

**SEWAGE HANDLING AND DISPOSAL APPEAL  
REVIEW BOARD**

**IN THE APPEAL OF REV. LESTER D. AND CRYSTAL RENE FRYE**

**ORDER**

**Background/Findings of Fact**

1. By letter of November 25, 2003, the Virginia Department of Health (“VDH” or the “Department”) denied a request (the “Request”) submitted by Reverend Lester D. and Mrs. Crystal R. Frye (the “Fryes” or the “Appellants”) reimbursement from the Onsite Sewage Indemnification Fund (“Fund”) in the amount of \$ 29,905.70. (See November 25, 2003, letter from Dwayne Roadcap, Department Exhibit 23).

2. In so doing, the Department relied upon a finding that the Appellants’ onsite septic system (the “System”) failed, not as a result of the Department’s negligence, but due to faulty construction which allowed excess water to enter the system from leaky tanks, improper grading, and roof drains. *Id.*

3. The Appellants appealed the denial of their Request to this Board which heard evidence and argument on April 7, 2004. (See Department Exhibit 19, Transcript, pages 107-110).

4. Such evidence included a grading plan (the “Grading Plan”) showing construction of a storm water drainage swale over the System’s septic tank and pump tank. Evidence indicated that the Department did not receive notice of such Grading Plan until May 20, 1996, more than four years after it inspected and approved the System. (See Department Exhibit 19, Transcript, pages 107-110).

5. Upon mature consideration of the evidence and argument presented, the Board ruled that it lacked sufficient evidence to determine the date upon which the Department received notice of the Grading Plan and whether such notice preceded the Department's issuance of a permit for the System. (*See* Final Order, Department Exhibit R-1).

6. Accordingly, the Board remanded the appeal to the Department, directing the Department to take additional evidence to "ascertain whether and when VDH received notice of re-grading of a drainage swale impacting the Appellants' septic system prior to issuance of the operating permit for such septic system." The Review Board further directed the Department to render a new decision on Appellants' reimbursement request "taking into account such evidence." *Id.*

7. Pursuant to the Board's direction, the Department investigated the facts and circumstances surrounding VDH notification of the Grading Plan. (*See* Department Exhibits R-2 through R-8).

8. The Board finds no evidence that the Department was aware of the re-grading or the Grading Plan when it inspected and approved Appellants' System in 1991 and 1992. (*See* Department Exhibits R-2 through R-8).

9. Furthermore, the Department found that the specific activities provided in the Grading Plan, although not desirable for any septic system, are not specifically prohibited by the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20). (*See* Department Exhibit R-11).

10. Appellants produced no new evidence to prove that the Department was aware of the re-grading or the Grading Plan prior to inspecting and approving Appellants' septic system in 1991 and 1992. Appellants' Exhibit I, filed with the Department on May 26, 2004, appears to be a

document the Department provided Appellants in or around 1991 or 1992. That document contains the following statement:

*The Health Department's final visit to the property usually takes place prior to the completion of the development of the site, It is important that all parties consider the significance of final grading, surface water, roof drains, other building drains, and French drain. These waters must be diverted from the septic tank site and from the drainfield area. The system is designed to dispose of and treat the effluent generated in the facility. Additional waters in the system will decrease its effectiveness and could cause the system to fail.*

(See Department Exhibit R-9).

11. Although not specifically directed to do so, the Department investigated Appellants' statements from the April 7, 2004, hearing that the septic system contains a third tank that is unknown to the Department. (See Transcript pages 113-114). The evidence indicates that there are only two tanks associated with Appellants' septic system and that there are three risers attached to the two tanks. (See Department Exhibit R-10).

12. As a result of this further investigation, on July 19, 2004, the Department reaffirmed its earlier finding that Appellants' septic system failed due to third-party errors which included leaky tanks, improper grading - including construction of a driveway that was later found to be acting as a dam, and roof drains. There existed no evidence that any of these causes for failure resulted from negligence by the Department.

13. Accordingly, upon the further investigation directed by the Board, the Department denied Appellants' request for reimbursement from the Fund. (See Department Exhibit R-11).

## **Conclusions of Law**

The Appellants bear the burden of proving that their System failed within three (3) years of construction and that such failure resulted from negligence by the Department. *See* Va. Code § 2.2-4020.

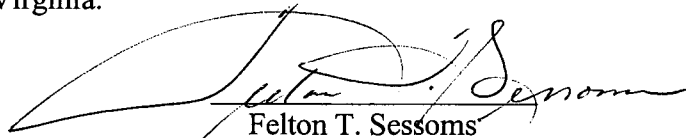
The Appellants failed to carry that burden at the Board's April 7, 2004 hearing on their appeal as indicated in the Board's Final Order. (*See* Final Order, Department Exhibit R-1).

The Board remanded this matter to the Department for the taking of evidence on the specific question of whether the Department was aware of the Appellants' Grading Plan when it inspected and approved their System in 1991 and 1992.

The Appellants have failed to prove that the Department was aware of the Grading Plan prior to permitting their System or that such awareness caused the failure of the System.

Consequently, the Appellants have failed to prove that failure of the System resulted from negligence by the Department. *See* Va. Code § 32.1-164.1:01.

WHEREFORE, Appellants' appeal hereby is dismissed and the Departments decision affirmed. If Appellants wish to appeal this Order to Circuit Court, they 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.

  
Felton T. Sessoms  
Chairman

Dated: November 4, 2004

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