

Maidens in Goochland County, Virginia (“Property”). An onsite sewage disposal system (“System”) was installed on the Property and subsequently failed within three years of installation.

3. On October 17, 2007, the Forsmarks appealed to the Board from the Department’s granting of an award of Two Thousand, Nine Hundred Fifty Dollars (\$2,950.00) from the fund.

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

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

6. The Department stipulates Department negligence caused the failure of the System within the contemplations of Virginia Code § 32.1-164.1:01.

APPLICABLE LAWS AND REGULATIONS

1. Virginia 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.

2. 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.

3. 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 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. 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.

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

6. Regarding matters within the Board of Health's jurisdiction, Va. Code § 32.1-20 vests the State Health Commissioner with all the authority of the board when it is not in session, subject to such rules and regulations as may be prescribed by the board.

7. 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 of defect.

3. The Forsmarks submitted to the Department written proposals for the System repair.

4. The Department has evaluated the Forsmarks' application of July 6, 2006 and determined they do qualify for payment from the fund.

5. The Board has determined that definitive or sufficient evidence has not been presented to the Board for the newly installed System in that one of the documents presented was a proposal, not an invoice indicating payment.

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.

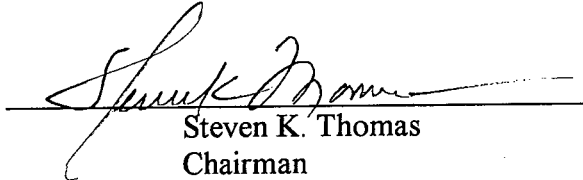
2. The Board finds the Department's decision inconsistent with Va. Code § 32.1-164.1:01 because the amount awarded fails to adequately indemnify the Forsmarks for the cost of the System, assuming the claims made by them are adequately substantiated by definitive evidence.

3. It is premature for the Board to render a decision on the amount of the indemnification award; although repairs have been made to the System, invoices or other documentation definitely establishing the cost of the repairs were not presented to the Board to clearly ascertain an alternate amount for an award.

THEREFORE, for the foregoing reasons, and in consideration of the request of the Department and with the consent of the Appellants, the Board hereby *reverses* the Department's award of indemnification in the amount of \$2,950.00, and *remands* the case back to the Health Commissioner and the Department for consideration of the actual cost of installation of a replacement System in accord with the amended statute, Va. Code § 32.1-164.1:01, which became effective July 1, 2007. Further, the Board requires definitive evidence be presented to the Department or the Board in the form of receipts or similar documentation which substantiate the cost of the System before the Department or the Board make an award.

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.


Steven K. Thomas
Chairman

Dated: November 2, 2007