

RICHARD J. MILLER

County Attorney

P.O. Box 1127
Belton, Texas 76513

Bell County, Texas

(254) 933-5135
1-800-460-2355
FAX (254) 933-5150

RECEIVED

FEB 01 2008

January 30, 2008

OPINION COMMITTEE

FILE # ML-45531-08
I.D. # 45531

The Hon. Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0691-GA

Re: Request for opinion

Dear General Abbott:

A request is herein made for a legal opinion regarding a conflict between county land regulation authority and regulations imposed and interpreted by the Texas Commission on Environmental Quality ("TCEQ").

Fact Situation

Bell County has in its unincorporated area a number of small lots that have been platted for many, many years, preceding the promulgation of current sewage system requirements, many of which are under one-half acre in size. Property owners desiring now to build homes on these sites are encountering a TCEQ requirement, effective on June 13, 2001, that an on-site residential sewage disposal system can only be installed on a single platted residential lot of one-half acre or larger, and if the existing lot is less than one-half acre, the residence must be wholly on that lot and an on-site sewage disposal system can only be on another lot owned by the same person. TCEQ has, over the years, increased minimum standards requiring increasingly larger drain fields for sewage disposal systems. The Bell County Health District is the authorized agent in Bell County for the TCEQ and enforces the minimum standards promulgated by TCEQ. [see attached rules of the Bell County Public Health District].

The county believes that it may allow an owner with a lot under one-half acre to purchase an adjacent lot for the purpose of building a residence across the property lines of the two lots with a sewage system that would meet minimum TCEQ requirements. All that would be required in such circumstance would be the filing of an affidavit that identifies the combined properties as a single "tract" for TCEQ purposes. It would not be necessary for the owner to go through a costly replatting process. TCEQ has opined that its rules do not allow for such a situation and that multiple tracts cannot be combined into a single tract (without replatting) for on-site sewage disposal purposes. As a result of this curious edict, the affected property owner is faced with tremendous additional expense and the county is confronted with the TCEQ dictating its platting parameters in such cases. As TCEQ's authorized agent, Bell County does not issue a sewage system permit unless TCEQ minimum standards are met. It is the county's desire to work with its citizens in these existing situations without engendering more problems because of a bureaucratic dictate that does not make

any sense.

Question

Does the county have the authority to allow tracts to be combined as above described, without the necessity of replatting, in order to accommodate the TCEQ minimum standards with regard to on-site sewage disposal systems?

Discussion

The county's subdivision and platting authority is found in Chapter 232 of the Local Government Code. Section 232.0015 (a) states:

“To determine whether specific divisions of land are required to be platted, a county may define and classify the divisions. A county need not require platting for every division of land otherwise within the scope of this subchapter.”

It probably should be pointed out that the question at issue herein involves the *combination* of already platted properties, not their *division*.

Chapter 366 of the Health and Safety Code governs on-site sewage disposal systems, and gives TCEQ its authority to promulgate rules governing the installation of such systems and to require compliance with its rules. See Sections 366.004, 366.011, and 366.012.

Chapter 285, Title 30, Texas Administrative Code, lays out the on-site sewage facility rules promulgated by TCEQ. Specifically, Section 285.4 [attached] requires that “subdivisions” of single family dwellings now served by a public water supply and using individual on-site sewage disposal systems shall have lots of at least one-half acre. TCEQ strictly interprets Section 285.4(b) as meaning that a proposed residence on a pre-existing non-conforming lot can only be built on that tract, and additional lots must be used for a connected on-site sewage disposal system only, but that a residence cannot be built across property lines of such adjoining lots to make a single tract that meets TCEQ's minimum standards.

TCEQ's ruling in this situation constitutes an incursion on the county's platting authority and decision-making. By allowing a resident to *combine* properties into a single “tract” to accommodate TCEQ minimum standards, the county is resolving a problem at the least expense, but mindful of health needs and requirements. TCEQ's rules assume a residence is being built on a single non-conforming tract, in which case its edict makes sense. However, residences proposed for combined tracts, and which will be built across property lines, are not addressed and there is no violation of any rules or statutes. The permit will be issued when the on-site sewage system meets TCEQ minimum standards. TCEQ's ruling in this situation is arbitrary and wrong.

Your opinion on this matter will be greatly appreciated.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Rick Miller". The signature is fluid and extends to the right with a long, sweeping tail.

Rick Miller
Bell County Attorney

(3) Connecting recreational vehicles or manufactured homes to rental spaces is not considered construction if the existing OSSF system is not altered.

(g) Exclusions. The following systems are not authorized by this subchapter and may require a permit under Chapter 205 or Chapter 305 of this title (relating to General Permits for Waste Discharges or Consolidated Permits, respectively) or an authorization under Chapter 331 of this title (relating to Underground Injection Control):

(1) one or more systems that cumulatively treat and dispose of more than 5,000 gallons of sewage per day on one piece of property;

(2) any system that accepts waste that is either municipal, agricultural, industrial, or other waste as defined in Texas Water Code, Chapter 26;

(3) any system that will discharge into or adjacent to waters in the state; or

(4) any new cluster systems.

(h) Variances. Requests for variances from provisions of this chapter may be considered by the appropriate permitting authority on a case-by-case basis.

(1) A variance may be granted if the owner, or a professional sanitarian or professional engineer representing the owner, demonstrates to the satisfaction of the permitting authority that conditions are such that equivalent or greater protection of the public health and the environment can be provided by alternate means. Variances for separation distances shall not be granted unless the provisions of this chapter cannot be met.

(2) Any request for a variance under this subsection must contain planning materials prepared by either a professional sanitarian or a professional engineer (with appropriate seal, date, and signature).

(i) Unauthorized systems. Boreholes, cesspools, and seepage pits are prohibited for installation or use. Boreholes, cesspools, and seepage pits that treat or dispose of less than 5,000 gallons of sewage per day shall be closed according to §285.36 of this title (relating to Abandoned Tanks, Boreholes, Cesspools, and Seepage Pits). Boreholes, cesspools, and seepage pits that exceed 5,000 gallons of sewage per day must be closed as a Class V injection well under Chapter 331 of this title (relating to Underground Injection Control).

Adopted May 23, 2001

Effective June 13, 2001

§285.4. Facility Planning.

(a) Land planning and site evaluation. Property that will use an OSSF for sewage disposal shall be evaluated for overall site suitability. For property located on the Edwards Aquifer recharge

zone, see §285.40 of this title (relating to OSSFs on the Recharge Zone of the Edwards Aquifer) for additional requirements. The following requirements apply to all sites where an OSSF may be located.

(1) Residential lot sizing.

(A) Platted or unplatted subdivisions served by a public water supply.

Subdivisions of single family dwellings platted or created after the effective date of this section, served by a public water supply and using individual OSSFs for sewage disposal, shall have lots of at least 1/2 acre.

(B) Platted or unplatted subdivisions not served by a public water supply.

Subdivisions of single family dwellings platted or created after the effective date of this section, not served by a public water supply and using individual OSSFs, shall have lots of at least one acre.

(2) Manufactured housing communities or multi-unit residential developments. The owners of manufactured housing communities or multi-unit residential developments that are served by an OSSF and rent or lease space shall submit a sewage disposal plan to the permitting authority for approval. The total anticipated sewage flow for the individual tract of land shall not exceed 5,000 gallons per day. The plan shall be prepared by a professional engineer or professional sanitarian. This plan is in addition to the requirements of subsection (c) of this section.

(b) Approval of OSSF systems on existing small lots or tracts.

(1) Existing small lots or tracts, that do not meet the minimum lot size requirements under subsection (a)(1)(A) or (B) of this section and were either subdivided before January 1, 1988, or had a site-specific sewage disposal plan approved between January 1, 1988, and the effective date of this section, may be approved for an OSSF provided:

(A) minimum separation distances in §285.31(d) of this title (relating to General Criteria for Treatment and Disposal Systems) are maintained;

(B) the site has been evaluated according to §285.30 of this title (relating to Site Evaluation); and

(C) all other requirements of this chapter regarding treatment and disposal are met.

(2) The owner of a single family dwelling on an existing small lot or tract (property 1) may transport the wastewater from the dwelling to an OSSF at another location (property 2) provided that:

(A) both properties (properties 1 and 2) are owned by the same person;

(B) the owner or owner's agent demonstrates that no OSSF authorized under these rules can be installed on the property which contains the single-family dwelling (property 1);

(C) if property not owned by the owner of properties 1 and 2 must be crossed in transporting the sewage, the application includes all right-of-ways and permanent easements needed for the sewage conveyance lines; and

(D) the application includes an affidavit indicating that the owner or the owner's agent recorded the information required by §285.3(b)(3) on the real property deeds of both properties (properties 1 and 2). The deed recording shall state that the properties cannot be sold separately.

(c) **Review of subdivision or development plans.** Before the permit process for individual OSSFs can begin, persons proposing residential subdivisions, manufactured housing communities, multi-unit residential developments, business parks, or other similar uses and using OSSFs for sewage disposal shall submit planning materials for these developments to the permitting authority. The planning materials shall be prepared by a professional engineer or professional sanitarian and shall include an overall site plan, topographic map, 100-year floodplain map, soil survey, location of water wells, locations of easements as identified in §285.91(10) of this title (relating to Tables), and a complete report detailing the types of OSSFs to be considered and their compatibility with area-wide drainage and groundwater. A comprehensive drainage plan shall also be included in these planning materials. The permitting authority will either approve or deny the planning materials, in writing, with a receipt.

Adopted May 23, 2001

Effective June 13, 2001

§285.91 Requirements for Planning Materials.

(a) **Submittal of planning material.** Planning materials required under this chapter shall be submitted by the owner, or owner's agent, to the permitting authority for review and approval according to this section. All planning materials shall comply with this chapter and shall be submitted according to §285.91(9) of this title (relating to Tables). A legal description of the property where an on-site sewage facility (OSSF) is to be installed must be included with the permit application. Additionally, a scale drawing of the OSSF, all structures served by the OSSF, and all items specified in §285.30(b) of this title (relating to Site Evaluation) and §285.91(10) of this title (relating to Tables) must be included with the permit application.

(1) **Planning materials prepared by an owner or installer.** Either the owner or installer may prepare the planning materials for any proposed OSSF not requiring the preparation of plans according to paragraphs (2) or (3) of this subsection.

(2) **Planning materials prepared by a professional engineer or professional sanitarian.** OSSF planning materials shall be prepared by a professional engineer or professional sanitarian (with appropriate seal, date, and signature) as follows, unless otherwise specified in this chapter:

(A) any proposals for treatment or disposal that are not standard as described in Subchapter D of this chapter (relating to Planning, Construction, and Installation Standards for OSSFs) unless otherwise specified under §285.91(9) of this title;

Bell County Public Health District
Additional Rules beyond Chapter 285

- 1). All construction of, alteration, extension or repair to on-site sewage facilities shall be permitted and inspected, regardless of the size of the tract of land.
- 2). All platted subdivisions, approved and filed prior to the date of these Rules, are presumed to be designed and approved for single-family residential use unless alternative land uses or densities are specifically identified on the original plat or accompanying legal documentation (dedication or restrictive covenants).
- 3). All subdivisions, approved after the date of these Rules, not served by a public water supply, must meet the minimum lot size requirements set by the Clearwater Underground Water Conservation District as long as those lot size requirements exceed TAC 30 Chapter 285.
- 4). All undeveloped lots in single family subdivisions approved prior to January, 1988, which do not meet the current minimum lot size of ½ acre with public water, must submit a professional design, regardless of soil or system type, must show a secondary drainfield area equivalent to the proposed drainfield area or adequate area to install a surface discharge drainfield.
- 5). All manufactured housing communities, condominiums or apartment complexes, multi-unit residential developments proposed after the effective date of these Rules, shall meet the following minimum lot size.

1 st living unit	½ acre
Each additional living unit	¼ acre

Definition: Living unit –refers to 1 manufactured home, 1 apartment in an apartment complex or condominium or ½ duplex ect...

- 6). All subdivisions proposed for commercial use, after the effective date of these Rules, must show a site specific design for the facility and the design must show 2x's the proposed drainfield area. The secondary drainfield area must meet the provisions of TAC 30 Chapter 285.
- 7). All commercial facilities changing operation or ownership must submit an estimated water usage projection to the permitting authority. The projection must provide the expected volume and strengths of flow. Any change from projection/approved volume without prior approval from the permitting authority will result in the license to operate the OSSF being revoked and requiring a new license be obtained.
- 8). All facilities holding a food dealers permit, which have additional treatment beyond a septic tank, shall be checked and maintained a minimum of every three months by a certified service provider. A chlorine or fecal coliform test shall be made at each site visit where disinfection is required. One BOD and TSS grab sample test shall be conducted per year. Water meter reading must be submitted with each test result and maintenance report or discharge meter readings, if available.

9). Any secondary treatment device maintained by a qualified homeowner may be periodically inspected by the permitting authority at any reasonable time. If at any time a public health nuisance associated with the homeowner maintained OSSF is confirmed, the property owner loses approval to maintain the system and must contract with a registered Maintenance Provider.

10). In the event that the property owner does not possess a current OSSF maintenance contract on an OSSF on which a maintenance contract is required, or if a system is creating a public health nuisance thirty days after notification, its license to operate will be cancelled. The system will not be re-licensed until the M/C is renewed, the nuisance is abated and the OSSF re-license fee is paid.

11). An installer will not be issued an authorization to construct in Bell County if they are delinquent in submitting required maintenance reports within Bell County.

12). No subsurface disposal system may be installed within 5 (five) feet of a home or buildings foundation (slab).

13). Holding tanks cannot be proposed for new construction. Authorization to utilize a septic tank in an approved design as a temporary holding tank will be good for no more than (60) sixty days.

14). (A) All secondary treatment systems in Bell County require maintenance contracts and testing and reporting to be submitted to the Bell County Public Health District.

(B) All contracted maintenance of an on-site sewage disposal system using aerobic treatment shall be conducted by a TCEQ registered maintenance company. There shall be no homeowner maintenance of OSSF's using secondary treatment unless the owner resides in the single family dwelling and:

- (1) the homeowner is a TCEQ registered maintenance provider for their property's aerobic treatment unit, or
- (2) the homeowner has been certified by the manufacturer of the aerobic treatment unit, or
- (3) the homeowner holds a class D or higher Wastewater Treatment license, or
- (4) the homeowner has been trained on the site by a certified maintenance provider.

(C) All maintenance inspections, including testing and reporting results shall meet all inspection requirements as specified by the Rules and the Bell County Public Health District.

(D) Homeowners failing to submit a maintenance contract, testing and reporting results or falsifying the required documents, will be required to contract with a certified maintenance provider.

The following fees are set by the Bell County Public Health District:

Permit fee

Re-License fee

Re-Inspection fee