

In re: Appeal of John and Donna Cox

ORDER

FINDINGS OF FACT

1. This case is an appeal of a decision (the "Case Decision") of the Virginia Department of Health (the "Department") to reimburse a portion of the cost of a failed onsite sewage disposal system requested by John and Donna Cox (the "Appellants").

2. The Appellants are owners of record of an approximately 2.75 acre property (the "Property") located in Montgomery County and identified as Lot 15, Brush Mountain Estates Subdivision..

3. The Property contains a four bedroom dwelling served by an onsite sewage disposal system installed on September 4, 2001 (the "Septic System").

4. The Septic System failed in August, 2003.

5. The Commissioner determined that Appellants qualified for reimbursement from the Fund in the amount of \$1,925.00, or one-half the estimated cost of the failed Septic System. (*See Dept. Ex. 24*).

6. In so doing, the Commissioner applied the Department's policy or guidance document regarding requests for reimbursement from the Fund, identified as Guidance Memoranda and Policies ("GMP") # 126 (hereinafter, the "Policy"), promulgated on December 12, 2003. (*See Dept. Ex. 26*).

CONCLUSIONS OF LAW

1. *Va. Code* § 32.1-164.1:01 established the Fund to receive monies generated by a portion of the fees collected by the Department for onsite sewage system applications.
2. The purpose of the 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.
3. 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.
4. The Board of Health has not promulgated regulations concerning requests for indemnification, however, the State Health Commissioner approved the Policy on December 12, 2003, to prescribe certain policies and procedures for handling Fund requests during the period from December 12, 2003 forward until regulations can be adopted.
5. It is undisputed that the Septic System was installed in 2001, prior to promulgation of the Policy.
6. It is also undisputed that the Septic System failed in August of 2003, prior to promulgation of the Policy.
7. Accordingly, grant or denial of Appellant's request for reimbursement from the Fund is governed by policies, procedures and practices followed by the Department prior to promulgation of the Policy.

WHEREFORE, the Case Decision is *vacated and remanded*, with instruction that the Department consider Appellants' request for reimbursement from the Fund under the policies, procedures and practices followed by the Department prior to promulgation of the Policy.

If the Appellant 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: July 28, 2005