STATE OF NEW HAMPSHIRE

WATER COUNCIL

DOCKET NO. 03-14 WC

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DEC 30 2003

APPEAL OF GERALD A. BELL

NOTICE OF FILING OF DECLARATORY JUDGMENT ACTION

NOW COMES GERALD A. BELL OF 701 Old Homestead Highway, Swanzey, County of Cheshire and State of New Hampshire by his attorney and says as follows:

1. That notice is hereby given that Gerald A. Bell has simultaneously with the filing of this Notice filed with the Merrimack County Superior Court a Petition For Declaratory Relief Pursuant To RSA 541-A:24 in the matter of Gerald A. Bell v. State of New Hampshire, Department of Environmental Services.

2. That a true copy of said Petition For Declaratory Relief is attached hereto.

COPY

GERALD A. BELL

December 29, 2003

By: _____
Michael P. Bentley
His Attorney

I certify that copy of the within Notice along with a copy of the attached Petition For Declaratory Relief was forward to Jennifer J. Patterson, Esq. and Thomas R. Hanna, Esq. this 29th day of December, 2003.

COPY

_____
Michael P. Bentley

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.
NO.

SUPERIOR COURT
DECEMBER TERM, 2003

Gerald A. Bell

v.

State of New Hampshire, Department
of Environmental Services

PETITION FOR DECLARATORY RELIEF
PURSUANT TO RSA 541-A:24

NOW COMES GERALD A. BELL OF 701 Old Homestead Highway, Swanzey, County of Cheshire and State of New Hampshire 03446 and complains against the State of New Hampshire, Department of Environmental Services (hereinafter referred to as "DES"), 6 Hazen Drive, Concord, County of Merrimack and State of New Hampshire 03301 and says as follows:

1. That for the past twenty one (21) years, Gerald A. Bell has operated a properly licensed septage facility at property owned by him located on Whitcomb Road in Swanzey, County of Cheshire and State of New Hampshire said site being designated on the records of the Defendant as NHDES Site #198405066-S-001.

2. That the previously existing groundwater permit issued by the Defendant to the Plaintiff, and which permit authorized the Plaintiff to operate the facility, expired on May 20, 2003.

3. That effective as of May 5, 1999, while Gerald A. Bell was operating his septage facility under the previously issued groundwater permit, the Department of Environmental Services adopted Env-Ws1608 entitled "Facility Permit Requirements" thereby adopting

substantially different requirements for septage facilities then had previously existed in the State of New Hampshire.

4. That nowhere in Env-Ws 1608 is there any reference to the manner in which pre-existing, properly permitted septage facilities were to be re-licensed in view of the newly adopted rules.

5. That for 21 years, Gerald A. Bell, has made a substantial financial investment in his septage facility in order to meet all state requirements applicable to that facility.

6. That Env-Ws 1608.08 promulgated "Facility Standards" apparently applicable to all septage facilities, whether new or pre-existing, with Env-Ws 1608.08(f) adopting Table 1608-I setting forth Buffer Distances, so-called, with the further proviso that "...no person shall situate or operate a facility within the buffer distances specified in Table 1608-I."

7. That Env-Ws 1608.08(f) and Table 1608-I included therein, set forth that no person shall situate or operate a septage facility within five hundred (500') feet of a property line.

8. That on April 25, 2003, as revised on June 9, 2003, the Plaintiff submitted to the Defendant a Septage Facility Permit Application seeking to renew his permit which had expired on May 20, 2003.

9. That as reflected in said application, one of the Plaintiff's existing abutter's (Richard Cote) property line is 85' feet southerly of the existing septage lagoons on the Plaintiff's property.

10. That although the Buffer Distance to an abutter's property line may be reduced below 500 feet with the abutter's prior written consent, the Plaintiff's abutter, Richard Cote, refused to give his consent to a reduced buffer.

11. That Gerald A. Bell, pursuant to Env Ws1610.01, made application to the New Hampshire Department of Environmental Services, Water Division, Residuals Management Section ("DES") for a waiver of the buffer requirement set forth in Env-Ws 1608.08(g)(2).

12. That by letter dated August 19, 2003, DES denied the application for a waiver submitted by Gerald A. Bell.

13. That as to the facts as they pertain to this application, the abutter in question, Richard Cote, has owned his unimproved real estate since October 13, 1981 with his deed being recorded in Vol. 1008, Pg. 656 of the Cheshire County Registry of Deeds.

14. That for the entire 21 year period of time that the Plaintiff's existing septage facility has been in operation in strict accordance with the requirements of DES, Richard Cote was, in fact, the abutter from who no consent was required.

15. That, in fact, for the entire period of the existence of the Plaintiff's existing facility, Richard Cote has known of the "nuisances from operation of a septage facility," as characterized by DEDS, since it has been his neighbor since day one.

16. That the requirement for the Plaintiff to have to obtain the abutter's consent to a reduced buffer distance permits an abutter to seek unfair and exorbitant compensation from an applicant in exchange for that consent.

17. That while DES might think the abutter's "right is important to assure that the abutter accepts the increased likelihood of nuisances arising from operation of a septage facility" in reality the rule permits an abutter to take unfair advantage of an operator of an existing septage facility and, as it pertains to the facts of this case, is irrelevant since the abutter in question has been such when the Plaintiff's properly permitted septage facility complied with al pre-existing buffer requirements.

18. That as reflected in the Plaintiff's Septage Facility Permit Application, testing has indicated that groundwater movement in the area of the Plaintiff's existing facility is to the north northeast which is away from the Cote property. Further, as it pertains to the facts in this case, the Plaintiff's existing septage facility and Richard Cote have co-existed for over 21 years.

19. That but for the buffer requirement issue, DES has not raised any other substantial technical issues with the Plaintiff's Septage Facility Permit Application.

20. That the Plaintiff provides a valuable service to inhabitants of Cheshire County who will be substantially inconvenienced if the applicant is forced to close his septage facility which would result in increased dumping at the City of Keene Waste Water Treatment facility where septage can be off loaded only during certain hours during non-holiday weekdays.

21. That due to the nature of the septage haulage business, it is beneficial to the Plaintiff, and to the members of the public who he serves, to be able to pump and remove septage from customer's property on days and at hours where the City of Keene's facility is not opened which will be impossible unless the Plaintiff is able to re-license and to use his septage facility.

22. That Env-Ws 1608 does not address, in any fashion, how a pre-existing, properly permitted septage facility can be re-licensed when the pre-existing facility can't possibly comply with the newly adopted requirements nor do the rules provide for the granting of a variance based upon the merits of the application instead allowing a waiver only if one could obtain the written consent of an abutter.

23. That to couch the granting of a variance solely on obtaining the written consent of an abutter is neither fair nor equitable and, when applied to the facts of this case, is akin to having no variance procedure at all.

24. That the 500 foot buffer distance from a property line imposed by the Defendant's new rule is arbitrary and capricious with there being no justification for it in scientific fact.

25. That the provisions of Env-Ws-1608 interfere with and impair the legal rights and privileges of the Plaintiff and constitute a taking of a vested property right for which the Plaintiff has expended considerable sums over 21 years in order to maintain compliance with State regulations.

WHEREFORE Gerald A. Bell respectfully prays as follows:

A. That the Court issue Orders of Notice on this Petition For Declaratory Relief.

B. That the Court, after hearing, rule that the provisions of Env-Ws 1608.08(f) and Table 1608-I are invalid and not applicable to the Plaintiff's Septage Permit Application as they pertain to the distance of that facility to any property line with an abutter.

C. That the Court find that the rules promulgated as "Env-Ws 1608 Facility Permit Requirements" are void and not applicable to pre-existing, properly permitted septage facilities that were in existence prior to May 5, 1999.

D. That the Court find that the rules promulgated as "Env-Ws 1608 Facility Permit Requirements" are void in that the rules fail to provide any equitable procedure allowing for a variance from the applicability of the rules to a pre-existing septic facility when strict compliance with the rule is physically impossible.

E. That the Court find that the provisions of Env-Ws 1608.08(f) couching the granting of a waiver only upon the obtaining from an abutter of their express written consent is no remedy at all but only subjects one such as the Plaintiff to a demand from an abutter for unreasonable compensation due to the predicament which the Env-Ws 1608 has placed one such as the Plaintiff in.

F. That the Court find that the provisions of Env-WS 1608.08(f) and the 500 foot buffer distance to a property line as set forth in Table 1608-1 is arbitrary and capricious and not supported by any scientific fact.

G. For such further and other relief as may be equitable and just.

December 29, 2003

COPY

Gerald A. Bell

STATE OF NEW HAMPSHIRE, CHESHIRE, SS.

Personally appeared Gerald A. Bell, before me, and acknowledged the foregoing this 29th day of December, 2003.

COPY

Notary Public/Justice of the Peace
Printed Name:
My Commission Expires:

Plaintiff:

Gerald A. Bell
701 Old Homestead Highway
Swanzey, NH 03446

Plaintiff's Counsel:

Michael P. Bentley, Esq.
Lane and Bentley, P.C.
106 Washington Street, PO Box 472
Keene, NH 03431
(603) 352-5720

Defendant:

State of New Hampshire
Department of Environmental Services
6 Hazen Drive, PO Box 95
Concord, NH 03301