



# COMMONWEALTH of VIRGINIA

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July 28, 2008

The Honorable Lynwood W. Lewis, Jr.  
Member, House of Delegates  
P.O. Box 760  
Accomac, Virginia 23301

Dear Delegate Lewis:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You inquire whether 12 VAC §§ 5-610-460 and 5-630-230, the Onsite Sewage Quality Assurance Manual of the Department of Health, or any other provision of Virginia law authorizes the Department to require a “survey plat” in applications for construction permits for private wells.

## Response

It is my opinion that the Department of Health has the authority to require submission of a survey plat with an application for a private well construction permit.

## Background

The Department of Health (the “Department”) distributed its “Procedures Manual for the Onsite Sewage Program” (the “Manual”) on October 17, 2007.<sup>1</sup> The purpose of the Manual is to provide guidance to local Health Departments and to identify measurable standards for internal processes associated with the Sewage Program in an effort to raise the overall quality of the program.<sup>2</sup> The Manual combines the procedures for applying for permits for septic systems under the Sewage Handling and Disposal Regulations<sup>3</sup> (the “Sewage Regulations”) and private wells under the Private Well Regulations<sup>4</sup> (the “Well Regulations”) (collectively, the “Regulations”).<sup>5</sup> You state that local health departments

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<sup>1</sup> See Memorandum from Jeffrey Lake, M.S., Deputy Commissioner for Community Health Services, Department of Health (Oct. 17, 2007) (copy on file with author); see also Dep’t of Health, Procedures Manual for the Onsite Sewage Program (Oct. 17, 2007) (copy on file with author) [hereinafter “Manual”].

<sup>2</sup> See *id.*, Introduction, “Establishing a Quality Assurance Program.”

<sup>3</sup> 12 VA. ADMIN. CODE §§ 5-610-20 to 5-610-1170 (2002) (codified in scattered sections).

<sup>4</sup> 12 VA. ADMIN. CODE §§ 5-630-10 to 5-630-480 (2002) (codified in scattered sections).

<sup>5</sup> See Manual, *supra* note 1, Septic & Well Bare Application Process, app. 2, “Instructions for Well and Septic Permit Applications”; *id.* app. 3, “Check List for Septic or Septic and Well Applications.”

throughout the Commonwealth have been implementing the processes outlined within the Manual. You indicate that the Eastern Shore Health District, relying upon the Manual and the Regulations, recently has required the submission of a survey plat as part of a complete application package for a private well construction permit. Therefore, you ask whether the Department's policy in the Manual to require such survey plat is a reasonable interpretation of the Regulations.

### **Applicable Law and Discussion**

The Sewage Regulations, adopted by the Board of Health (the "Board") pursuant to § 32.1-164, specifically authorize the Department to require a survey plat. The Sewage Regulations require a "site plan (sketch) ... to evaluate the suitability of a subsurface soil absorption system for that site."<sup>6</sup> "[A]s a minimum, prior to issuance of the construction permit the perimeter of the soil absorption area site or sites shall be shown on a copy of a surveyed plat of the property."<sup>7</sup>

Pursuant to § 32.1-176.4(A), the Department enforces the Well Regulations adopted by the Board to govern the location and construction of private wells in the Commonwealth. The Well Regulations require a completed application to include "[a] site plan showing the proposed well site, property boundaries, accurate locations of actual or proposed sewage disposal systems, recorded easements, and other sources of contamination within 100 feet of the proposed well site."<sup>8</sup> The Well Regulations do not define the term "site plan" and do not include a specific requirement for a survey plat.

The Manual includes a survey plat of the property as an element of a complete application for both a septic permit and a private well construction permit, thereby equating the requirement for a site plan or site sketch with a survey plat.<sup>9</sup> The Manual is in effect a guidance document.<sup>10</sup> Such documents, while not having the force and effect of law,<sup>11</sup> serve to advise the agency's staff and the public of the agency's interpretation of its regulations.<sup>12</sup> Courts generally give such "interpretative" rules persuasive effect:

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<sup>6</sup>12 VA. ADMIN. CODE § 5-610-460.

<sup>7</sup>*Id.*

<sup>8</sup>12 VA. ADMIN. CODE § 5-630-230.

<sup>9</sup>*See* Manual, *supra* note 1, Septic & Well Bare Application Process, app. 2, "Instructions for Well and Septic Permit Applications."

<sup>10</sup>The Administrative Process Act, §§ 2.2-4000 to 2.2-4031, defines a "guidance document" as "any document developed by a state agency ... that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations." VA. CODE ANN. § 2.2-4001 (Supp. 2007).

<sup>11</sup>*NRV Real Estate, LLC v. Va. Dep't of Health*, 51 Va. App. 514, 526-27, 659 S.E.2d 527, 533 (2008).

<sup>12</sup>The General Assembly has charged the Department, like all administrative agencies, with the interpretation and application of regulations adopted by the Board. *See* VA. CODE ANN. § 32.1-176.4(A) (2004) (mandating that Department enforce rules and regulations of Board regarding location and construction of private wells). Reviewing courts will afford varying degrees of deference to the decision of an administrative agency. *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 243-44, 369 S.E.2d 1, 8 (1988). If the issue to be resolved falls within the specialized competence of the agency, the latter's decision is entitled to special weight. *Id.* at 244, 369 S.E.2d at 8. That interpretation will not be reversed unless it is arbitrary and capricious. *Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 159, 384 S.E.2d 622, 626 (1989). The Department's interpretation of the Board's regulations in the present situation to a given permit application would be such an issue.

[A]n agency “has incidental powers which are reasonably implied as a necessary incident to its expressly granted powers for accomplishing [its] purposes.” This includes the adoption of interpretative rules. Since such rules do not undergo the same scrutiny as do formally promulgated regulations, they “do not purport to be a substitute for the statute.” “[T]hey do not have the force of law.” In spite of this, interpretative rules carry persuasive effect. We give “great deference to an administrative agency’s interpretation of the regulations it is responsible for enforcing,” for “it is inappropriate for a court to second-guess the manner in which an agency responds to its responsibility of carrying out the Commonwealth’s policy when those means are not prohibited[.]”<sup>13</sup>

Determining the appropriate components to be included in an application for a private well permit falls within the area of the Department’s special area of expertise. The Department has determined that the requirement of a survey as part of such an application is necessary to accomplish the proper purpose of the Well Regulations.<sup>14</sup> I find no statutes or regulations that would prohibit the Department from adopting such a requirement.

The General Assembly considers the preparation of a plat for site plans to be part of the practice of surveying.<sup>15</sup> As previously noted, 12 VAC § 5-630-230 of the Well Regulations requires a “site plan” to show among other things the property boundaries, the accurate location of actual or proposed sewage disposal systems, the proposed well site, and any recorded easements. Such items would necessitate a properly prepared, reliable, and accurate survey or plat to provide the Department with the information to make a correct and informed decision regarding a well application. Thus, in my opinion, it is reasonable for the Department to require that a “site plan” under the Well Regulations include a survey.

### Conclusion

Accordingly, it is my opinion that the Department of Health has the authority to require submission of a survey plat with an application for a private well construction permit.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

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<sup>13</sup>NRV Real Estate, LLC v. Va. Dep’t of Health, 51 Va. App. 514, 526-27, 659 S.E.2d. 527, 533-34 (2008) (citations omitted) (first and second alterations in original).

<sup>14</sup>See *supra* note 9 and accompanying text.

<sup>15</sup>See VA. CODE ANN. § 54.1-408 (2005) (expanding statutory definition of “practice of land surveying” to provide that “[i]n addition to the work defined in § 54-400, a land surveyor may, for subdivisions, *site plans* and plans of development only, prepare plats, plans and profiles for roads, storm drainage systems, [and] sanitary sewer extensions.” (Emphasis added.)