

**VIRGINIA:**

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

**In Re: Appeal of Mr. Samuel Michael Morgan.**

**ORDER**

**Findings of Fact.**

Based upon the entirety of the record of this matter and the documents, other evidence and argument offered by the parties, the Board makes the following findings of fact:

1. Michael and Jennifer MacDonald are the owners of record of property identified as Lot 20, Brush Mountain Estates Subdivision located in Montgomery County. (the "Property").
2. The Property is approximately .0115 acres in size and there is a 3 bedroom home on the lot. An onsite sewage disposal system was installed on the Property on May 31, 2000.
3. Mr. Morgan purchased the Property on May 15, 2001 and sold it to the McDonalds on May 30, 2003.

**SYSTEM INSTALLATION**

4. In February of 2000, Roger Purdue filed an application for a sewage disposal permit for the Property. The local health department ("LHD") issued a sewage disposal construction permit on February 24, 2000. **EXHIBIT 1.**
5. On May 31, 2000, Clare Zaronsky, Environmental Health Specialist Senior for the LHD, inspected and approved the system construction. Ms. Zaronsky filed a completion statement for the installation of an onsite sewage disposal system on the Property on May 31, 2000. LHD inspected and approved the system the same day. **EXHIBIT 1.**

## SYSTEM FAILURE AND REPAIR PERMITS

6. Mr. Morgan asserts that the system failed in October, 2001. **EXHIBIT 4.**
7. Mr. Morgan filed a repair permit on September 9, 2002. **EXHIBIT 2.**
8. Mr. Morgan sold the Property on May 30, 2003. Title to the Property passed to the McDonalds on July 11, 2003. **EXHIBIT 6.**
9. Mr. McDonald filed a subsequent repair permit with LHD on October 22, 2003. **EXHIBIT 3.**

## REQUEST FOR INDEMNIFICATION

10. Mr. Morgan filed a request for indemnification on March 23, 2004. Mr. Morgan reported that the system failed one year and four months after the date of installation. **EXHIBIT 4.**

## INDEMNIFICATION DECISION

11. The State Health Commissioner, Robert B. Stroube, M.D., M.P.H., denied Mr. Morgan's request for indemnification on December 28, 2004, because Mr. Morgan was not a "Virginia real property owner" entitled to reimbursement as defined by Va. Code § 32.1-164.1:01 at the time of his request for reimbursement. **EXHIBIT 6.**

## REQUEST FOR FORMAL HEARING

18. Mr. Morgan requested a formal hearing before the Board to challenge the Commissioner's decision. **EXHIBIT 7.**

## APPLICABLE LAWS AND REGULATIONS

19. *Va. Code* §32.1-164 provides that the Board of Health's regulations "shall govern the collection, conveyance, transportation, treatment and disposal of sewage." The Board of Health lawfully promulgated the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20 et seq., as amended July 2000, previously amended 1989, the "Regulations") governing the permitting and operation of onsite sewage systems.
20. The *Regulations* (12 VAC 5-610-350 as amended July 2000) define the failure of a sewage disposal system, stating:

the presence of raw or partially treated sewage on the ground's surface or in adjacent ditches or waterways or

exposure to insects, animals or humans is prima facie evidence of such system failure and is deemed a violation of these regulations. Pollution of the groundwater or backup of sewage into plumbing fixtures may also indicate system failure.

21. The *Regulations* (12 VAC 5-610-490.A.2 as amended July 2000, §3.5.A.2 as amended 1989) state that “gray and/or gray mottlings indicate seasonal water tables for at least three weeks duration.” The *Regulations* (12 VAC 5-610-120 as amended July 2000, § 1.12 as amended 1989) define “gray color” as chroma-2 or less on the Munsell Color Chart.
22. The *Regulations* (§ 4.30 as amended 1989) established the requirement for the vertical separation between the drainfield trench bottom and seasonal water table based upon percolation rate- two inches for a rate of 5 minutes per inch, 3 inches for a rate of 17, 12 inches for a rate of 46, 18 inches for a rate of 90, and 20 inches for a rate of 120.
23. *Va. Code* §32.1-164.1:01 established the Onsite Sewage Indemnification Fund to receive monies generated by a portion of the fees collected by the Department for onsite sewage system applications. The purpose of the Indemnification Fund is to assist any Virginia real property owner holding a valid septic tank permit when his or her system fails within three years of construction and the failure results from the negligence of the Department. The owner of a septic tank system permitted by the Department may request the Commissioner to review the circumstances of the onsite system failure and grant indemnification from the fund, if the septic system is permitted by the Department and it has failed within three years of construction.

### **Conclusions.**

In order for Mr. Morgan to be indemnified by the Fund, Va. Code § 32.1-164.1:01 requires that he be a “Virginia real property owner” at the time of the request for reimbursement.

Va. Code § 32.1-164.1:01 also requires that the permitted system fail within one year after installation.

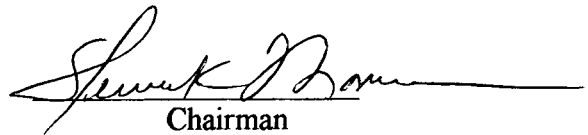
Because he sold the Property before submitting his request for reimbursement, Mr. Morgan was not a “Virginia real property owner” within the contemplation of Va. Code § 32.1-164.1:01.

Further, Mr. Morgan’s request indicated that the system failure occurred more than one year after installation.

WHEREFORE, the Board affirms the decision of the Commissioner.

Mr. Morgan is not eligible for reimbursement for attorneys' fees and costs under Va. 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 Va. Code §§ 2.2-4025, *et seq.*, or for certain proceedings otherwise exempted from the Virginia Administrative Process Act. See Va. Code §§ 2.2-4030(A); 2.2-4002, 2.2-4006, 2.2-4011 and 2.2-4018.

If Mr. Morgan wishes to appeal this Order to Circuit Court, he should do so by: (1) filing a notice of appeal with Susan Sherertz, Sewage Handling and Disposal Appeal Review Board, within thirty (30) days of receipt of this Order; and (2) filing a Petition for Appeal with the Circuit Court within thirty (30) days of filing the Notice of Appeal as required by Rule 2A:4 of the Rules of the Supreme Court of Virginia.

  
Chairman

Dated: June 29, 2005

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