

**VIRGINIA:**

**SEWAGE HANDLING AND DISPOSAL APPEAL REVIEW BOARD**

JOYCE KENNY )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 VIRGINIA DEPARTMENT OF HEALTH, )  
 )  
 Appellee. )

IN THE APPEAL OF THE DECISION BY THE VIRGINIA DEPARTMENT OF HEALTH RE: Indemnification for Sewage System Failure of 3.1 acre lot, Lot 9-C of the Gess Haven Subdivision in Fluvanna County.

**ORDER**

Based upon the entirety of the record of this matter, including documents, presentation, oral testimony, argument, other evidence, and authorities offered by the parties pursuant to the September 13, 2006 hearing before the Sewage Handling and Disposal Appeal Review Board (the "Board) herein, the Board finds the following:

**BACKGROUND**

1. This case is an appeal of the award of the Virginia Department of Health ("Department") of a request by Ms. Joyce Kenny for the indemnification from the Onsite Sewage Indemnification Fund ("Fund").
2. Ms. Kenny is the owner of record of property located at Lot 9-C in the Gess Haven Subdivision of Fluvanna County ("Property"). An onsite sewage disposal

system ("System") was installed on the Property and subsequently failed within three years of installation.

3. The Department awarded Ms. Kenney indemnification from the Fund in the amount of Two Thousand, Three Hundred Seventy Six and 66/100 dollars (\$2,376.66). This amount was based on the estimated total cost from Appendix E of GMP-123: Three Thousand, Five Hundred Sixty Five dollars (\$3,565). The amount from Appendix E of GMP-123 was then divided by two thirds to constitute the Department's share of the negligence, with a private soil consultant responsible for the remaining one third.

4. The Department stipulates that the System failed within three (3) years of installation.

5. The Department further stipulates that Department negligence is partially responsible for the cause of the failure of the system within the contemplation of Va. Code §32.1-164.1:01.

#### **APPLICABLE LAWS AND REGULATIONS**

6. Va. Code § 32.1-164.1:01 established the Fund to receive monies generated by a portion of the fees collected by the Department pursuant to the permitting of onsite sewage disposal systems.

7. The purpose of the Fund is to assist any Virginia real property owner holding a valid septic tank permit when such owner's system fails within three years of construction and the failure results from the negligence of the Department.

8. Pursuant to Va. Code § 32.1-164.1:01, the owner of the septic tank system permitted by the Departments may request the Commissioner to review to 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.

9. The Regulations of the Board of Health govern the collection, conveyance, transport, treatment, and disposal of sewage within the Commonwealth.

10. The Board of Health also regulates the use and disbursement of monies in the Fund pursuant to Va. Code § 32.1-164.1:01.

11. Regarding matters within the Board of Health's jurisdiction, Va. Code § 32.1-164 authorizes the State Health Commissioner to act in the absence of Board regulations.

12. Pursuant to Va. Code § 32.1-164.1:01, the Sewage Handling and Disposal Appeal Review Board hears appeals from the denial of an application to the State Health Commissioner for indemnification from the fund.

#### **FINDINGS OF FACT**

1. The original indemnification award was based on the estimate table in Appendix E of GMP-123.

2. Ms. Kenny obtained three oral estimates for repair of the System.

3. Ms. Kenny's estimates were based on telephone conversations and not physical inspection by potential installers.

4. There is no written plan or estimate for installation of a new onsite sewage disposal system on the Property.

5. In addition, Ms. Kenny failed to provide documentation upon which an indemnification award may be based.

6. Ms. Kenny has not filed a repair application with the Department.

### **CONCLUSIONS OF LAW**

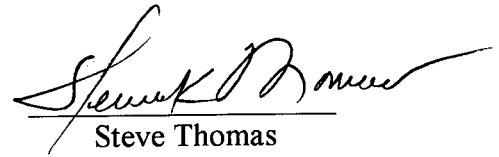
1. The Board is authorized to determine whether a decision of the State Health Commissioner to refuse an application for indemnification from the Fund complies with the requirements of Va. Code § 32.1-164.1:01.

2. Absent a repair application or other written estimates, there is nothing upon which the Board may base a decision for change of indemnification award.

3. It is premature for the Board to render a decision on the indemnification award because no repair application was filed, nor was evidence introduced establishing an alternate amount.

**WHEREFORE**, for the foregoing reasons, the Board hereby *remands* this case to the Department, with a recommendation to reconsider the Fund award after the local health department has received and considered a repair application for the Property.

**If the Appellants wish to appeal this ORDER, they may do so pursuant to Virginia Code §§ 2.2-4000, et seq. and the Rules of the Supreme Court of Virginia by: (1) filing a Notice of Appeal with the Secretary of the Board within thirty (30) days of receipt of this ORDER as required by Rule 2A:2; and (2) filing a Petition for Appeal in the Circuit Court within (30) days of filing the Notice of Appeal in accordance with Rule 2A:4 of the Rules of the Supreme Court of Virginia.**



Handwritten signature of Steve Thomas in cursive script.

Steve Thomas  
Chairman

Dated: November 10, 2006