

VIRGINIA:

SEWAGE HANDLING AND DISPOSAL APPEAL REVIEW BOARD

GARY KERR AND TRACY KERR,)
)
 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 Lot 4, Section B in the
Pocahontas Subdivision of Powhatan County.

ORDER

Based upon the entirety of the record of this matter, including documents, 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 (“Board”) herein, the Board finds the following:

BACKGROUND

1. This case is the second appeal of the award by the Virginia Department of
Health (“Department”) to Mr. and Mrs. Gary Kerr (“the Kerrs”) for indemnification from
the Onsite Sewage Indemnification Fund (“Fund”)

2. The Kerrs are owners of record of property located at Lot 4, Section B, in the Pocahontas Subdivision of Powhatan County ("Property"). An onsite sewage disposal system ("System") was installed on the Property and subsequently failed within three years of installation.

3. On January 18, 2006, the Kerrs first appealed to the Board from the Department's granting of an award of Three Thousand, Two Hundred Sixty and 46/100 dollars (\$3,260.46) from the Fund. The Board therein reversed the Department's award and remanded the case with a specific charge to consider the actual cost of System repair on the Property.

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

5. The Department stipulates that the Kerrs timely filed an application for indemnification from the Fund within one (1) year of failure of the System.

6. The Department stipulates that Department negligence caused the failure of the System within the contemplation of Va. Code § 32.1-164.1:01.

APPLICABLE LAWS AND REGULATIONS

7. 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.

8. 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.

9. Pursuant to Va. Code § 32.1-164.1:01, the owner of the septic tank system permitted by the Department 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.

10. Pursuant to the authority of Va. Code § 32.1-164, the Regulations of the Board of Health govern the collection, conveyance, transport, treatment, and disposal of sewage within the Commonwealth.

11. Under Va. Code § 32.1-164.1:01, the Board of Health also regulates the use and disbursement of monies in the Fund.

12. 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.

13. 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 System has failed.
2. Any warranty claims against the System manufacturer have been denied because the failure of the System was due to improper soil conditions as opposed to mechanical malfunction or defect.
3. Following the January appeal, the Kerrs submitted to the Department written estimates for the System repair.

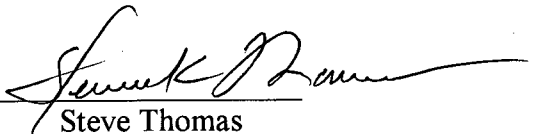
4. The Department issued the Kerrs a repair permit for the System.
5. The Department reviewed the Kerrs' estimates under the policy established in GMP #123. The Department thus awarded the Kerrs indemnification from the Fund in the entirety of the amount allowed by the policy limit, Fifteen Thousand dollars (\$15,000).

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. A majority of the Board convened to consider this appeal finds that the monetary financial caps imposed by the policy under GMP #123 are not sufficient for the purposes of indemnification, and are an outdated estimate of repair costs for onsite sewage disposal systems.
3. A majority finds the Department's decision inconsistent with *Va. Code* § 32.1-164.1:01 because the amount awarded fails to adequately indemnify the Kerrs for the cost of installation of a functioning onsite sewage disposal system.

WHEREFORE, for the foregoing reasons, the Board hereby *reverses* the Department's award of indemnification in the amount of \$15,000, and *remands* the case back to the Health Commissioner for consideration of the actual cost of installation of a replacement System. Further, the Board recommends the Commissioner develop new policies to estimate reasonable costs of system repairs, reflective of current costs.

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.


Steve Thomas
Chairman

Dated: November 10, 2006