

WASTEWATER (SEPTIC) SYSTEM COMPLAINT

To: NC Department of Health and Human Services

Complaint filed against:

1. NC Engineer- **Patrick Shillington** License # 015472
2. Orange County Environmental Health Director- **Victoria Hudson**
3. Orange County Health Director- **Quintana Stewart**

Site location (subject of complaint):

3200 Damascus Church Rd. Chapel Hill NC 27516

Business Office of the Merritt Gravel Pit and residence of Tony Merritt

Complaint date mailed: October 14, 2020

BACKGROUND AND COMPLAINT

Sometime **before 2001**, a non-permitted and unapproved wastewater septic system was installed by Tony Merritt, who was leasing the property from his aunt (LelaLou Merritt), at 3200 Damascus Church Rd. Chapel Hill, NC. Tony Merritt purchased the property from his aunt around 2010.

The Orange County Environmental Health Department became aware that the septic system was installed without the proper permits and inspections and made numerous attempts for the property owner to resolve the non-compliance. On **October 18, 2001**, Orange County Environmental Health Supervisor Tom Konsler advised the local jurisdiction (Town of Carrboro) that, due to the lack of cooperation from the Merritt family, an inspection could not be performed and no Construction Authorization was issued, and therefore, the Town of Carrboro should not grant a building permit. **Konsler wrote to Town of Carrboro:**

On September 7, 2001, this office received an application for inspection of the septic system serving an office/residential unit at 3200 Damascus Church Rd. Our field staff attempted to conduct the inspection on October 11th but was unable to complete the inspection. A Mr. Merritt was verbally abusive and demanded that we leave the property.

(see OCHD Konsler violation letter to Canova-TOC 10.18.01 Exhibit A); (see Inspector Notes 10.11.01 Exhibit B)

On **November 15, 2001**, the Merritts' long-time engineer, Patrick Shillington performed an evaluation and inspection of the wastewater septic system at 3200 Damascus Church Rd.

On **November 26, 2001**, engineer Shillington issued a professional opinion letter from his November 15, 2001 inspection of the unapproved wastewater septic system.

(see Shillington septic inspection and evaluation 11.26.01 Exhibit C)

On **May 2, 2002**, Konsler wrote to LelaLou Merritt:

The dwelling at this location has been occupied without providing an approved wastewater (septic) system as required by NC G.S. 130A-335 and 336. The septic system that exists was installed in an area unsuitable for septic systems, the construction and location of the components did not meet the required standards, none of the required permits were obtained, and no inspection of the system was conducted as required by the North Carolina Administrative Code.

(see OCHD Konsler violation letter to LelaLou Merritt 5.2.2002 Exhibit D)

On **June 13, 2002**, Konsler wrote to Town of Carrboro:

On May 29, 2002, we [Orange County] received an application for an Improvement Permit and Construction Authorization. Through Mr. Merritt's attorney and a soil scientist that he [Merritt] hired, we scheduled an appointment to conduct evaluations on the afternoon of June 11th. We received a call that morning from Mr. Loftin [Merritt's attorney] instructing us that we need not continue with the appointment. Apparently, Mr. Merritt was not interested in pursuing an approved septic system to serve the home and office that were constructed on the property.

Therefore, our determination is that the home cannot legally be occupied, nor can the continued use of the illegal septic system be allowed for the following reasons:

- 1. The person owning and controlling the residence has not provided an approved wastewater system required by NC GS 130A-335(a)**
- 2. Our department has not conducted an evaluation of the site as required in NC GS 130A-336(a) and 15A NCAC 18A.1900. Although an application has been made after the fact, Mr. Merritt is apparently not willing to allow us to complete the evaluation of his property.**
- 3. Neither an Improvement Permit of Construction Authorization was issued by our office as required in accordance with NC GS 130A-336 and 15A NCAC 18A.1900. Subsequently, no building permit can be issued in accordance with NC GS 130A-338.**
- 4. No inspection of the existing septic system was made as required in accordance with NC GS 130A-337(a) and 15A NCAC 18A.1900.**
- 5. An Operation Permit was never issued by our office that allows the septic system to be placed in use in accordance with NC GS 130A-337 and 15A NCAC 18A.1900. Subsequently electrical service cannot be allowed to this residence in accordance with NCGS 130A-339.**

6. **It has been determined that at a site visit earlier, that the existing system cannot be approved because of its location, and the fact that it does not contain the required components, and was installed without the required permits and inspections.**

(see OCHD Konsler violation determination letter to Canova-TOC 6.13.2002 Exhibit E)

By **July 2005**, Orange County Health Department's Konsler wrote again, this time to the Orange County District Attorney's Office:

Our office...has determined that the existing system cannot be modified to meet requirements and must be abandoned in accordance with the requirements.

(see OCHD Konsler violation letter to DA 7.20.05 Exhibit F)

The local jurisdiction (Town of Carrboro) has determined that this structure, which is served by the illegal septic system, is also not in compliance, as there was never a Certificate of Completion issued by the Town of Carrboro. This is partly due the non-permitted and illegal septic system, but also due to the structure not having the appropriate building permits and inspections performed. (see TOC NOV 9.26.19 Exhibit G)

NC Licensed Soil Scientist, **Robin (Little) Maycock Perez** (NCLSS #1205), was involved with Shillington between 2001/2002 until about April 2020 in the investigation and analysis of field soil tests on the Merritt property. There is concern about the validity of samples between the two LSS in 2002 and in 2020: Are the soil samples similar? Are they identical? Were the tests actually performed? (see NCLSS Robin M. Little evaluation 6.20.02 Exhibit H); (see OCHD Victoria Hudson email to Vilaro 5.1.20 Exhibit I)

Recent attempts to encourage compliance failed and resulted in Notices of Violation issued by the Town of Carrboro and Orange County, and subsequently, the filing of separate civil lawsuits against the Merritts in Orange County Superior Court for these violations. (see septic NOV OCDH 2.14.20 Exhibit J); (see 20CVS744 OC vs. TIK septic Jul.10.2020 Exhibit K); (see 20CVS 552 TOC vs. TIK May.22.2020 Exhibit P)

On **March 5, 2020**, Orange County's Environmental Health Supervisor, **Phil Vilaro**, raised several logical concerns to the NC Department of Environmental Health Services' **Kevin Neal and Trish Angoli**. Based on a **public records request**, neither Neal nor Angoli replied to Vilaro's email. Neither did they acknowledge or address any of Vilaro's concerns. Vilaro wisely questioned the validity of Shillington's plan to allow the existing tank to remain, as it was previously determined by Orange County that the existing septic tank was required to be abandoned and removed. Vilaro questions, **"can they really do an EOP to legitimize a 20-year old existing unpermitted system installed in unsuitable soil, that doesn't meet several setbacks?"** The existing septic tank is located under an enclosed deck and does not meet setback code requirements.

Astutely, Vilaro raised another concern which pointed out that Merritt's engineer, Shillington, offered and performed a wastewater site inspection without being properly certified as an NC Wastewater Inspector, as required by **NC GS 90A-72 (a) (Certification Required)**. (see OCHD Vilaro email to NCDHHS 3.5.20 Exhibit L);

Despite Orange County rendering a determination that the existing system cannot be modified and the existing area unsuitable, on **July 15, 2020**, engineer Shillington filed an application to the Orange County Environmental Health to install an impermissible wastewater septic system which does not meet code. (see Shillington EOP septic application 7.15.20 combined Exhibit M)

In response to Shillington’s application on behalf of the Merritts, Orange County issued an improvement permit and construction authorization for an Engineered Option Permit (EOP). Was this orange County Environmental Health Department’s attempt to rid itself of this decades-old problem without having to actually enforce the law?

The EOP was not passed into law to circumvent wastewater septic construction code. If so, every citizen of NC should be made aware of the process for by-passing the law.

The LHD, Orange County, has failed to enforce NCGS regulating wastewater system construction.

Based on information and belief

- Engineer’s EOP application to Orange Health Department is incomplete and inaccurate.
- Engineer’s report and summary provides inaccurate and misleading information.
- Engineer’s proposed septic “replacement” wastewater system does not meet code.
- The NCLSS has provided inaccurate information which was used to obtain the EOP.
- Soil testing was not performed in the manner described by the NCLSS.
- Soil testing results, GPS test locations, evidence of backhoe pits are in serious question, if performed at all.
- Location of the existing and proposed drain fields are located in **LoC (Louisburg)** soil type, which is a soil type with the highest level of unsuitability possible for wastewater systems. (see USDA Soil Map site details Exhibit N)
- It is likely that the unpermitted well servicing the subject property where the existing and proposed drain fields may not meet private well setbacks.

Because of this information, there are additional pending complaints to be filed with the **NC Board of Examiners for Engineers, Orange County Health Department, NC Onsite Wastewater Contractor Inspector Certification Board, NC Department of Environmental Quality, and NC Department of Insurance- Building Inspections**. If not addressed, ALL remedies afforded to a citizen will be utilized to ensure public health and compliance of regulations.

This complaint is intended to protect the environment and public health, safety, and welfare, as well as adjacent and future property owners by ensuring the integrity of the Engineered Option Permit (EOP) and NC State Wastewater General Statutes are being meticulously followed.

ADDITIONAL COMPLAINTS

1. Shillington has been the engineer for Merritt Gravel Pit since 1995

It is highly unlikely Tony Merritt installed the existing illegal wastewater septic system without the knowledge, assistance, and/or direction from a close confidant and advisor.

2. Shillington is not certified as a wastewater contractor or certified wastewater inspector.

§ 90A-72. Certification required, applicability. (a) Certification Required. – No person shall construct, install, or repair or offer to construct, install, or repair an on-site wastewater system permitted under Article 11 of Chapter 130A of the General Statutes without being certified as a contractor at the required level of certification for the specified system. **No person shall conduct an inspection or offer to conduct an inspection of an on-site wastewater system as permitted under Article 11 of Chapter 130A of the General Statutes without being certified in accordance with the provisions of this Article.**

On **November 26, 2001**, engineer **Shillington** offered and performed an inspection of the existing wastewater septic system and provided a septic system evaluation and professional opinion. (see Shillington septic inspection and evaluation 11.26.01 Exhibit C)

Although **NC GS 90A-72** (SESSION LAW 2006-82 HOUSE BILL 688), which requires certification prior to performing a wastewater inspection, was not passed until 2006, it is clear that engineer **Shillington** knew, or should have known, the installed system was unpermitted, unauthorized and did not meet required code when he performed the site evaluation and provided his professional opinion. **Shillington's** 11.26.01 site evaluation was several months after the Merritts had received non-compliance septic wastewater code violations regarding the unauthorized system.

On **July 15, 2020**, **Shillington** offered and performed an inspection of the existing wastewater septic system and provided a septic system evaluation and professional opinion without a certification as required under **NC GS 90A-72**. (see Shillington septic evaluation report 7.15.20 Exhibit R)

NC GS 90A-72. Certification required; applicability. (a) Certification Required. – No person shall construct, install, or repair or offer to construct, install, or repair an on-site wastewater system permitted under Article 11 of Chapter 130A of the General Statutes without being certified as a contractor at the required level of certification for the specified system. **No person shall conduct an inspection or offer to conduct an inspection of an on-site wastewater system as permitted under Article 11 of Chapter 130A of the General Statutes without being certified in accordance with the provisions of this Article**

NC GS 90A-81. Remedies.

(a) Denial, Suspension, and Revocation of Certification. - The Board may deny, suspend, or revoke a certificate under this Article for:

(3) Any act of gross negligence, incompetence, or misconduct in the construction, installation, repair, or inspection of an on-site wastewater system.

(c) Injunction. - The Board may ask the Attorney General to seek an injunction to restrain any person, firm, partnership, or corporation from violating the provisions of this Article or rules adopted by the Board. The Attorney General may bring an action for an injunction in the name of the State in the superior court of any county in which the violator resides or the violator's principal place of business is located. In any proceedings for an injunction, it shall not be necessary to allege or prove either that an adequate remedy at law does not exist, or that substantial or irreparable damage would result from the continued violation. Members of the Board shall not be personally or professionally

liable for any act or omission pursuant to this subsection. The Board shall not be required to post a bond in connection with any action to obtain an injunction.

(d) Offenses. - A person who commits any one or more of the following offenses is guilty of a Class 2 misdemeanor:

(1) **Engages in or offers to engage in the construction, installation, repair, or inspection of an on-site wastewater system without the appropriate certificate for the grade level of on-site wastewater system.**

3. **Shillington signed and sealed Inspection and Evaluation Findings Letter which contains inaccuracies and omissions. As a licensed NC engineer, professional conduct is required.**

21 NCAC 56.0701 Rules of Professional Conduct:

(b) A licensee shall conduct the practice in order to protect the public health, safety and welfare. **The licensee shall at all times recognize the primary obligation to protect the public in the performance of the professional duties.** If the licensee's engineering or land surveying judgment is overruled under circumstances where the safety, health and welfare of the public are endangered, the licensee shall inform the employer, the client, the contractor, other affected parties and any appropriate regulatory agency of the possible consequences of the situation.

4 (d) **A licensee shall issue public statements only in an objective and truthful manner and:**

(1) **Shall be objective and truthful in all professional reports, statements or testimony. The licensee shall include all relevant and pertinent information in such reports, statements or testimony**

Stated within the *Project Information* section of Shillington's findings letter: "*the existing system has been in good working order since 2002*". **Shillington is not a NC certified wastewater inspector or contractor**; therefore, how is Shillington qualified to make such statements?

Engineer Shillington also **omits** that the existing system is not approved and has not been permitted by Orange County Environmental Health since its installation.

Engineer Shillington states the new "repair" system to be installed is due to a "contingency" repair situation, should the existing system fail: "*although the existing system is in good working order, a repair system has been designed should the existing system fail*".

In truth, Orange County Environmental Health required that the Merritts bring their illegal wastewater system into compliance with all applicable laws. The existing system has been illegal since 2001 and has failed all inspections, except Shillington's "inspection".

(see Shillington septic evaluation report 7.15.20 Exhibit R)

4. Shillington’s lack of experience, knowledge, and/or willful oversight

Shillington knew, or should have known, the system was non-compliant and did not meet code in 2001. Still, on July 15, 2020 engineer Shillington designed and submitted a “repair” septic system plan to Orange County Environmental Health which does not meet NC General Statutes, wastewater codes, and requirements. Engineer Shillington fails to document and address within the application and site plans that the Merritt’s private well/water supply is has no permit and no inspection. It has been documented that the structure is used by visitors to the Gravel Pit and therefore contradicts Shillington’s statements within his inspection/evaluation letters 7.15.20

(see Shillington septic evaluation report 7.15.20 Exhibit R)

(see Shillington EOP septic application 7.15.20 Exhibit M)

(see OCHD Konsler violation letter to DA 7.20.05 Exhibit F)

5. Shillington’s application for an EOP is inaccurate and incomplete.

- a. Engineer Shillington’s *Repair On-Site Septic System (Sheet 2)* has incorrect data listing the structure as a 2 bedroom, when in fact, the structure is a 3-bedroom Mobile Home and Commercial office with an unpermitted and approved addition.
- b. A wastewater system contractor, licensed pursuant to **Article 5 of Chapter 90A of the General Statutes** was not listed on the septic application. This raises a serious question and concern as to whether engineer Shillington will allow the owner, rather than a licensed wastewater contractor, to perform the “repair” system installation.
- c. Engineer Shillington’s application/EOP fails to include a Plat as required by **NCGS § 130A-336.1**. Plat to include specific location of proposed facility and appetences, the site for the proposed wastewater system and the location of water supply.
- d. Engineer Shillington fails to locate, identify, and reference the water supply on the subject and adjoining properties as required by **15A NCAC 18A .1971**: The professional engineer shall reference any existing permit issued for a private drinking water supply, public water supply, or a wastewater system on both the subject and adjoining properties to provide documentation of compliance with setback requirements
- e. The application for an Improvement Permit shall contain at least the following information:
 - (d) type of water supply including the location of proposed or existing well(s), easements...

6. Existing wastewater system is located in a recorded easement not fully controlled by owner.

15A NCAC 18A .1938 (j) The entire wastewater sewage system shall be on property owned or controlled by the person owning or controlling the system. Necessary easements, right of ways, or encroachment agreements, as applicable, shall be obtained prior to the issuance of a Construction Authorization for the system installation or repair. Terms of the easement, right-of-way or encroachment agreement shall provide that the easement, right-of-way, or encroachment agreement: (1) is appurtenant to specifically described property and runs with the land and is not affected by change of ownership or control; (2) is valid for as long as the wastewater system is required for the facility that it is designed to serve; (3) describes and specifies the uses being granted and shall include ingress and egress, system installation, operation, maintenance, monitoring, and repairs; (4) specifies by metes and bounds description or attached plat, the area or site required for

the wastewater system and appurtenances including a site for any required system replacement; and (5) shall be recorded with the register of deeds in the county where the system and facility is located. Engineer **Shillington** failed to indicate the recorded private easement location on the site plans. Engineer **Shillington** has not sought nor obtained an easement agreement from adjacent property owner allowing encroachment of the septic system into the easement. In fact, the adjacent property owner (and easement holder) *will not* consent to allow encroachment into the easement for a septic system.

(see survey RECORDED 3.20.18 Exhibit S)

(see Merritt survey recorded 8.27.10 Exhibit T)

7. Orange County has determined the existing septic tank cannot be used.

Because the existing tank does not meet setback requirements as required by Orange County, the tank must be properly removed or collapsed, and an inspection must be performed. The existing tank is located directly underneath an unpermitted and enclosed addition to the structure, which is not 5 feet from the dripline.

In his proposed “repair” septic plan, engineer **Shillington** proposes the existing tank to remain, even though it has been determined NOT to meet code requirements.

The system fails to meet 15A NCAC 18A .1950 LOCATION OF SANITARY SEWAGE SYSTEMS

(See Konsler letter to DA 7.20.05 Exhibit F)

(see OC Well Septic application with guidelines Exhibit V)

(see Shillington septic Site Plan Sheet (1) existing system 7.15.20 Exhibit W)

(see Shillington septic Site Plan Sheet (2) repair proposed system 7.15.20 Exhibit X)

8. Orange County has no records of a private well located on the subject site.

The site plan provided by engineer **Shillington** does not indicate the location of any existing well or water supply lines to the existing structure as required by **15A NCAC 18A .1971 and .1973**. A PRR made to Orange County Environmental Health resulted in OCEH Department’s admission that there existed no well plans or permits. The site plans fail to ensure the required well setbacks and code are met.

15A NCAC 18A .1971 Engineered Option Permit

(c) Notice of Intent to Construct: The NOI for an EOP System shall be submitted by the owner or a professional engineer authorized as the legal representative of the owner to the local health department in the county where the design unit is located. The NOI shall be submitted on the common form...it shall include all of the information specified in G.S. 130A-336.1(b) and the following:

(3) **identification and location on the site plan of existing or proposed potable water supplies**...The professional engineer **shall** reference **any existing permit issued for a private drinking water supply, public water supply, or a wastewater system on both the subject and adjoining properties to provide documentation of compliance with setback requirements in Rule.1950 of this Section**; and (4) Proof of insurance for the professional engineer, soil scientist, geologist, and on-site wastewater system contractor.

15A NCAC 18A. 1937 Permits

The application for an Improvement Permit shall contain at least the following information:

(d) **type of water supply including the location of proposed or existing well(s)**

(see Orange County- no construction records of well for Merritts 9.3.20 Exhibit Y)

(see Shillington septic Site Plan Sheet (2) repair proposed system 7.15.20 Exhibit X)

9. Shillington's proposed system site plan does not indicate a suitable repair field

15A NCAC 18A .1945 Available Space

(a) Sites shall have sufficient available space to permit the installation and proper functioning of ground absorption sewage treatment and disposal systems, based upon the square footage of nitrification field required for the long-term acceptance rate determined in accordance with these Rules.

(b) Sites shall have sufficient available space for a repair area separate from the area determined in Paragraph (a) of this Rule. The repair area shall be based upon the area of the nitrification field required to accommodate the installation of a replacement system as specified in Rule .1955, .1956, or .1957 of this Section. Prior to issuance of the initial Improvement Permit for a site, the local health department shall designate on the permit the original system layout, the repair area, and the type of replacement system

10. Soil profile locations not indicated on Shillington Site Plan

North Carolina Licensed Soil Scientist (LSS), **Evan T. Morgan** states within the Soil Scientist Evaluation Report that *"three (3) soil profiles were advanced and their locations are noted on the site plan. Soil borings and site features were located using hand-held GPS using sub-meter accuracy"*. **These soil profile locations are not indicated on the signed and sealed site plan provided by engineer Shillington.**

(see LSS Evaluation Report Evan Morgan 3200 Damascus Church Rd Chapel Hill Exhibit Z)

11. No evidence of backhoe pits at site

LSS, **Evan T. Morgan** states within the soil scientist Evaluation Report that *"the field study was conducted on July 2, 2020. Soil profiles were conducted with a backhoe pit...subsurface that ranged 42"-48" below the ground surface"*

There is no visual evidence of these backhoe pit locations, despite the drain field being clearly visible both from the roadway and the adjacent property.

(see Shillington proposed repair drain field pics Exhibit AA)

(see Shillington septic Site Plan Sheet (2) repair proposed system 7.15.20 Exhibit X)

12. The structure serviced by the illegal septic system does not meet local zoning code with the Town of Carrboro. Authorization for wastewater system construction required before other permits to be issued.

(see TOC violations Letter 7.6.08 Exhibit BB)

The Town of Carrboro has not issued a final determination as to whether the structure's use is permissible under the Town of Carrboro Land Use Ordinance (LOU). Engineers are responsible for compliance with all applicable laws. No building permits have been issued for the structure since the structure has been illegally occupied since 2001.

NC GS 130A-337. Inspection; operation permit required

- (a) No system of wastewater collection, treatment and disposal shall be covered or placed into use by any person until an inspection by the local health department has determined that the system has been installed or repaired in accordance with any conditions of the improvement permit, the rules and this Article.
- (d) No person shall occupy a residence, place of business or place of public assembly, or place a wastewater system into use or reuse for a residence, place of business or place of public assembly until an operational permit has been issued or authorization has been obtained pursuant to G.S. 130A-337(c)

NC GS 130A-338. Authorization for wastewater system construction required before other permits to be issued.

Where construction, location or relocation is proposed to be done upon a residence, place of business or place of public assembly, no permit required for electrical, plumbing, heating, air conditioning or other construction, location or relocation activity under any provision of general or special law shall be issued until an authorization for wastewater system construction has been issued under G.S. 130A-336 or authorization has been obtained under G.S. 130A-337(c).

NC GS 130A-339. Limitation on electrical service.

No person shall allow permanent electrical service to a residence, place of business or place of public assembly upon construction, location or relocation until the official electrical inspector with jurisdiction as provided in G.S. 143-143.2 certifies to the electrical supplier that the required improvement permit authorization for wastewater system construction and an operation permit or authorization under G.S. 130A-337(c) has been obtained.

If the Shillington EOP septic application, Evaluation Findings Letter and NCLSS Morgan's Evaluation Report is not rebutted and corrected, it will become part of the permanent, public record.

Should the existing or proposed "repair" system fail, any affected party, including adjacent property owners, or future owners of 3200 Damascus Church Rd., may have recourse against Orange County, NC State Environmental Health and other regulatory bodies for not requiring factual statements in the record.

Should Orange County, NC State Environmental Health and other regulatory bodies allow the existing wastewater system to remain and the proposed "repair" system to be installed, neither of which meet code, these regulatory bodies may become liable to any impacted party.

If no swift action is taken by the appropriate regulatory body for violations to the NCGS under the guise of an EOP, injunctive relief by a citizen may be the only remaining remedy.