

**In re: Appeal of Mr. Wilbur Roda, III and Mrs. Bettina Roda**

**ORDER**

**BACKGROUND**

1. This case is an appeal of the denial by the Virginia Department of Health (the "Department") of a request by Wilbur Roda, III and Bettina Roda (the "Rodas" or the "Appellants") for indemnification from the Onsite Sewage Indemnification Fund (The "Fund").

2. The Rodas are owners of record of property located in Chesterfield County at Lot 46, Section 2, Brandy Oaks Subdivision or 11147 Walkmill Reach Trail (the "Property"). The Property comprises approximately  $\frac{3}{4}$  acres and includes a four-bedroom home. An onsite sewage disposal system (the "System") was installed on the Property in December 1998 and failed within three (3) years of installation.

3. The Department denied the Rodas' request for indemnification from the Fund on the ground that the Rodas did not file a completed application for indemnification with the Division of Onsite Sewage and Water Services within one (1) year of the time the system failed.

4. The Chesterfield Health Department ("CHD") approved Lot 46 as part of its 1990 subdivision process. It did so based on work by Mathews Soil Consultants, Inc., a private soil consulting firm. (See Department Exhibit 1).

5. On May 4, 1994, Westbridge Homes, Inc. filed an application for a construction permit for the System. CHD evaluated the site and soil conditions existing on the Property and issued an onsite sewage system construction permit on July 14, 1994. (See Department Exhibits 2-4).

6. On December 2, 1998, Amelia Backhoe Service installed the System. CDH inspected and approved the System that same day. The installer submitted a completion statement and CDH issued an Operating Permit for the System. (See Department Exhibit 5).

7. The Rodas took possession of their house on April 7, 1999. (See Department Exhibit 10).

8. Evidence indicates that the Rodas began to experience problems with the System shortly after they first occupied their home. Handwritten notes on the construction permit dated May 4 and May 5, 1999, show that the pump wire was accidentally cut and repaired. (See Commonwealth Exhibit 4).

9. Columbia Gas Co. apparently damaged the original septic tank and replaced it in March of 1999. Handwritten notes in the local health department files dated May 3, 1999, appear to record a conversation between a staff person and one of the Rodas. The notes indicate that Columbia Gas Company "hit [the] original tank & crushed it" and that a "new tank was installed in March." The notes also say that "[the] septic tank is showing 2-3 inches from the dirt settling" and "[the] yard is soaked." (See Exhibit 6).

10. A local health department staff person wrote the words "surface waters" and the date, May 4, 2000, on the construction permit. (See Department Exhibit 4).

11. In June 2000 Mrs. Roda requested and received a copy of the construction permit. (See Department Exhibit 7).

12. The Rodas contacted CDH again in January 2001 about their sewage system. Department Exhibit 8 contains several documents, including sketches and water

meter reports, indicating that CDH was investigating the problems with the Rodas' sewage system.

13. Department Exhibit 9 contains additional notes dated March 27, 2001, related to the CDH investigation.

14. On March 24, 2001, the Rodas wrote to Donald J. Alexander, Director of the Department's Division of Onsite Sewage and Water Services, and Dwayne Roadcap, Program Manager for the *Fund* by electronic mail. The Rodas stated that they had contacted CDH in the summer of 2000 and again in January 2001 to report their observations of raw sewage seeping out of the ground, a "geyser of water," and a sewage odor associated with their System. The Rodas reported that Steve Hennessey, a CDH Environmental Health Specialist Senior, told them that he could not find anything wrong with their System. (*See* Department Exhibit 10).

15. On March 26, 2001, Mr. Roadcap responded to the Rodas by email. Mr. Roadcap suggested to the Rodas that they file an application with CDH for a permit to repair the System and that they also submit the attached "application for indemnification." Mrs. Roda responded to Mr. Roadcap by stating that, "I think it's probably been happening daily since we moved in but has worsened over time." Mrs. Roda further stated that she would complete the application for indemnification and forward it to Mr. Roadcap "promptly." (Department Exhibit 10).

16. Department Exhibit 11 contains additional correspondence from late March and early April 2001 concerning malfunctioning of the System. The Rodas reported making a video tape of water bubbling up out of the ground in the drainfield area

and reported showing that tape to Bob Bowers, Environmental Health Supervisor for the local health department, and to Mr. Hennessey.

17. On April 25, 2001, Mr. Hennessey wrote to the Rodas and offered two suggestions for correcting the malfunctioning system. (See Department Exhibit 12).

18. On February 13, 2004, the Rodas filed an application for indemnification from the Fund. (Department Exhibit 13). In that application the Rodas reported that the first indication of failure of their system occurred on April 30, 2000, and that they reported the failure to the local health department on May 1, 2000.

19. The Department denied the Rodas' request for indemnification on June 16, 2004, because they had not filed it within one year of the date that their system failed, as required by the Department's policy. (See Department Exhibit 15).

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

*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. 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. 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.

The Board of Health has not promulgated regulations concerning requests for indemnification, however, the State Health Commissioner approved a policy, or guidance

document, on December 12, 2003, to prescribe certain policies and procedures for handling Fund requests until regulations can be adopted. The Department's policy, identified as Guidance Memoranda and Policies ("GMP") #123, states that any claim is barred from consideration unless the claimant submits a complete application within one year from the date that the sewage system first failed. (See Department Exhibit 17).

### **CONCLUSIONS OF LAW**

The Department adopted its policy regarding claims for reimbursement from the Fund (the "Policy") on December 12, 2003, after several years of experience with the Fund and after careful consideration. Prior to adopting the policy, the Department processed several claims where owners allowed their systems to fail for many years before filing a claim. After filing a claim, many owners continued to allow their systems to fail while awaiting a decision under the Fund. The Department received claims for systems that failed as many as 14 years before the request for indemnification, well before the date of the legislation that established the Fund. Of these, the Department received claims in excess of \$250,000.00 related to failed systems that initially cost only a few thousand dollars to construct and it reimbursed owners for failed systems only to find that months or years later they had not repaired their failing systems.

Time limits set by the Policy are essential to ensure that cases can be properly and fairly investigated and adjudicated. Such limits are specified in almost all litigated and administrative matters.<sup>1</sup>

There are also practical reasons for the Policy's time limits. Without time limits, important investigative procedures are rendered useless and the passage of time may make it impossible to determine the causes of a failure. Outdated, old or stale records and evidence hinder an adequate understanding of pertinent issues and excessive delay deprives both the owner and the Department of the best opportunity to evaluate permitting decisions, system installation and failure. In many instances first-hand information is beneficial — even crucial — when reviewing and verifying the accuracy of field data and documentation.

The Policy's limits are reasonable and commensurate with other, similar filing deadlines applicable to other areas of law.<sup>2</sup>

The Board of Health's primary mission is to supervise and control the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage as these affect the public health and welfare (*Va. Code* § 32.1-164). The Department is

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<sup>1</sup> Limitations on actions in civil cases are provided in Chapter 4 of Title 8.01 of the *Code of Virginia*, §§ 8.01-228 *et seq.* Specifically, *Code* § 8.01-230 states that, “[i]n every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of . . . damage to the property”. Actions involving injury to property “shall be brought within five years after the cause of action accrues.” *Code of Virginia* § 8.02-243. Actions based on a written contract shall be brought within five years after the cause of action accrued. *Code of Virginia* § 8.01-246. Furthermore, “[n]o action to recover for any injury to property, real or personal, . . . arising out of the defective and unsafe condition of an improvement to real property, . . . shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction.” *Code of Virginia* § 8.01-250.

<sup>2</sup> For example, tort claims against the Commonwealth are subject to a one-year statute of limitations. See *Code of Virginia* § 8.01-195.7.

charged with administering the Board's regulations and programs, including the Fund. It must assure that the Fund is administered in ways that encourage onsite sewage systems to be properly located, constructed, and operated in order to prevent the spread of human diseases from sewage. A failing onsite sewage system represents a threat to public health and the environment and must be repaired in a timely manner. Failure to do so may cause or allow untreated or inadequately treated sewage to be released into the environment. Human diseases, such as salmonellosis, shigellosis, cholera, viral hepatitis A, sporadic and epidemic viral gastroenteritis, and amebiasis, may be transmitted through the improper treatment and disposal of sewage. Contamination of drinking water supplies and shellfish waters are two of many methods by which such disease-causing organisms can be transmitted to humans. Enforcing reasonable deadlines for filing indemnification claims encourages owners to seek timely and efficient solutions for failing onsite sewage systems.

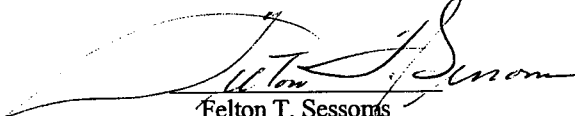
As reported by the Rodas, and verified by CDH, the system began to fail almost immediately after the Rodas first occupied their house in April 1999 and again in January 2001 (See Department Exhibits 4, 6, 8, and 10). However, the Rodas did not file an application for indemnification within one year of either date.

On March 26, 2001, Mr. Roadcap urged the Rodas to file an application for indemnification and Mrs. Roda said she would do so promptly (Department Exhibit 10). The Rodas did not file an application within one year of that date.

The Rodas filed an application for indemnification on February 13, 2004, almost four years after their system first failed, and more than two years and ten months after

Mr. Roadcap urged them to file. The Policy, therefore, bars their claim (Department Exhibits 13, 17).<sup>3</sup>

WHEREFORE, the Appellants' appeal hereby is dismissed and the Department's 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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<sup>3</sup> The Rodas argue that, for the purposes of the Policy, "failure" occurs upon the applicant's notification of failure, not the date system actually fails. In this fashion, they contend their System failed on the date CDH advised them unequivocally of failure. Even if the Board were to adopt this interpretation, the result remains the same. If the system failed within one year prior to the Rodas' application for indemnification, failure occurred more than three years after installation of the System. Alternatively, if the system failed within three years of installation, the Rodas application falls outside of one years from the date of failure.