

VIRGINIA:

**BEFORE THE STATE HEALTH DEPARTMENT
SEWAGE HANDLING AND DISPOSAL APPEAL REVIEW BOARD**

In Re: Ms. Janet McLaughlin

ORDER

Ms. Janet McLaughlin ("McLaughlin") is the owner of record of certain property located at 11617 Lucasville Road, Manassas, Virginia 20112 (the "Property") within the County of Prince William. A three-bedroom single-family home on the Property is served by septic tank and drainfield. The system failed in 1998. The repairs authorized by the Virginia Department of Health ("VDH" or the "Department"), Division of Onsite Sewage and Water Services ("DOSWS") failed in 2000. The Department denied McLaughlin's application for indemnification from the Onsite Sewage Indemnification Fund (the "Fund") and McLaughlin appealed the denial. The Board heard the appeal on October 23, 2002.

CODE § 32.1-164.01, effective July 1, 1994, creates the Fund. The Fund receives a portion of the fees collected by the Department under § 32.1-164.C (application fee for onsite sewage disposal system) and § 32.1-164.E (fee for installation and monitoring inspections of alternative discharging sewage systems). Upon finding that a septic tank or other onsite sewage system permitted by the Department has failed within three years of construction and that the failure resulted from Department negligence, the Commissioner indemnifies the owner. The statute confers upon this Board jurisdiction to hear appeals of denials of requests for indemnification from the Fund.

The facts of McLaughlin's situation are set forth in detail in the Department's June 26, 2002 Recommendation and Analysis Report, introduced as Exhibit 1 at the October 23, 2002 appeal hearing, which the Board adopts in primary part.

To summarize: in 1996, the Prince William County Department of Health ("PWCDH") issued a permit for a single-family home on the Property under the 1971 Sewage handling and Disposal Regulations (the "1971 Regulations"). The owner, however, never installed the permitted system and the permit expired according to its terms.

In 1996, PWCDH received another application requesting a certification letter for a sewage system to serve a three-bedroom single-family home on the Property. By this time, the Board had adopted new, revised regulations (the "1989 Regulations"). PWCDH employees performed a site and soil evaluation of the Property and a percolation test of soils on the Property in March and April of 1996. This site and soil evaluation located a sufficient area to install a low-pressure distribution ("LPD") sewage system serving a two-bedroom house pursuant to the 1989 Regulations, but the site did not contain

sufficient area for a 50 percent reserve.¹ Because the sewage system previously had been approved under the 1971 Regulations, the Department's "grandfather clause" (GMP #66) authorized PWCDH to issue a permit pursuant to the 1971 Regulations if the owner recorded a conditional permit indicating that the site did not comply with the 1989 Regulations.

Based upon the site and soil evaluations, the applicant modified its certification application letter and requested certification of a sewage system to serve a two-bedroom house. PWCDH issued Certification Letter #175-96-0020 on April 29, 1996, and designed a sewage system for use not to exceed a two-bedroom house with peak flow of 300 gallons per day ("GPD") and an average flow of 160 GPD. The owner recorded the Certification Letter, including grandfather clause provisions, into the land records on August 14, 1996 (Deed Book 2366, pages 572-76) and modified its application to receive a construction permit in accordance with the limitations of the Certification Letter.

The owner's application for a construction permit included informal plans to install a Perc-Rite Drip Disposal LPD system, submitted by Robert B. Mayer, PE ("Mayer"), of American Manufacturing, Inc. In a letter accompanying the informal plans, Mayer represented that the components of the Perc-Rite system would work no matter where you placed them on the Property. Previously, the Perc-Rite system had received State-wide approval via GMP #67.

GMP #67 required that Wastewater Systems, Inc. ("WSI"), the manufacturer of the Perc-Rite system, train and certify installers as having passed minimum training qualifications before installing any Perc-Rite systems in Virginia. GMP # 67 mandated installation of drip-tube lines on a specified contour and required quarterly field inspections of the system to be logged with VHD. GMP # 67 required WSI to provide training classes within six months of approval of GMP # 67. It also required that installers install Perc-Rite components so that soil compaction would not occur around the system's drip-tubing.

PWCDH reviewed the informal plans and approved them in accordance with GMP # 67 and the 1989 Regulations. Accordingly, on August 20, 1996, PWCDH issued Conditional Construction Permit # 175-96-0355 (the "Construction Permit"), incorporating the grandfather clause provision which allowed installation of the Perc-Rite system without the reserve area required by the 1989 Regulations. The Construction Permit also contained technical and installation requirements for the Perc-Rite system to be installed on the Property. In addition, the owner recorded a condition that the limited the house to be built on the Property to two-bedrooms/four person occupancy, or 300 GPD.

On April 16, 1997, Southern American Septic ("SAS") installed the Perc-Rite system on the Property and, on that same date, PWCDH inspected and approved the system's construction. Subsequently, SAS issued a completion statement representing that the system installed had a peak design capacity of 300 GPD and was designed to handle an average daily sewage flow of 180 gallons.

¹ LPD systems distribute effluent via low-pressure transmission through pipes to the soil media. Drip dispersal technology constitutes one type of low-pressure distribution.

On May 12, 1997, McLaughlin acquired title to the Property.

On January 28, 1998, William Ameen, EHS Senior with PWCDH ("Ameen"), conducted a site evaluation of the property adjacent to McLaughlin's Property. While there, he heard the high-water alarm sound on the McLaughlin Property system. Ameen observed that the system's septic and pump tanks appeared to be leaking. Over the following three weeks, Ameen met with Mayer and officers or agents of SAS to ascertain and oversee performance of repairs to the system's septic and pump tanks, the computer directing pumping to the systems various drip zones and the "dialer" allowing SAS to remotely monitor system performance. Nevertheless, despite repairs to these components, the system continued to fail.

In a March 2, 1998 letter, Mayer suggested the system failure may have been caused by installation of the system's drip-tubes in "marginal soil," during "wet weather." On October 12, 2000, Phil Cobb, a certified Soil Scientist and research Associate with Virginia Polytechnic and State University ("Cobb"), performed a site and soil evaluation of the McLaughlin Property and concluded that installation of the drip-tubes with a vibratory plow may have caused compaction of the soil surrounding the tubes, impeding the outflow of septic effluent and groundwater from the tubes and causing the system failure.

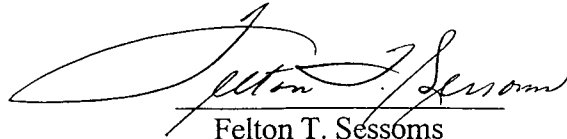
Mr. Ameen testified that, at the time of installation of the drip-tubes, he observed that the tubes appeared to be contained within tubes of soil caused by vibratory plow installation. He also stated that he noticed that the drip-tubes could easily be pulled and moved even after installation. From Cobb's site and soil evaluation, as well as testimony by Mayer at the hearing, the Board learned that this "tubing" of soils surrounding the drip-tubes resulted from improper installation in wet soils and could result in failure of a Perc-Rite LPD drip-tube system. Mayer also testified that one indicator of "soil tubing" is the ability to easily pull or move drip-tubes within the ground a short time after installation.

Mr. Ameen testified that he informed SAS installers of the apparent soil-tubing, but that the installers advised him that such tubing was temporary and would not impair system function. Mr. Ameen also testified that he received little instruction from VDH regarding Perc-Rite systems, prior to inspecting and approving the McLaughlin system .

Based on this evidence, the Board concludes that the Department did not exercise due care under the circumstances. The Board finds that the Department was negligent in that Ameen approved the construction/installation of the McLaughlin Property system despite evidence of soil-tubing during construction/installation. The Board also finds that the Department was negligent in not providing Ameen with adequate training regarding Perc-Rite LPD systems prior to his inspection and approval of the McLaughlin system. The Board is concerned that lack of adequate training required Ameen to rely almost entirely upon SAS installers to determine whether the McLaughlin system had been properly installed and caused him to disregard evidence of soil-tubing which, if timely addressed, might have prevented failure of the system or enabled re-installation prior to failure. Accordingly, the Board finds that, had the Department exercised due care, the system would not have failed.

Accordingly the Board concludes that the Commissioner shall pay Ms. McLaughlin from the Fund a total of \$23,000.00 for the cost of the repair system for the McLaughlin Property. McLaughlin is not eligible for reimbursement for attorneys' fees and costs under CODE § 2.2-4030, which permits reimbursement of such moneys from an agency's operating expenses to a party prevailing upon judicial review of an agency case decision pursuant to CODE § 2.2-4025, et seq., or for certain proceedings otherwise exempted from the Virginia Administrative Process Act. See CODE §§ 2.2-4030(A); 2.2-4002, 2.2-4006, 2.2-4011 and 2.2-4018.

The Board will hear any dispute about indemnification of attorneys' fee and costs.



Felton T. Sessoms
Chairman

Dated: December 10, 2002

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