 He said: Well, you have got to get some-
8 body else to run the perk test on this land, I ain't going
9 to take time to drill a hole down that deep, I only have this
10 little auger here, and they won't allow you to put a septic
11 tank in that deep.

12 So, I said: All right, I will get somebody
13 else to do that, I have a man that does it for us in Prince
14 William where we are right now building, he is doing sub-
15 divisions down there for us right now, he just finished a
16 subdivision where he has got 58 lots in it and they have all
17 got septic tanks, and I will just get him to come up here and
18 do it for me.

19 So, I called Mr. Godfrey and he said: Yes,
20 get the man to come up here and do it, and whatever the
21 expenses are I will stand the expense.

22 So, I got Mr. R. B. Thomas, he's a licensed
23 engineer out of Manassas, and he got his men to come up there
24 on Saturday, and we run these tests, we run them down deep,
25 and we found very good soil for it. Mr. Thomas, he said:

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G. B. Miller - Direct

14.

1 This is real good, this is better than what you are finding
2 down where we are building down there, and it passes down
3 there, and I wish we had this good of soil down where you are
4 building all those houses down there.

5 So, I said: All right, we will go ahead
6 and lay out where the house is going to be, and give me the
7 plot papers so we can show where everything is going to be
8 at and show it to the county. Which he did. When he gave
9 them to me I called Mr. Borders, and he said: I will be down
10 to see where you are going to put it at.

11 When Mr. Borders come down on the job he
12 walked down on the job, and he walked up there and said: Why
13 are you building way back here. I said: I want it back up
14 here on the hill so I will get good drainage and all, and I
15 think this is a good place that will perk, and I like it back
16 here, I like this spot back here. I said: It don't matter
17 where I build to you-all, does it, Mr. Borders, because I
18 want it back here.

19 Then I showed him the papers, and when he
20 looked at the papers and seen the name on them he just threw
21 them down on the ground and said: I won't accept them papers,
22 I know that man, he's not even from here in the county, I'm
23 not going to accept those papers. He wouldn't even look at
24 them.

25 Q That was Mr. Thomas' papers, weren't they?

1 A Yes, Mr. Thomas' papers.

2 Q Just, very briefly, if I show you Exhibit 6
3 here, is that what Mr. Thomas prepared?

4 A Yes, this is one of them. I don't know
5 where the plot papers are, but he had the plot papers show-
6 ing where the house was going to be and all. It should be
7 here.

8 MR. STEKETEE: I would indicate to the Court
9 that the Thomas report that he is talking about is
10 Exhibit No. 6.

11 THE COURT: That's dated March the 3rd,
12 1977?

13 MR. STEKETEE: That's correct. I think
14 there are several pages accompanying that exhibit.

15 THE COURT: All right, sir.

16 Q I am sorry I interrupted you, Mr. Miller.
17 Go ahead, please.

18 A So, he took out this little bit of an auger
19 he had, it was about three foot long, and he started drilling
20 down again. And, I said: Mr. Borders, this top land up here
21 is clay and jacky and it will not pass a septic tank system,
22 but if you go down five or six feet deep it will do that.
23 He said: Well, I am not going to allow you to put a tank
24 down five or six feet deep, it's against the law.

25 I said: Well, Mr. Borders, I am building

G. B. Miller - Direct

16.

1 houses how, and it just happens that right today. I am in
2 Prince William County and I am putting two septic tanks in
3 today and they are going down in the ground pretty near eight
4 feet deep, and I am down there next to the reservoir where
5 all the people are going to be drinking out of, and I am
6 within 100 feet of the reservoir, and if they pass it in
7 that county I don't know why you won't pass it up here on
8 the hill when I am half a mile away from anybody's house,
9 that just don't seem right.

10 Well, he got mad and told me, he said:
11 Well, I am not going to pass it, if I can't get no good sand
12 with this thing I am not going to pass it, you are not going
13 to put it in that deep up here. I said: Well, Mr. Borders,
14 I am going to get this thing in here, I don't want to argue
15 with you. I said: I know what I am doing down there, we
16 do it down there where there is a difference in the law, but
17 the law in Virginia ought to be for every county.

18 And, we discussed it on further and he
19 said: I will not pass it. I said: Look at this, look at
20 this other side. But, he just kept on, he wouldn't look at
21 nothing. I said: Well, what do you think I am going to do
22 with it, I done put all this money in and all this time into
23 it and built the road in here, cleared in here with expecta-
24 tions of this going on through, and I am going to build a
25 home here.

1 He said: I told you not to do this. He
2 said: I have condemned this ground and it's going to stay
3 condemned, I ain't going to let no house be built on this
4 ground, it's condemned.

5 Q Who said that it was condemned?

6 A Mr. Borders, he said it was condemned.

7 Q Go ahead.

8 A He wasn't going to let nobody build on
9 this ground, and that it was condemned. He said: We are
10 just not going to allow septic tanks in this county anymore,
11 they are going to have to be sewers or something else. I
12 said: Well, that ain't no way to be if you are going to do
13 it.

14 At that time Mr. Godfrey was down there,
15 and Mr. Godfrey spoke up and said to him: Well, what should
16 we do, we don't want to have to go through this. Mr. Godfrey
17 said: I want to sell this land, I don't need it, I would
18 like to sell it, and I would like to see Mr. Miller get his
19 septic tank.

20 Well, Mr. Borders, he said: Well, if you
21 was to go in here and get Mr. T. A. Houston here in town,
22 he's here in Culpeper, and if he was to come out here and
23 was to okay this land, if he would okay this land I would
24 have no other choice because he's a registered-- I can't
25 say the word, in other words they go around doing all this

1 type of work. He said: We accept his work without even going
2 to look at it, and if you can get him to come out here and
3 say it's okay, I will accept his work.

4 So, we left there, and we come in and we
5 engaged Mr. T. A. Houston, and he said he would go down and
6 look at it. I rode him down there in my truck, and I said:
7 I am going to build the house here, and I want to put in
8 some septic tanks here, so see where you can find a spot
9 here on this side of this hill here to put these tanks in,
10 wherever you find a good spot.

11 And, he said: I don't have time to get out
12 now and look and everything, but I will see where you are
13 going to build at so I don't put the tank where the house is
14 going to be, and I will come on back later and do it. And,
15 I said: I will get Mr. Godfrey to call you and tell you that
16 he will pay you for your trouble.

17 So, later in the day I called Mr. Godfrey
18 and told him would he pay him for taking him down there and
19 doing that, the bill was to be about \$250 to go down there and
20 run these perk tests, and he said he would.

21 Well, he went on down, and he got the perk
22 tests run, and I picked up the papers at a later date, I
23 don't know the exact date, but I picked up the papers. And
24 I come up and asked Mr. Borders if he would meet me down
25 there and see the site that he picked out. Mr. Borders come

1 down on the job, but he looked at them there and he said:
2 That's exactly where Thomas picked them out at, and I told
3 you that was condemned, I wasn't going to have it here. I
4 said: I didn't tell Mr. Houston to put it here, that's where
5 he said was the best spot, he tried all around, and he said
6 this was the best of all of them right here. I said: I
7 would rather have it further over, further away from the
8 house where I am going to build, but if it has to be here
9 it will just have to be here, that's all. I said: I might
10 have to move my house in another 50, 75 feet to get further
11 away from where it's at, but I will do that.

12 He said: Well, I ain't going to okay this
13 here. And, I said: You mean after I spent all this money
14 now again you are not going to okay this. He said: No, I
15 am not going to okay this at all, I have made up my mind, I
16 ain't going to okay nothing on this, you are just wasting my
17 time, and I am not going to okay nothing, no part of this
18 land. He said: I am not coming down here no more, you are
19 just not going to get no permit, you aren't going to get a
20 house in here nowhere on this land, you can just forget it.
21 He said: I am going to see to it that you don't get it.

22 Well, I said: I ain't going to let you
23 run over the top of me. I said: I got who you wanted, Mr.
24 Houston, and he has done the test. I said: I didn't tell
25 him where to put it at, he put it at where he wanted to put

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20.

1 it at, and he said this was the best place, and that's where
2 he put it.

3 So, he wouldn't do nothing, he wouldn't
4 give me no permit. I carried him down and told him, I
5 explained to him that I would like to put in a split system,
6 and that I had put it in a lot worse places than this. I
7 said: I have put in a lot of systems that Mr. Burke okayed
8 in the county that was in a whole lot worse ground than this,
9 but all at once because I want to build here for some reason
10 or another you have got your dander up and don't want me to
11 build here.

12 THE COURT: Who are you talking about?

13 What is this man's name?

14 THE WITNESS: Mr. Borders.

15 MR. CRIGLER: That's Stanley Borders, Your
16 Honor, from the Health Department.

17 THE COURT: What is his position with the
18 Health Department?

19 MR. VANCE: Your Honor, he's the local
20 sanitarian, or he was at that time, he is not at
21 this time. Mr. Borders is no longer employed in
22 Culpeper County, Your Honor.

23 MR. STEKETEE: Your Honor, the first exhibit
24 in the record picking up his name and identification
25 appears with Exhibit 3 which--

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21.

1 THE COURT: Do you have a letter in here
2 from Mr. Houston in which he approves this site?

3 MR. STEKETEE: Yes, Your Honor.

4 THE COURT: Where's that?

5 MR. STEKETEE: If the Court will look at
6 Exhibit 19.

7 THE COURT: All right.

8 Q I am showing you Exhibit 19, which is a
9 handful of pages, and is that what you received from Mr.
10 Houston?

11 A Yes, sir. We got copies of this here from
12 Mr. Houston.

13 Q And that's what he provided you in response
14 to your request on this particular property?

15 A Yes, sir. He provided this to me, and
16 there is quite a bit of it, and then he carried me down
17 there and showed me where the holes was and the flags, and
18 he put the flags up and marked on each hole what they took,
19 how much water they took in an hour. And, one of my sons
20 carried a 5-gallon bucket, he would go to a fish pond nearby
21 and bring back two 5-gallon buckets of water, they wasn't
22 full, he would have about 4 gallons, and he would dump that
23 in a hole, and then he would have to walk just about a city
24 block to get more, and by the time he would come back the
25 water would be going out of them holes that quick because it

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22.

1 was that sandy underneath.

2 Q This was essentially all that took place
3 in your discussions with the local Health Department then?

4 A With Mr. Borders. This was showing how
5 good this land would take this.

6 Q This was up until the time of the appeal?

7 A Yes, sir.

8 MR. STEKETEE: Mr. Miller, Mr. Vance may
9 have some questions for you, and would you please
10 answer the questions the best you can.

11 THE WITNESS: Yes.

12
13 CROSS-EXAMINATION

14 BY MR. VANCE:

15 Q Mr. Miller, are you familiar with a Mr.
16 Burke who is the sanitarian supervisor for Culpeper County?

17 A Yes, sir.

18 Q Mr. Miller, did you ever ask Mr. Burke to
19 review the decision of Mr. Borders?

20 A At a later date, yes.

21 Q Did Mr. Burke later on review the decision
22 of Mr. Borders?

23 A Later on Mr. Burke told me, this was his
24 words if I remember them correctly, he said: I will not go
25 against that man that was out there, he was out there, and that's

1 the way it will have to be.

2 Q Did Mr. Burke ever go out on the site him-
3 self and carry out any kind of testing?

4 A Mr. Burke was out there the first time, yes.

5 Q And did Mr. Burke in fact examine that site?

6 A The site that Mr. Burke pointed out and
7 told me to run a perk test on myself, I did run a perk test
8 on it, and it didn't come out good, and I told him so later
9 on, I told him where he picked out wasn't good.

10 Q Did you have occasion on June 29th, 1977
11 to attend an appeal hearing in Richmond in which the decision
12 of Mr. Borders, Mr. Burke, and other Health Department staff
13 was reviewed by a hearing panel of the State Health Commis-
14 sioner?

15 A I was.

16 Q Are you able to see well enough to be able
17 to read, Mr. Miller?

18 A My reading ability is very little.

19 Q Let me read this language from Page 43 of
20 the record that was taken on that date.

21 MR. VANCE: Your Honor, this is Exhibit

22 No. 22.

23 THE COURT: All right, sir.

24 Q In the agency record, Exhibit 22, on Page 43
25 of that record, Mr. Miller, Mr. Burke made the following state-

1 ment, "The three sites that we examined, we examined in the
2 usual way, and where the applicant wants additional informa-
3 tion we will go further up the line, and that was done in
4 this case. The reason in this county and the other counties
5 that we have there that these similar sites would be rejected,
6 one would be that there is a poor percolation rate, a poor
7 percolation rate in the soil, the subsoil; and, we also
8 maintain that the percolation rate in the parent material
9 is also low. If it is used for any length of time it--"
10 And, there it drops off.

11 Do you remember Mr. Burke making that state-
12 ment at that time, Mr. Miller?

13 A He talked quite a bit in that courtroom
14 that day. I wouldn't want to say just what he said that day.
15 He was down in the courtroom, him and Mr. Borders both that
16 day, and I didn't get to say nothing then.

17 Q On Page 44 of that same record on the very
18 next page, Mr. Miller, at Line 5 Mr. Burke is quoted as say-
19 ing, "I will go into our experience as to determine why that
20 is." There he's talking about whether or not these soils
21 will accept a septic tank. Quoting from Mr. Burke again,
22 "Now, those were the reasons: poor percolation rate, poor
23 subsurface drainage, and a water table. Now, we had indica-
24 tions of the water table in all the areas surrounding this.
25 It's not unusual to have one small area of unsatisfactory

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9054 25.

1 soil that has this condition if you have only a hole here
2 and there, and in our experience that is borne out." And,
3 he continues on, he sets forth the reasons why he had turned
4 down this particular site.

5 Do you remember that, Mr. Miller?

6 A Yes, I do, sir, and at that time, if I may
7 add, he didn't let me tell you, or nobody else told you, but
8 they talked about this site like water would stand on it when
9 it rains, but I guarantee you, this is steep, it's on a slope,
10 it's quite a slope, and I tell you that if the water ever
11 stands on it we won't be sitting in here, I can guarantee you
12 that, because no water is going to stand up on that ground,
13 it's up against a mountain on a hillside, quite a hillside.

14 Q Mr. Miller, on Page 77 there are a few
15 quotations on Page 77 and 78 of the agency record in which
16 you had the opportunity to speak to the hearing board at
17 that time. After Mr. Steketee speaks on Line 6 on Page 77
18 you begin speaking, and there you recite the fact that you
19 had been building houses for 35 years, that you have a license
20 to put in septic tanks in several counties and several states,
21 and that you have been a builder for 35 years. At no time in
22 this hearing did you mention the incident that you had with
23 Mr. Borders in which Mr. Borders threw the paper down and told
24 you that under no circumstances would he ever approve a lot
25 on this site.

1 What is the reason why you didn't make those
2 allegations known at that time?

3 A On that day I was advised that I wasn't
4 supposed to say anything that day, I was advised to keep
5 quiet and just listen.

6 Q Who advised you to do that, Mr. Miller?

7 A I was advised by my attorneys that they
8 would do the talking at that hearing, and that I was to keep
9 quiet.

10 Q Was that Mr. Crigler and Mr. Steketee?

11 A Yes, it was. I just let them do the talking.
12 And, you-all talk in words sometimes that I don't understand.
13 I can tell you that I have had experience enough to know when
14 a septic tank is put in right or not, I can tell you that.

15 Q Mr. Miller, do you know who Mr. Bodkin is?

16 A I can't recall that name right offhand.

17 Q To refresh your memory, he's identified in
18 the agency record, he was one of the individuals who was
19 present at the hearing on the 29th, Mr. H. V. Bodkin is the
20 regional sanitarian for the State Health Department of Staunton.
21 Are you aware of whether he went out onto the site?

22 A Not while I was on the site.

23 Q But are you aware of whether or not he did
24 at some time go out to carry out an inspection?

25 A No, I am not aware that he was ever there.

1 He was not ever there at my invitation. If he went there, he
2 went there on his own.

3 Q Do you know who Mr. W. J. Meyer, state soil
4 scientist, is?

5 MR. CRIGLER: If the Court please, in the
6 interest of time, and in relation to the record, we
7 certainly stipulate to the record as to the testimony
8 that was given by the parties in Richmond, and if it
9 would assist Mr. Vance we would certainly ask that
10 the Court consider this in its full consideration of
11 the matter without having to go over it piece by
12 piece at this particular time.

13 MR. VANCE: Well, Your Honor, in--

14 THE COURT: You will have the right to
15 cross-examine this witness as to what's in the record,
16 and you may proceed. The objection is overruled.

17 Q Mr. Meyer is quoted in the record from the
18 prior hearing at Page 62 beginning at Line 1, and Mr. Meyer
19 is identified in the record as the state soil scientist, and
20 who is identified in the record as having gone out on the
21 property and inspected the property, Mr. Meyer says the
22 following, "Now, where the water could come from we could
23 discuss quite indefinitely, but what I think the problem in
24 all of this is the variability in the depth of the rock. We
25 have investigated this kind of soil in a number of places,

1 and I could even show you slides.

2 "Now, what you have is the surface, and
3 then you have a plastic clay. This clay, I think everybody
4 has almost already agreed on, will not take the water. Then,
5 you have your weathered parent material down here, and then
6 you have the rock."

7 Then Mr. Meyer skips down to Line 17, and
8 he says, "There have been numerous attempts to try to put a
9 drain field in this material, and one or two may be success-
10 ful, but what you generally end up with are pockets, it goes
11 up and down like this."

12 Do you have any reason to believe that what
13 Mr. Meyer described in the record at the hearing on June the
14 29th is incorrect?

15 A It is, sir.

16 Q It is incorrect?

17 A Yes, sir.

18 Q Can you tell me how that's incorrect.

19 A All right. Right in that same area, right
20 around there, there are 35 houses right around there, and
21 they have all got bathrooms in them and all, and they are all
22 working. There is one house that's right on this property,
23 it's old, and the man there has been there for 35 years, and
24 he said he forgets where he put the septic tank in, it was
25 one of the first ones put in this county right here, he for-

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1 gets where it is right now, but it has been in there for 35
2 years, and it was put in on this property that is supposed
3 to be no good. And, there are 31 houses around there that
4 have bathrooms within two miles of this house where I want
5 to build at, and they all have bathrooms and septic tanks.

6 Q Are you aware that there is evidence in the
7 record that shows that some of these other septic tanks in
8 the area are failing?

9 A Yes, sir, I am very aware because one of
10 them called me and asked me what could be done about it. I
11 went back to see, and whoever put it in, it was not put in
12 right, it just had three little drain ditches right down in
13 the front yard, which is the lowest place in the yard, and
14 when it rains all the water off the road runs in over top of
15 the drain field. He has got three little 75-foot drain
16 ditches, and it was put in years ago, and he has an automatic
17 washer and he has got about seven children there, and he has
18 got about 150, 200 feet of drain field where he ought to have
19 600 feet of drain field in there. I advised him of that.
20 Yes, it's failing, no wonder, it wasn't put in right.

21 Q Mr. Miller, on the agency record on Page 56
22 Mr. Burke is quoted as saying that perhaps 10 percent of the
23 septic tanks that go into this particular kind of soil fail.
24 Do you have any reason to believe that that's inaccurate?

25 A Well, Mr. Burke can talk about it, but I am

1 in the building business and in all the houses I have built,
2 that doesn't mean that every house I built that it will be
3 perfect, there won't be any furnace failure or some fixture
4 in the house fail, or refrigerator or stove fail, but any
5 septic tank can fail if they are not put in correctly or
6 something can happen, nothing is 100 percent.

7 What I am saying is that I dug on this
8 ground down for eight foot all over with a backhoe to show
9 them, eight foot wherever they wanted to dig. I said: Here,
10 take this backhoe and dig down eight feet deep and you will
11 come up with sand. But, they walked away from it, they
12 wouldn't stop to listen, they wouldn't even look at my holes.
13 They had in their minds to condemn it, and they walked away
14 from it, they would never look at it.

15 Q Mr. Miller, on Page 57 of the record at
16 Line 4 Mr. Borders testified, "This one road is 1.9 miles,
17 this Mount Pony Road from its beginning down to this spot,
18 and there are four that have failed or been replaced in the
19 nine years I have been in the county, are failing or have
20 been replaced."

21 Do you have any reason to believe that Mr.
22 Borders is inaccurate in saying that there are four failing
23 septic tanks within a 2-mile stretch?

24 A Just as I got done saying, I know one of
25 them is failing right now, and the man asked me last summer

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1 what he could do about it, and I told him the only thing he
2 could do about it now was making a bigger field with the
3 right amount of drain ditches. He has got about three drain
4 ditches about 75 feet long, when what he requires is about
5 600 feet. That's not the slope of the ground, it's a problem
6 in the installation.

7 Q You made the statement earlier, Mr. Miller,
8 that Mr. Borders told you that no septic tanks were going to
9 go into this kind of soil, isn't that correct?

10 A That's what he said.

11 Q Are you aware that this agency record, and
12 the testimony that came out on June 29th at the earlier hear-
13 ing, showed that numerous septic tanks have been placed into
14 exactly this kind of soil, in fact septic tanks that are
15 placed in this kind of soil both in the county and in other
16 counties?

17 A Mr. Borders told us he had a letter telling
18 him not to let no septic tanks be put in there, Mr. Godfrey
19 was down there with me, and that he had a letter from Rich-
20 mond that no more septic tanks could be put in this county,
21 and that's why he couldn't pass this one.

22 Q Have you ever seen the letter or a copy of
23 the letter?

24 A No, but that's what he told us, it had to
25 be the best of conditions before he could let us have it in

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1 there. He said: I can't do it, and I ain't going to do it,
2 I condemned this ground, and it's going to stay condemned.
3 He wouldn't even let me talk about a split system, which will
4 work.

5 May I add something else, sir?

6 Q Yes, sir.

7 A All right, sir. I carried an inspector
8 down on the job where I am at, and I am building within 100,
9 200 feet of the reservoir area for the drinking water of the
10 nation's capital and in Arlington and all around, and we are
11 putting houses in within 200 feet of that reservoir. We have
12 got Government inspectors and county inspectors and a little
13 bit of everything, and I carried one of the inspectors to
14 look at this thing, and he was a Government inspector, and
15 he told me: Is that how that happened, is that part of the
16 United States, or is that somewhere else. He said: I just
17 can't believe that anybody would object to putting a septic
18 tank in on that hill, that's like we are in some other
19 country talking like that. He said: If we had this good of
20 soil down here I wouldn't even have to sit out here while you
21 are working. He said: I don't know, they must be back in
22 the 1800s, ain't they.

23 That's what some of the people down there
24 take a viewpoint of this county, the way you-all act up in
25 this county about putting in a septic tank.

1 Q Are you aware that in the final decision
2 that Dr. Kenley rendered on July 28th, 1977, this is the
3 opinion that is the subject of this appeal, it's Exhibit 25,
4 Your Honor, that in his letter in which he turned down two of
5 the sites that had been examined he wrote back as follows,
6 Dr. Kenley wrote back as follows, and I am quoting from
7 Page 2 of this letter of July 28th, "Mr. Houston has main-
8 tained that there may be other locations on the tract where
9 a septic tank tile field would function properly, and this
10 information has not yet been evaluated by the local Health
11 Department. This information should be assessed and if the
12 following minimum soil conditions are demonstrated to be
13 present in the exact location proposed for the septic tank
14 tile field, the local Health Department will consider issuing
15 a septic tank permit."

16 Then four conditions are laid out, "A
17 thickness of at least three feet of weathered diabase situated
18 deeper than the planned bottom of the tile field trench at
19 all points along the proposed location of the tile field; b,
20 no evidence of water table in the soil; c, weathered diabase
21 to be continuous and without hard rock interruptions, over
22 each section of tile field. Sections to be no less than
23 50 feet in length; d, acceptable rates of absorption in the
24 weathered diabase as demonstrated by percolation tests."

25 Now, what Dr. Kenley is saying here is that

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1 if you meet these conditions you can get a septic tank put
2 in in that soil. Are you aware of the fact that this option
3 was made available to you and to Mr. Godfrey?

4 A Yes, and I exercised that option. I got
5 a receipt and can bring back the backhoe operator that I
6 brought in there so that he could see it, and I paid that
7 operator \$200 to move that backhoe in there and dig ditches,
8 and we dug ditches wherever they said. If they said they
9 wanted one here, we dug it. We dug them deep enough so that
10 a man could get in there, eight foot deep, right down so he
11 could see the soil. I could take them to the job site and
12 show them and you 100 of them where I dug over there. Mr.
13 Borders was supposed to come, but he wouldn't come that day,
14 he promised to be there at 10 o'clock. But, he did come, the --
15 next day and we walked back in and looked at one of them,
16 but he wouldn't look at the rest of them, he said: I am not
17 going to pass it. And, he left us, and I have got witnesses
18 to that.

19 Q Mr. Miller, are you aware of the fact that
20 Mr. Borders is at the bottom of a fairly long chain of command
21 that goes up through Mr. Burke, through Mr. Bodkin, and
22 ultimately ends with the State Health Commissioner, and that
23 each decision or that anything that Mr. Borders says can be
24 appealed on up? Are you aware of that?

25 A Well, what am I going to do when they say:

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1 We will put Mr. Borders down there. I go to Mr. Burke, and
2 he sends Mr. Borders down there. Mr. Burke told me over and
3 over: I won't go against Mr. Borders because he's the man
4 in charge there.

5 I used to deal with Mr. Burke, I put in
6 septic tanks in the county, and I would call Mr. Burke and
7 he would say: I will be down to see you later on, Miller,
8 I know your work is all right, you go on down and be doing
9 them. Mr. Burke and I used to be the very best of friends,
10 and I hope we still are for that matter, but if he told me
11 something he done what he told me, but Mr. Borders would
12 never do what he told you, and he would lie to you, and he
13 would do anything for spite.

14 Q Have you appealed Mr. Borders' decision
15 after this July 28th letter up to either Mr. Bodkin, who is
16 above Mr. Burke, or to the Health Commissioner, or to any
17 other person in the State Health Department who would have
18 the power to overrule Mr. Borders' decision?

19 A I have done everything that I could, I
20 went through everything, and I finally got my attorney here,
21 Mr. Steketee, to meet me up here, and we went up personally
22 into Mr. Burke's office just recently, I can't recall the
23 dates, there are so many of them, and he spoke for me. He
24 asked him: Can't we overrule this thing sensibly, we have
25 met everything, can't we possibly work out a solution. He

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1 said: Mr. Miller was thinking maybe we could try this new
2 system," talking about this simplex thing.

3 Mr. Borders had said: I don't know whether
4 we will pass it or not, we might pass this, but I don't
5 really think we want anything like that there.

6 My attorney, he said: We understand Mr.
7 Borders isn't here anymore, and is there any way that we can
8 work it out. My attorney done the talking for me, but Mr.
9 Burke turned me down, he said he wouldn't do nothing, he said
10 he wasn't even supposed to talk about it. He said: I am not
11 going to let you have no permit, I am not going to have
12 nothing to do with it, that's out, you might as well forget
13 it.

14 So, I forced every effort I could, and I
15 have spent about \$5,000 on this thing trying to get this
16 permit, and I have been two and a half years trying to get
17 it.

18 Q Did you attempt to override Mr. Burke's
19 decision in any way by going over his head to either Mr.
20 Bodkin or to the State Health Commissioner or one of his
21 agents in Richmond?

22 A I went through Mr. Borders to Mr. Burke,
23 and from Mr. Burke we finally seen no other way to do it, I
24 didn't know who else to go to, and so I engaged an attorney
25 here, and Mr. Godfrey also kept on, and finally we got this

1 thing in Richmond.

2 In Richmond, after this trial was over, and
3 I wasn't able to talk, I went to talk to the man down there
4 about what I wanted to do, and he said: You go on back there
5 and I will see if I can't do something because I know you are
6 going to build the right kind of home. And, I said: I am,
7 I ain't going to build a house up there that is going to hurt
8 anybody. And, I come back with that idea, and he said: I
9 will let you know in a few days. And, in 30 days he told me:
10 No, nothing doing.

11 So, that's the way it's been, two and a
12 half years, \$5,000.

13 Q Let me explore for a few minutes those
14 alternative septic tanks. You mentioned that Mr. Borders
15 mentioned the possibility of some kind of alternative to a
16 septic tank.

17 I would like to call the Court's attention
18 and your attention to Exhibit No. 52 in the agency record,
19 this is a one-page letter dated August 31st, 1977 to Mr.
20 Steketee from Mr. Burke, Exhibit 52.

21 Now, the second paragraph of that letter,
22 Mr. Miller, reads, "We will, however, give full and prompt
23 consideration to any alternative method of sewage disposal,
24 and Mr. Miller and Mr. Godfrey could submit a proposal indi-
25 cating planning by a certified engineer, or the engineer

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1 could submit the proposal directly.

2 Now, did any of these alternative methods
3 of sewage disposal ever get presented by you to the State
4 Health Department?

5 A I talked with him about it, and my lawyer
6 was present, and I talked to him about a split system which
7 we used in Arlington County, Fairfax County, and everywhere
8 else, and he said: No, they didn't recognize that here,
9 that was no good. I talked to him about another system, and
10 I even went as far as to write for it and get all the informa-
11 tion I could about it, but it was too costly, one of them
12 above-ground systems.

13 Q Those are the kinds of alternatives that
14 I was asking you about.

15 A They are too costly, the equipment itself,
16 and just for a small unit it's over \$10,000 plus installation,
17 and that makes it about \$20,000 for one of them.

18 Q Did you try, for example, a sand-filter
19 system of disposing of sewage?

20 A At this time I have wasted so much money,
21 and I would still have to go through that Health Department,
22 and it would be useless for me to go back any more when they
23 have said: We aren't going to pass it, it's condemned. There
24 ain't no point in going any further after two years. I have
25 reached the end of my rope. I think I have gone as far as

1 any man can humanly go when I presented them with everything
2 that there was.

3 I have had sanitation engineers from other
4 counties come in, and they laugh about it. Unfortunately
5 they don't want to get mixed up in this county, or they
6 would be here to testify that this beats anything they have
7 ever seen, they have never heard tell of anything like this.
8 If this was down in the bottom next to somebody's house it
9 would be a different story, but that's up on a mountainside,
10 mister, it's clean away from everybody's house.

11 Q Do you recall that at the hearing on the
12 29th of June one of the other alternatives was mentioned,
13 Dr. Graham asked Mr. Burke: Did you consider a nonpoint
14 discharge. And, the answer of Mr. Burke was: No, sir,
15 because there was no application, we dealt with the applica-
16 tion which was for septic tank drainage.

17 Did you ever at any point look at the
18 possibility of installing a nonpoint discharge lagoon on the
19 site?

20 A I talked about a drain field, which to me
21 is the sensible thing to put in there. I think with as much
22 experience as I have got, and I don't claim to have it all
23 by no means, I can learn an awful lot more about this, but
24 when I look at this ground and I know what I am doing now,
25 I know what I have been doing, and I know what I have done

G. B. Miller - Cross

40.

1 all through the county when I have been building here for 35
2 years, I know what I have done in the county and what I have
3 done in Arlington County, and I know what I have done, and
4 then I go out there and I see what I have got out there to
5 work with, and I know what I can do and I don't think anybody
6 else can do anything any better, I really just don't know
7 what I should do now.

8 I am sure you would do the same thing in
9 your business. I have been down here, and I have been down
10 the river so much with them to try to work this out, and when
11 I would ask them about going to another location they wouldn't
12 go there. I spent hundreds of dollars for backhoes to dig up
13 the ground to show them any place they wanted to look at. I
14 moved a front-end loader in there at the cost of \$350 to
15 scoop out ditches about 75 feet long, 10 feet deep, so they
16 could see the ground, it was nothing but sand, it was almost
17 good enough to mix mortar with, it was white sand. But, they
18 would walk away from it and say: It's condemned, it's
19 condemned. I would ask by who, and they would say: Mr.
20 Borders condemned it. They wouldn't go against him, he
21 condemned the land and said nobody was going to build on
22 that land.

23 Q Are you aware of the fact that there are
24 alternatives to septic tanks as a method for disposing of
25 sewage on individual homesites?

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41.

G. B. Miller - Cross

1 A Sir, I am building homes now down there
2 where we have got five different types of septic tanks
3 that we are putting in down there, and I put one in for
4 Mr. Worley, who I think works for the Treasury Department,
5 the Government, and I put that down in the ground 20 feet
6 deep the other day. We dug a hole 20 feet deep and 8 feet
7 long and put a bed of gravel in the ground 20 feet deep,
8 and it was inspected by the Government and by the county
9 inspectors, and they said: What a good job, that's a good
10 job.

11 And, I have got another one to put in
12 within the next couple weeks just like it, and that, sir,
13 is within two city blocks of the reservoir, the drinking
14 water of the capital. If I can put them in down there and
15 I can satisfy the United States Government, and I can't put
16 one on my own land to satisfy myself, I am telling you this
17 country is in bad, bad shape.

18 Q Mr. Miller, the testimony of Mr. Burke
19 at the earlier hearing was that the land that was going to
20 be the subject of these septic tank installations had a
21 water table that would come up over top of the drain field.
22 Do you have information that would refute that testimony and
23 that would show that testimony was wrong?

24 A I can tell the Court that it might be hard
25 to get in there, but if water comes in over this you won't

G. B. Miller - Cross

1 drive the streets of this city here if it comes over that
2 because this is a hillside, it's on a slope, and the water
3 would have to rise up 300 feet deep at the bottom of the
4 hill to get up where I want to put the septic tank, it would
5 have to be 300 feet deep down there.

6 You see, this is up against the mountain.
7 There is no way water could get up on there. In fact, it's
8 so steep that I am going to worry about when I put the septic
9 tank in that the water ain't going to wash it out. I am
10 going to plant it back with grass to keep it from washing
11 away it's that steep. It's so steep that when I put the
12 house in against the hill where I am going to build it, when
13 I walk out the back I'm going to have to have about a 15- or
14 20-foot retaining wall to hold back the mountain, it's that
15 steep in there.

16 You talk about water standing on it, well,
17 water comes off there so quick it's like running off the
18 roof.

19 MR. VANCE: Thank you for being so candid,
20 and I appreciate your responses to the questions.

21 THE WITNESS: I do thank you, sir, for
22 letting me tell my story, I really do.

23 MR. CRIGLER: Your Honor, I sense that Mr.
24 Miller is just getting warmed up, but we have no
25 further questions.

1 THE WITNESS: I have been wound up, Your
2 Honor, and I am sorry I am like this, but if you
3 would know what I have went through you could see
4 how I can be wound up.

5 THE COURT: All right, step down, Mr. Miller.

6
7 WITNESS STOOD DOWN

8
9 THE COURT: The Court will take a five-
10 minute recess here, gentlemen.

11
12 NOTE: At this point a brief recess is
13 taken; at the conclusion of which the case continues
14 as follows:

15
16 MR. CRIGLER: We will proceed with Mr.
17 Godfrey, if it please the Court.

18 NOTE: The witness is sworn.

19
20 JOSEPH E. GODFREY, the complainant herein,
21 called in his own behalf, first being duly sworn, testifies
22 and states:

23 DIRECT EXAMINATION

24 BY MR. CRIGLER:

25 Q You are Joseph Godfrey?

J. E. Godfrey - Direct

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1 A Yes, sir.

2 Q Where do you live?

3 A I live in Nokesville, 8929 Burwell Road,
4 Nokesville, Virginia.

5 Q Mr. Godfrey, are you the owner of a certain
6 tract of land that's in Culpeper County near Mount Pony?

7 A Yes, sir.

8 Q How many acres are in that property all
9 together?

10 A 222.

11 Q Was part of that property subject to a
12 contract with Mr. Miller to purchase under certain terms and
13 conditions?

14 A Yes, sir.

15 Q How many acres were involved in that?

16 A There were 14 acres that we got a contract
17 on, but at that same time an additional 26 acres was asked
18 for.

19 Q So, all together it was about 40 or 41
20 acres all together?

21 A Yes, sir.

22 Q And a condition of that contract was Health
23 Department approval of a drain field site?

24 A That was a condition of the contract, yes,
25 sir.

J. E. Godfrey - Direct

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1 Q Was this for the installation of a drain
2 field site for a single-family residence?

3 A Yes, sir. Ten acres is minimum, and that's
4 14, so it was single-family.

5 Q Plus the 26?

6 A Plus the 26.

7 Q Now, Mr. Godfrey, after you executed the
8 agreement with the Millers, what if any contact did you have
9 with the Health Department?

10 A Mr. Miller proceeded to ask for a building
11 permit, and the system is that you go through the Health
12 Department. He called me saying that the Health Department
13 refused to give him an okay so that he could go and get the
14 building permit.

15 Q What did you do after he contacted you in
16 this regard?

17 A Well, in this time I had seen Mr. Miller,
18 and in talking and so forth I realized that he was a con-
19 struction contractor, and that he was much more familiar
20 with this work than I was, so I told him: George, you go
21 ahead and let me know, just proceed and let me know what is
22 happening.

23 Q Did you have any personal contact with the
24 people from the Health Department after you were advised that
25 there were troubles getting the permit?

1 A Yes, sir.

2 Q Where was that contact, the first contact?

3 A It's been like two and a half years ago.

4 I want to be accurate, but--

5 Q Let me rephrase the question. Did you have
6 an occasion to be at a meeting on the property when members
7 of the Health Department as well as Mr. Miller were present?

8 A Definitely.

9 Q And you recall Mr. Miller testifying in
10 that regard?

11 A Yes, sir.

12 Q Could you tell the Court what you remember
13 taking place.

14 A Well, Mr. Miller is exactly right. And,
15 I was astounded. And, then there were two different instances,
16 if I remember correctly, and on the second one-- No, it was
17 where things got a little warm there, you might even say hot,
18 and I pulled Mr. Borders aside and said to him: Mr. Borders,
19 I am the seller, and please advise me as to what I can do to
20 get this permit and what I can do to get this permit through
21 and get this sale, I want to sell the property to Mr. Miller.

22 Q What if any response was given to you?

23 A The first time he said he didn't have time
24 to go around there and find us a site, for us to go and get
25 somebody--and I want to be clear on this thing now--to get

J. E. Godfrey - Direct

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1 somebody, an engineer to find us a site and stake it off,
2 that he didn't have time for that.

3 The second time, so that I am clear, the
4 second time it was to get definitely Mr. Houston.

5 Q So, it's my understanding that an engineer,
6 to wit Mr. Thomas, was hired to perform certain site tests,
7 and then after that Mr. Borders recommended Mr. Houston?

8 A Yes, sir.

9 Q Is it fair to say that there came a time
10 when it was clear that Mr. Borders and Mr. Miller were not
11 getting along from a personal standpoint?

12 A Of course it's a debate of two people, like
13 playing a ballgame as to the rules, and--

14 MR. VANCE: I am going to object to that on
15 the grounds of relevancy at this time.

16 MR. CRIGLER: Your Honor, one of our posi-
17 tions is that the Health Department has been
18 arbitrary and capricious.

19 MR. VANCE: I withdraw the objection.

20 THE COURT: It's overruled. Let's proceed.

21 Q Did there come a time that it was obvious
22 that there were some personal differences, personal problems
23 between Mr. Borders and Mr. Miller?

24 A Yes, sir.

25 Q And, as a matter of fact, whatever each one

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J. E. Godfrey - Direct

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1 said the other one disagreed over it?

2 A Yes, sir.

3 THE COURT: What date did you sell this
4 property to this man?

5 MR. CRIGLER: Your Honor, it hadn't been
6 closed as of this time.

7 THE COURT: What day was your contract?

8 THE WITNESS: It's so long ago, sir, two
9 and a half years.

10 MR. CRIGLER: It was prior to December of
11 1976, Your Honor. It's in a separate file since
12 there wasn't any dispute over the contract.

13 Q What other contact did you have with Mr.
14 Borders after the second time? Did you have any further
15 contact with him?

16 A Yes, sir. Then we had a meeting, we went
17 up to a meeting, and he had some gentleman, I believe the
18 gentleman's name starts with a "B."

19 Q Mr. Burke?

20 A Mr. Burke was there, but there was another
21 gentleman, that one from Staunton or somewhere up there.

22 Q Bodkin?

23 A Mr. Bodkin, that's right. We conversed
24 there awhile, and then they were going to proceed and invite
25 another gentleman. I talked to him a little bit because I

J. E. Godfrey - Direct

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1 had some boys at VPI at the time, and he was from Blacksburg,
2 and he held sort of a state position where he advised through-
3 out the state.

4 Q Let me ask you this question. In Mr.
5 Houston's work on the property, were you aware that he con-
6 ducted seismographic studies, took seismographic readings
7 with respect to rock formations? Were you aware of that?

8 A No, sir.

9 Q Did you attend the hearing in Richmond on
10 the appeal?

11 A No, sir.

12 Q Were you aware, if at all, whether or not
13 subsequent attempts after the hearing in Richmond were made
14 to find a site that was suitable to the Health Department?

15 A No, sir.

16 Q You weren't aware that after the ruling
17 they went out on the property again and tried to find alterna-
18 tive sites?

19 A There was a time when this Mr. Bodkin and
20 this gentleman from VPI were at the site, but it seems to me
21 that that was before the case in Richmond, Mr. Miller con-
22 tacted me to let me know that he was going there, and I think
23 I talked it over with Mr. Miller, but there was no point of
24 my going there.

25 Q Are you aware of any proposal that has been

J. E. Godfrey - Direct

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1 put forward to the Health Department that has been satisfactory
2 to them to this day?

3 A No, sir.

4 MR. CRIGLER: I don't have any further
5 questions.

6
7 CROSS-EXAMINATION

8 BY MR. VANCE:

9 Q I have a few brief questions, Mr. Godfrey.
10 You testified about some personality problems that may have
11 occurred with Mr. Borders. Do you know Mr. Burke, the
12 sanitarian supervisor?

13 A Yes, sir, I have met the gentleman.

14 Q Have any comparable types of conflicts
15 occurred between Mr. Burke and Mr. Miller, to your knowledge?

16 A Not to my knowledge.

17 Q Do you know who Mr. Bodkin is, the regional
18 sanitarian?

19 A I met the gentleman on the site.

20 Q To your knowledge, have any such conflicts
21 occurred between Mr. Bodkin and Mr. Miller?

22 A None whatsoever, to my knowledge.

23 Q You testified that a man from VPI met with
24 you and some other persons on the site, did you not?

25 A Mr. Bodkin, and what's this other gentle-

J. E. Godfrey - Cross

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1 man's name? I just--

2 Q Does the name Meyer sound familiar?

3 A Mr. Meyer, Mr. Bodkin, Mr. Burke, Mr.
4 Borders, yes, sir.

5 Q Are you aware that Mr. Meyer is not a
6 State Health Department employee, that he's an employee of
7 Virginia Tech and he's a soil scientist?

8 A I figured he was a soil scientist, but I
9 definitely figured that he was an employee of the state.

10 Q He is, yes, sir. Did any comparable types
11 of personality conflicts arise between Mr. Meyer and Mr.
12 Miller?

13 A None whatsoever, no. The fact is, I don't
14 really believe, if my memory serves me right, that Mr. Miller
15 at this particular time that I am speaking about was with us
16 there. I don't think Mr. Miller was there at that time. I
17 think R. B. Thomas' man, a man by the name of Mr. Hawkins, was
18 there.

19 Q When did these two meetings at the site
20 take place, do you recall?

21 A You mean datewise?

22 Q Yes, sir.

23 A No, sir.

24 Q At the meeting that you just spoke of
25 attended by Mr. Burke, Mr. Meyer, and Mr. Bodkin, can you

J. E. Godfrey - Cross

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1 tell the Court exactly what happened out at the site that
2 day?

3 A Well, they conferred with this Mr. Hawkins,
4 and they talked in technical terms and so forth and so on.
5 I would say that Mr. Hawkins gave me the opinion that when
6 they left everything was green, that we were going to have a
7 permit.

8 Q How long did that meeting take place?

9 A A couple of hours because Mr. Miller had
10 already dug holes with these big machines, and he had some
11 cavities in there and had some holes in there, and in my
12 opinion Mr. Meyer was right thorough in examining these.

13 Q What exactly did Mr. Meyer do on the site
14 that day, do you recall? Did he go around the site and
15 physically examine the holes?

16 A Yes, sir.

17 Q Did he take any core samples with soil
18 augers on the site that day?

19 A You mean like took a sample and took it
20 with him?

21 Q Not necessarily took it with him, but did
22 he actually feel the soil, or did he get the soil in his hand
23 and physically examine it?

24 A Yes, sir, he did.

25 Q Did he say anything at that site that gave

J. E. Godfrey - Cross

53.

1 you the impression that he had prejudged whether or not that
2 site was acceptable or not?

3 A. Prejudged? No.

4 Q. What about Mr. Bodkin, did Mr. Bodkin go
5 around to each one of the holes?

6 A. Mr. Bodkin, he was stalling a bit. Mr.
7 Meyer did the work, he went down in the holes, he didn't
8 save himself a bit.

9 Q. Did Mr. Meyer physically go down in the
10 backhoe pits?

11 A. Yes, sir. I even helped him out.

12 Q. Now, you testified that Health Department
13 approval of a drainfield site was a precondition to a transfer
14 of property in this contract, is that right?

15 A. Yes, sir.

16 Q. Do you recall for sure whether or not the
17 contract said that a drainfield site had to be there, or in
18 the alternative that it might have said that a Health Depart-
19 ment-approved sewage disposal system had to be provided?

20 A. The meaning is perk approval, yes, sir,
21 that it would be approved. The whole idea of it is that he
22 can build a house there.

23 Q. Are you aware of the fact that the Health
24 Department records, again refreshing your memory it's Item 52
25 in the record, Your Honor, contains a statement from Mr.

1 Burke that: We will give full and prompt consideration to
2 any alternative method of sewage disposal. Are you aware of
3 that?

4 A I am ashamed of myself. It could have been
5 in one of my letters from Mr. Burke or Mr. Borders, and that
6 I may have it in my file, but I would say, no, that I am not
7 aware of it.

8 THE COURT: That's your answer, no, you are
9 not aware of it. Proceed, gentlemen. Proceed.

10 Q To your knowledge, have any alternative
11 mechanisms for disposing of sewage been proposed for this
12 site, alternatives to septic tanks?

13 A No.

14 Q You-all have made no proffers of any
15 alternative methods for disposing of sewage?

16 A May I say something, Your Honor?

17 THE COURT: Say whatever you want.

18 Q Go ahead.

19 A Mr. Miller has years of experience in this
20 field. The time between the time I bought this piece of
21 property and when I was trying to sell it, things must have
22 changed like 180 degrees in Culpeper County because when I
23 bought the property they were building and they have built
24 through the seven years in and around the property, and
25 everything is going smoothly. I in no way when I sold that

J. E. Godfrey - Cross

55.

1 property to Mr. Miller thought that I was hooking him, trying
2 to get him sucked into a bum deal or anything. I thought I
3 was making a very good deal. Then when I found out that he's
4 a contractor, he has had experience, et cetera, I wondered
5 why he would be so insistent that this is right and they would
6 be giving him such a bad time.

7 I want to reiterate this thing that you have
8 here. Mr. Burke came out there three individual times and
9 would definitely not go deeper than three feet, noway. He
10 had a thing about this big, and he would say: This is as far
11 as I am going to go.

12 Now, what you have got to understand is,
13 all the literature, everything that everybody knows is on
14 this three feet. Mr. Miller has already said that at three
15 feet is what they call blackjack. He tells them to go under-
16 neath that to catch the white sand when sand of course dis-
17 perses the water.

18 I am in the middle of this thing. I have
19 gone through this for two and a half years, the expense and
20 everything. For what? Two people have authority, should
21 have authority, but there is a conflict. I understand from
22 very good sources throughout the Northern Virginia area that
23 these drain fields are put in from one foot to twelve feet
24 deep, that it's common. Why does a man come down to my place,
25 what has he got against me that he will only go down three

J. E. Godfrey - Cross

56.

1 feet? All your paperwork, mister, shows three feet. They
2 won't go any further than three feet. I don't understand it,
3 and that's my problem.

4 Q Did Mr. Meyer go below three feet?

5 A No, sir.

6 Q Mr. Meyer didn't when he went down in the
7 pits?

8 A No, sir. He went down and looked, but I
9 didn't see him take any samples, he just went down and
10 observed.

11 Q But the pits were dug more than three feet?

12 A Yes, sir.

13 Q So, he was down below this three-foot level
14 that you are talking about?

15 A He was physically down below the three feet.

16 Q The pits went down to the weathered diabase,
17 didn't they? The pits went down below the clay, didn't they?

18 A Definitely.

19 MR. VANCE: I have no further questions,
20 Your Honor.

21 THE COURT: All right, sir, step down.

22
23 WITNESS STOOD DOWN

24
25 MR. CRIGLER: That's our case, Your Honor.

1 THE COURT: All right. Any rebuttal?

2 MR. VANCE: Your Honor, the rebuttal rests
3 entirely in the agency record. I can either do this
4 at this time as a presentation of evidence, or I can,
5 in the alternative, do it in the form of closing
6 argument after Mr. Crigler has made his closing
7 argument. My entire case is the agency record, Your
8 Honor.

9 THE COURT: All right, proceed with your
10 argument then, sir.

11 MR. CRIGLER: If it please the Court, I
12 think where we are at this juncture is a situation
13 where the Health Department initially disapproved
14 an application for a septic tank permit, and when
15 alternatives were sought they recommended certain
16 people to do the testing. The people were hired
17 not only on one occasion, but on two occasions, two
18 separate individuals, and after they reviewed it
19 the Health Department again denied it.

20 I think the testimony has been clear that
21 all of the Health Department's position has been on
22 this three feet of clay over which we have no prob-
23 lem.

24 THE COURT: Now, did Mr. Houston approve
25 this thing?

1 MR. CRIGLER: Yes, sir.

2 THE COURT: Did he set up a system?

3 MR. CRIGLER: Yes, sir.

4 THE COURT: What did his system provide?

5 MR. CRIGLER: If it please the Court--

6 THE COURT: You-all never have gotten to
7 this issue in the case.

8 MR. CRIGLER: It was in the record, and I
9 was going to get to that. Exhibit No. 23 is, I
10 believe, Mr. Houston's report, and it's a letter
11 dated May the 31st, 1977 with a number of attach-
12 ments, and his proposal was one site as being more
13 preferable, and at a less preferable site you could
14 put in a system which goes under this clay, which
15 goes into the sand, and which with enough drainage
16 field would be sufficient, and if you engaged any
17 boulders or rock, then take a backhoe and dig them
18 out. That's all he said to do, and he says there's
19 your system.

20 THE COURT: What was the other man's name?
21 Vaughan?

22 MR. CRIGLER: No, it was Thomas, Your Honor.

23 THE COURT: What did he recommend?

24 MR. CRIGLER: The same thing.

25 THE COURT: Well, did the Health Department

1 come up with any proposal in reference to what it
2 thought should be done?

3 MR. CRIGLER: The only thing that it did,
4 Your Honor, was that when a proposal was made, it
5 would reject it and say to come back with something
6 else.

7 THE COURT: It made no proposal of its own?

8 MR. CRIGLER: No, sir. If it please the
9 Court, I think the Court can see that what the people
10 have been caught in was an administrative Catch 22.
11 They would do something, and then it would be dis-
12 approved, and they would recommend that they do some-
13 thing else, but then that would be disapproved, and
14 that's what they were being faced with all the way
15 down the line.

16 My argument, Your Honor, is try it and see
17 if it works. If it works, nothing else has to be
18 done, it's there.

19 THE COURT: This suit was brought in August
20 of 1977, Mr. Crigler. Why is this case so late
21 getting to this court?

22 MR. CRIGLER: Your Honor, there are a number
23 of reasons. If I can be candid with the Court, first
24 of all, financial arrangements, that has been one of
25 the problems in the case because Mr. Godfrey is sit-

1 ting on two hundred and some acres that he's been
2 paying on. Mr. Miller has been paying some expenses,
3 up to \$5,000, dealing with getting all this approved.
4 There was a hiatus period where both parties were
5 dried up in funds.

6 THE COURT: What has that got to do with
7 the hearing before this Court?

8 MR. CRIGLER: If you look at Exhibit 52,
9 the Health Department said: Bring some more sites.
10 So, we attempted to bring more sites, and every time
11 we tried a different site they disapproved it.

12 THE COURT: It looks like to me that you
13 have used judicial process to deprive these gentle-
14 men of their rights, that's the reason I am asking
15 you why this case didn't come before this Court
16 previously. Is it your fault, or is it Mr. Vance's
17 fault, or whose fault is it?

18 MR. CRIGLER: I think it's a combination
19 of matters, one of which was trying alternative
20 sites with the Health Department, which didn't work
21 out.

22 THE COURT: All right, sir.

23 MR. CRIGLER: That's all I have.

24 MR. VANCE: Your Honor, let me respond to
25 the last point that the Court obviously has a great

1 deal of concern about, why is it that the Court is at
2 this late date hearing this matter.

3 THE COURT: That's exactly right.

4 MR. VANCE: Your Honor, the final case
5 decision that is being appealed from was rendered
6 on July 28th, 1977. That case decision said in it:
7 There are two sites that we have looked at in
8 exhaustive detail, and those two sites aren't any
9 good; however, there are other sites out there,
10 this is a big piece of land, and if you can come
11 back with an alternative site that meets these four
12 identified criteria--and those four criteria are
13 laid out in the record--then we will give you a
14 septic tank permit.

15 In addition to that, the record also, on
16 Page 58 and 59 shows that there are other alterna-
17 tives to a septic tank. A septic tank is beyond a
18 doubt the preferred mechanism by which people dis-
19 pose of sewage for homes when they don't have sewers
20 just because it's the cheapest, but there are
21 alternatives to it, there are about ten or so dif-
22 ferent alternatives to septic tanks.

23 An attempt, I believe, was made by both the
24 Health Department and by the plaintiffs in this
25 matter to find alternatives, first off to try to

1 find an alternative septic tank location because if
2 you can put a septic tank in that would be the best
3 way and cheapest way for everybody to do it. At
4 least three different sites were tried and rejected,
5 and the agency record will show that those three
6 additional sites were looked at and were rejected.
7 They weren't gone all the way up to the appeal pro-
8 cedure to the State Health Commissioner, the matter
9 ended up getting litigated first.

10 Now, as to the other options, admittedly
11 they are more expensive than septic tanks, and
12 presumably the reason why those other options, which
13 may run as high as \$5,000, which I am told is the
14 price for a sand filter, some as high as \$10,000--

15 THE COURT: Well, has the State Health
16 Department ever said, Mr. Vance: If you do so-and-
17 so we will grant you a permit?

18 MR. VANCE: No, sir.

19 THE COURT: Why not?

20 MR. VANCE: Because, first off, you have
21 got one sanitarian in the county. The way that the
22 system works, Your Honor, is this: A person who
23 wants to put in a sewage disposal system for a
24 single-family house--

25 THE COURT: So, you are saying all this must

1 come from the other person?

2 MR. VANCE: Yes, sir.

3 THE COURT: Is that arbitrary and capricious
4 in itself?

5 MR. VANCE: Well, Your Honor, the reason
6 why we contend that it isn't is because the state
7 has a limited amount of funds, it has to take all
8 of our tax funds--

9 THE COURT: Well, the state has a limited
10 amount of funds, and this man has an unlimited amount
11 of funds, is that the position of the Attorney
12 General?

13 MR. VANCE: No, sir, no. Our position is
14 that there are alternatives available which have not
15 been explored. We maintain that the record shows
16 that there are alternatives that exist that have not
17 been explored. We maintain that the record shows
18 clearly that the two specific sites that the State
19 Health Commissioner has ruled on, are not acceptable,
20 and we think that if the Court reads through the
21 record on this and attempts to try to find evidence
22 that somewhere on this entire tract a septic tank
23 would go, that the Court will find no evidence that
24 there is anywhere a septic tank will go. That's not
25 to say that something else won't go on this site,

1 that a sand filter or some other more expensive
2 technique can't be used.

3 But, Your Honor, the evidence that these
4 sites are unacceptable is set forth in Page 44 of
5 the hearing that was held before the State Health
6 Commissioner. That evidence is also supplemented
7 by the evidence of Mr. Meyer, who is a VPI soil
8 scientist and not a State Health Department employee,
9 and through the testimony here said physically went
10 down into those pits that had been dug on the site.

11 The plaintiffs, Your Honor, justifiably
12 want a site to get rid of the sewage so they can
13 build a house. The Health Department agrees to that.
14 Your Honor, on Page 73 Dr. LeGarde is quoted as say-
15 ing, "We will examine any proposal at any time, and
16 if their engineer offers a solution to this thing
17 that we can accept, then certainly we will. We will
18 attempt to help the man find a place to live, that's
19 our business, that's what we do. We are obligated
20 to be sure that we don't create a public health
21 hazard or a nuisance."

22 THE COURT: Did you do it?

23 MR. VANCE: We have examined every proposal
24 made, Your Honor.

25 THE COURT: All right. Did you make any

1 proposals?

2 MR. VANCE: Our contention is that alterna-
3 tives to septic tanks were not offered, that they
4 never have been offered, and our contention further
5 is that this property will not support a septic
6 tank. We maintain that the record bears that out,
7 Your Honor.

8 Your Honor, there may have been difficulties
9 between Mr. Miller and Mr. Borders, and the testimony
10 is that there was, but Mr. Borders is the very bottom
11 rung in a very long and complex decision-making
12 process. Mr. Borders answers to Mr. Burke, who
13 answers to Mr. Bodkin, and both Mr. Burke and Mr.
14 Bodkin have been out there and looked at this. Mr.
15 Meyer, who is an independent VPI soil scientist has
16 been out here and looked at this property, and he
17 said the property will not accept a septic tank.
18 That decision has been the subject of an exhaustive
19 hearing before the State Health Commissioner that
20 was 70-some pages long. Counsel for the plaintiff
21 was there to cross-examine all the witnesses and to
22 present any kind of evidence that they had, and you
23 will note, Your Honor, that the conflicts concerning
24 Mr. Miller and Mr. Borders weren't brought out during
25 that hearing.

1 Your Honor, this matter has received exhaus-
2 tive review by the state agency charged with the
3 responsibility for protecting public health. This
4 is not like the case where you have a man applying
5 for a business license or some kind of license that
6 could only affect him if he gets the license. Your
7 Honor, you have got a public health concern here,
8 and if he puts in this facility and it fails, then
9 not only is he going to be endangered, but lots of
10 other people could conceivably be endangered by it.

11 Your Honor, we would submit to the Court
12 that the evidence in the record supports the deci-
13 sion that has been reached by the State Health
14 Commissioner, and we would ask that the Court review
15 the agency record in depth, and we will certainly
16 be glad to respond again and come back again, Your
17 Honor, if the Court has further questions after the
18 agency record has been reviewed.

19 THE COURT: All right, sir.

20 MR. STEKETEE: If the Court please, I be-
21 lieve at this point Mr. Crigler would have the
22 opportunity to go ahead, but I would ask leave of
23 court to proceed in his behalf in response.

24 THE COURT: All right.

25 MR. STEKETEE: I think it's only fair that

1 the Court ask why this has taken so long. I think
2 it's only fair for us to respond that Mr. Miller has
3 done everything possible in the past two years to
4 provide this administration with the information
5 they have needed, which they required of him, which
6 they demanded of him to meet this need of his to
7 develop this property.

8 What Mr. Miller did not realize in this
9 period of time was that what he was trying to get,
10 this right of property, was dissolving into a mere
11 privilege of property at the whim and fancy of this
12 local administration. Nevertheless, he still tried
13 to eke out one proposal after another, finally
14 resolving in his mind that this was the least costly
15 means by which he could attack the problem.

16 Therefore, it is in court today on this
17 problem. It is not that there has not been anything
18 submitted that has been shown to be acceptable. To
19 the contrary, there have been three showings of
20 acceptable proposals. The Court only need look at
21 the proposal of Mr. Thomas and two made by Mr.
22 Houston.

23 Certainly the Court must find that Mr.
24 Miller has done everything possible, and that Mr.
25 Godfrey has done everything possible to resolve this

1 situation. The problem has laid with the administra-
2 tion, it's the moral of chasing a tail that never
3 exists, a changing of the right of property owner-
4 ship into a mere privilege, and that's why we are
5 here today. We submit that that is purely arbitrary
6 and capricious conduct by the local agency and the
7 state administration.

8 We ask for relief by the Court.

9 THE COURT: All right, sir.

10 MR. STEKETEE: Thank you, Your Honor.

11 THE COURT: Gentlemen, I still say to you-
12 all that when a suit is filed in 1977, the matter
13 should have been before this Court long before now.
14 I don't approve of using judicial process to deprive
15 people of their rights.

16 There isn't any question in my mind in this
17 case that the State Health Department has acted
18 arbitrarily and capriciously, the local Health Depart-
19 ment and the State Health Department both have.

20 I don't think the State Health Department
21 can sit back on its righteousness and say: We just
22 deny everything you propose. I think that in and of
23 itself is arbitrary and capricious.

24 So, I am going to declare that it is by
25 court order, and we will see if the Supreme Court

1 wants to set that aside. If they do, it's all right
2 with me.

3 In the meantime, the Court is going to
4 direct by a court order that this man has a right
5 to build a septic tank and according to Mr. Houston's
6 specifications, and let that also be appealed.

7 That concludes this matter, gentlemen. I
8 might say that in some courts property rights have
9 no bearing, but in this court they do, and as long
10 as I am Judge here people are not going to be
11 deprived of property rights in any such high-handed
12 manner as has been done here.

13 All right, gentlemen, that concludes this
14 matter as far as this Court is concerned.

15 MR. CRIGLER: Your Honor, may I ask some-
16 thing about the language of that order? I believe
17 in light of the Supreme Court decisions the order
18 of this court may be better drawn directing the
19 agency to issue the permit. I don't want to create
20 any problems for the Court, but I think from an
21 administrative review point--

22 THE COURT: All right, direct the agency
23 to issue the permit, and let it go from there.

24 MR. VANCE: Your Honor, may we respectfully
25 note our exceptions for the record?

1 THE COURT: Yes, sir, I expect you to appeal
2 it. I think that the Attorney General's Office may
3 be criticized in this case also, Mr. Vance, I think
4 you have been dragging your feet throughout this
5 case, and I think that in and of itself is using
6 judicial process to deprive people of their rights.
7 If this Court has any say-so in that connection it
8 criticizes the Attorney General's Office.

9 MR. VANCE: Yes, sir.

10 THE COURT: All right.

11 MR. VANCE: Your Honor, may we respectfully
12 ask also that the transcript of the hearing be
13 entered into the record of this matter, and may we
14 also--

15 THE COURT: You have introduced that in
16 evidence with no objection, I presume.

17 MR. VANCE: The transcript, Your Honor.

18 MR. CRIGLER: This transcript, Your Honor.

19 THE COURT: Certainly, there is no ques-
20 tion about that.

21 MR. VANCE: Yes, sir.

22 THE COURT: Good day, gentlemen.

23
24 HEARING CONCLUDED
25

ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN RULING THE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN DENYING THE SEPTIC TANK PERMIT AND IN ORDERING THE STATE BOARD OF HEALTH TO ISSUE A SEPTIC TANK PERMIT TO APPELLEES.

II. THE CIRCUIT COURT ERRED IN HEARING THIS MATTER PRIOR TO THE TIME THAT APPELLEES HAD EXHAUSTED THEIR ADMINISTRATIVE REMEDIES.

III. THE CIRCUIT COURT ERRED IN ALLOWING APPELLEES TO INTRODUCE AT TRIAL ORAL EVIDENCE OUTSIDE THE AGENCY RECORD