

**VIRGINIA:**

**BEFORE THE STATE HEALTH DEPARTMENT  
SEWAGE HANDLING AND DISPOSAL APPEAL REVIEW BOARD**

**In Re: Mr. C.R. Dalton**

**ORDER**

**Findings of Fact.**

Mr. C. R. Dalton ("Mr. Dalton" or the "Permittee") is the owner of record of certain parcel of property identified as Map #76-1-77A in Pulaski County (the "Parcel"). The Parcel comprises approximately 31.4 acres and contains an existing dwelling with onsite sewage system and well.

On January 28, 2002, Mr. Dalton applied for a sewage disposal system construction permit regarding a portion of the 31.4 acre Parcel that he identified as Lot #3 (the "Property"). Mr. Dalton indicated in his application that a proposed dwelling to be serviced by the sewage system would contain two bedrooms and be served by an existing water supply. Documents Mr. Dalton filed with his application indicated that the Property adjoins Va. Route 690 and is part of a proposed subdivision of the larger Parcel into several smaller lots. (Commonwealth's Exhibit 1).

On February 14, 2002, Pulaski County Senior Environmental Health Specialist Michael Campbell ("Mr. Campbell") evaluated the site and soil conditions of the Property and identified an area (the "absorption Area") that complied with the minimum requirements of the 12 VAC 5-610-20, *et seq.* (the "Sewage Handling and Disposal Regulations" or the "Regulations") for a conventional septic-effluent system. That acceptable soil absorption area was located on the side of the proposed dwelling opposite Route 690 and lay generally upslope from both the proposed dwelling and Route 690. Mr. Campbell estimated the percolation rate of the soil absorption area to be 65-70 minutes per inch. Because the percolation rate was greater than 45 minutes per inch, he determined that a reserve area equal to 50 percent of the primary absorption area was required. Accordingly, Mr. Campbell identified a reserve area on the Property (the "Reserve Area") which complied with the minimum requirements of Regulations for a shallow-placed soil absorption system with secondary treatment. This Reserve Area was located on the Property adjacent and parallel to Route 690. (Commonwealth's Exhibit 2).

During the February 14 evaluation of two backhoe pits in the identified Reserve Area, Mr. Campbell noted a dark brown loam (topsoil) horizon, designated "Ap," that was 8 inches deep in one pit and 12 inches deep in the other. He also documented free water at 26 and 28 inches below the surfaces of the pits, respectively. Mr. Campbell noted that a broad drainage way (the "Drainway") separated the Reserve Area from the proposed location of the dwelling on the Property.

On February 14, 2002, Mr. Campbell issued a construction permit (the "Permit") for the Property. (Commonwealth's Exhibit 3).

On July 17, 2002, Mr. Campbell visited the Property to inspect a sewage system being installed on Lot 6 of the Parcel. Mr. Dalton invited Mr. Campbell to look at the Property and Mr. Campbell noted that the Reserve Area previously identified on the Property had been substantially and significantly altered. Specifically, soil material had been excavated from the Reserve Area and used to fill the Drainway and build up a roadbed (the "Roadbed") running perpendicular to the portion of Route 690 adjacent to the Property. The resulting landscape changes diverted drainage from the Drainway to the Reserve Area. A culvert also had been installed under the Roadbed to accept drainage from the newly-configured Drainway. These changes caused the Reserve Area to violate requirements of the Regulations in that the Regulations prohibit placing a soil absorption system in a drainage way subject to intermittent flooding. Excavation of soil from the Reserve Area also reduced the Reserve Area's available soil depth so that the vertical separation of the system from the seasonable water table and the system's installation depth no longer conformed to the Regulations. As a result, Mr. Campbell advised Mr. Dalton that changes to the Reserve Area rendered the Permit void. Mr. Campbell communicated the details of this meeting to his supervisor, Tina Thompson, via an email message of July 29, 2002. (Commonwealth's Exhibits 4, 17).

Mr. Campbell again notified Mr. Dalton that the Permit was void by letter dated July 31, 2002. In this letter, Mr. Campbell advised Mr. Dalton to apply for a new permit and suggested evaluating an area upslope of the primary absorption area for use as a new reserve area. (Commonwealth's Exhibit 5).

On September 5, 2002, Mr. Dalton requested an informal hearing pursuant to Virginia Code § 2.2-4019 to challenge the Department's decision to void the Permit. written could be met by the Reserve Area. (Commonwealth's Exhibit 6).

Pursuant to that hearing, New River Health District Director, J. Henry Hershey, M.D., M.P.H. ("Dr. Hershey"), conferred with Gary Whitley, a soil scientist under contract with the Department. Mr. Whitley also visited the Property on October 4 and October 18, 2002, conducting his own inspection of the Property. Conditions Mr. Whitley observed conformed in all significant respects to those reported by Mr. Campbell. (Commonwealth's Exhibits 8, 9, 10).

On October 30, 2002, the Department provided Mr. Dalton a copy of Mr. Whitley's report and invited him, again, to submit a permit application. The Department

also apprised Mr. Dalton of his right to a formal hearing under Code § 2.2-4020. (Commonwealth's Exhibit 11).

On November 18, 2002, Mr. Dalton contacted the Department to request an additional inspection of the Property and claimed that tests he had performed showed the Reserve Area complied with the Regulations.

On December 10, 2002, Dr. Hershey convened an informal hearing (the "Informal Hearing") and ruled that the Reserve Area had "changed substantially" from conditions existing at the time of issuance of the Permit. Accordingly, Dr. Hershey upheld the local Health Department's decision to void the Permit pursuant to § 300.A of the Regulations.

On January 16, 2003, Mr. Dalton requested a formal hearing (the "Formal Hearing"), which convened on April 9, 2003.

### **Conclusions of Law.**

CODE § 32.1-164 provides that the Board of Health's regulations "shall govern the collection, conveyance, transportation, treatment and disposal of sewage" for the purpose of assuring that onsite sewage disposal systems are properly constructed and operated to ensure against the spread of human disease. (See Commonwealth's Exhibit 16).

The Board of Health lawfully promulgated the Regulations governing the permitting, construction and operation of onsite sewage disposal systems and lawfully issued the Permit.

Section 710 of the Regulations requires a reserve area equal to 50 percent of the required absorption area "where the estimated or measured percolation rate exceeds 45 minutes/inch."

Section 300 of the Regulations provides that "all sewage disposal construction permits are null and void when . . . conditions such as house location, sewage system location . . . topography, drainage ways, or other site conditions are changed from those shown on the application . . . ."

It is undisputed that the Permittee or someone acting on his behalf, engaged in excavation, grading or other land disturbing activities in and around the absorption and/or Reserve areas on the Property after issuance of the Permit. These activities changed the topography, Drainway, vertical separation, installation depth and other conditions specified in the Permit from those specified in the Permittee's application for the Permit.

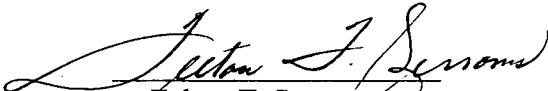
These changes were substantive and rendered the Property unsuitable under the Regulations for installation of an onsite sewage disposal system in that:

- (i) the Reserve area now occupies a position in a drainage way (the Drainway) subject to periodic flooding which is prohibited by § 593.4 of the Regulations. The erosion rills visible in photographs taken by the Department staff as well as the culvert installed under the Roadbed adjacent to the Property are evidence of this unacceptable position;

- (ii) Because original soil has been removed from the Reserve Area, the required vertical separation from the seasonable water table cannot be met/maintained within the Reserve Area. According to conditions observed on site and pursuant to §§ 490.A and 593 of the Regulations, the seasonal water table on the site is located at approximately 30 inches below the surface. Accordingly, a total depth of 36 inches with no wetness features is needed to accommodate both a required minimum installation depth of 18 inches and a required vertical separation from the water table of 18 inches. Staff inspections indicate that, since issuance of the Permit, 8-12 inches of original topsoil have been removed from the Reserve Area, leaving a vertical separation from the seasonal water table of only 6-10 inches in violation of the Regulations;
- (iii) Land disturbing activities in and around the Reserve Area resulted in the placement of fill material in the location of the septic system authorized by the Permit. Section 593.5 of the Regulations prohibits the placement of systems in fill material except in three specific circumstances which do not apply in this case;

WHEREFORE, changes in the sewage system location, topography, drainage ways and other site conditions have occurred since the issuance of the Permit, rendering the system location, topography, drainage ways and other site conditions substantially different from those existing at the time of issuance of the Permit and in violation of the requirements of the Regulations.

Based on these findings and rulings, the Board concludes that the Department properly declared the Permit void and affirms its decision so stating. Mr. Dalton is not eligible for reimbursement for attorneys' fees and costs under CODE § 2.2-4030, which permits reimbursement of such moneys from an agency's operating expenses to a party prevailing upon judicial review of an agency case decision pursuant to CODE § 2.2-4025, *et seq.*, or for certain proceedings otherwise exempted from the Virginia Administrative Process Act. See CODE §§ 2.2-4030(A); 2.2-4002, 2.2-4006, 2.2-4011 and 2.2-4018.

  
Felton T. Sessoms  
Chairman

Dated: May 12, 2003

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