

VIRGINIA:

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

In Re: Mr. & Mrs. C.J. Carter

ORDER

Mr. and Mrs. Carter own a 0.9 acre lot at Tax Map 29 A (4) 6B in Middlesex County. The three-bedroom house on the lot is served by septic tank and drainfield. The system failed in 1994. The repair system authorized by the Department failed in 1997. The Department has denied the Carters' application for indemnification from the Onsite Sewage Indemnification Fund and the Carters appeal the denial. The Board heard the appeal on May 24, 2000.

CODE § 32.1-164.01, effective July 1, 1994, creates the Fund. The Fund receives a portion of the fees collected by the Department under § 32.1-164.C (application fee for onsite sewage disposal system) and § 32.1-164.E (fee for installation and monitoring inspections of alternative discharging sewage systems). Upon finding that a septic tank or other onsite sewage system permitted by the Department has failed within three years of construction and that the failure resulted from Department of Health negligence, the Commissioner indemnifies the owner. The statute gives this Board jurisdiction to hear appeals of denials of requests for indemnification from the Fund.

The facts of the Carters' situation are set forth in detail in the Department's proposed Findings of Fact, which the Board adopts. In summary, in 1994 the system began backing up into the house. On August 22, 1994 Mr. Carter applied for a permit to repair the failed system. The Department faced a difficult situation: There were wells on the property and across the road, the old system appeared to be in a drainageway, and Meacham's creek is ca. 100 feet behind the house. The Department took a single soil boring, apparently in the higher area near the road, and found gray mottles at thirty inches. This was consistent with the two holes the Department bored in the area of the old drainfield in 1984 (when the drainfield was switched from the trailer that formerly stood on the property to the newly-built house). The Department interprets the mottles as indicating the presence of a seasonal perched water table.

The Sewage Handling and Disposal Regulations provide at 12 VAC 5-610-280.C.2

When issuing a construction permit for repair of an existing failing sewage disposal system for an

occupied structure with indoor plumbing the criteria contained in Part IV of this chapter shall be complied with to the greatest extent possible. However, it is not necessary to substantially comply with all of the requirements in Part IV of this chapter with the exception of the set back distances for shellfish waters or drinking water wells unless the system is already closer in which case the corrected system shall not be closer than the existing system. All corrections must be of such a nature that they can reasonably be expected to reduce the risk to public health caused by the malfunctioning systems.

The Department issued the repair permit for a new drainfield in the front of the property. In order to maximize the size of the (still inadequately small) drainfield, the Department authorized a system with the drainfield trenches running out from the higher elevation near the road downhill toward the house.¹ The deep ends of the trenches were at 40 inches, *i.e.*, ten inches below the seasonal water table.

The Department did not conduct an investigation to determine why the original system had failed. Mr. Carter testified that the contractor installing the pump chamber for the repair system uncovered the line from the septic tank and the distribution box and that the line had collapsed. Since the repair system had already been built, Mr. Carter says he went ahead and used it. He did not notify the Department.

The repair system failed in 1997. Mr. Carter testified that the sewage came to the surface at the shallow (downhill) end of the trenches and that the problem was worse in wet weather.

The Department does not dispute that the 1994 repair system was permitted by the Department or that it failed within three years. The Department denies that it was negligent. The Board concludes otherwise.

It is elementary good practice to investigate the reason for the failure of an onsite sewage system before undertaking a repair. In this case, if the Department had required Mr. Carter to uncover the distribution box, it would have learned that the problem was the pipe to the septic tank, not the drainfield. Instead, the Department assumed that the drainfield had failed. Thus, Mr. Carter was put to the unnecessary expense of building a new system.

The Board concludes that the Department did not exercise due care in the circumstances. The Department was negligent.

¹ Conventionally drainfield trenches are placed on contour. 12 VAC 5-610-950.F.1

Moreover, the Department's design of the repair system was flawed. The Board is concerned that the Department took only one soil boring in the area of the new drainfield; the Department would not accept a report based on a single hole from a private consultant, except in circumstances that do not apply here, and there is no reason for the Department to do less itself. That single boring, however, indicated a seasonal water table at thirty inches. The Department's design for the repair system starts the trenches at forty inches. Thus, during wet weather the system could be expected to have the uphill end of the trenches below the water table, *i.e.*, full of water. That appears to be what happened here. The system failed by breaking out to the surface during wet weather.

Repair permits require difficult decisions and the Carter repair was particularly difficult. The Department's choices as to location and trench direction were reasonable in the circumstances. The decision as to trench depth was not. The design almost guaranteed that the trenches would flood during wet weather.

As to the repair permit, the Board concludes that the Department did not exercise due care in the circumstances. The Department was negligent.

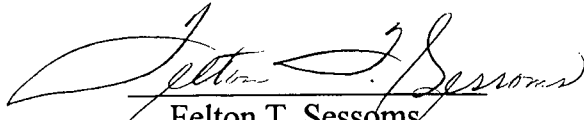
The final issue is whether the failure of the repair system resulted from the Department's negligence. The Board concludes that it did. If the Department had conducted an adequate investigation of the failure of the old system, there would have been no repair system; if the Department had exercised due care as to the design of the repair system, the repair system would not have failed.

Accordingly the Board concludes that the Commissioner shall pay Mr. Carter from the Fund the \$2,163.87 cost of the repair system.

On the current state of the facts the Board is unable to determine whether any further costs have resulted from the Department's negligence. The nature and cost of the repairs are not yet known. The Board therefore remands this matter to the Department. Once the repair is complete and the costs are known, the Commissioner has the jurisdiction to decide which if any of those costs should be reimbursed from the Fund. The Board will hear any dispute about indemnification of those costs.

The Carters should not mistake this process as a blank check to pay for any system they may choose. The Board is aware that Mr. Carter's failure to tell the Department about the failed pipe to the distribution box surely contributed to the ensuing problem, and the Board will be mindful of this fact in any future proceeding.

This case already has been much delayed. The Board expects that the pending repair and indemnification decisions will be reached promptly.



Felton T. Sessoms
Acting Chairman

Dated: June 5, 2000

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