

**Island County Board of Health
Regular Meeting - Monday, April 21, 2008
Minutes**

Members Present: Commissioners: John Dean, Mac McDowell and Phillip Bakke; Kristy Miller, WGH Commissioner; Jim Slowik Mayor of Oak Harbor; Roger S. Case, MD, Executive Secretary to the Board; Captain Colin Chinn, Medical Corps, U.S. Navy, Ex-Officio Member.

Members Absent: No members were absent.

Call to Order: Chairman Dean called this Regular Session of the Island County Board of Health to order at 1:16 p.m.

Additions or Changes to the Agenda: The Chair asked that the Appeal be moved to the end of the agenda and there were no objections.

Minutes: Commissioner Bakke moved that the minutes for the March 17, 2008 Regular Meeting and the April 2, 2008 Special Meeting be approved as written. Commissioner McDowell seconded and the motion passed unanimously.

Community Health Advisory Board (CHAB) Reappointments: Kristy Miller recommended to the Board that Ms. Cathy Niiro and Mr. David Macys be reappointed to continue service on the Community Health Advisory Board. Ms. Niiro will continue to fill Position #9 and Mr. Macys will continue to fill Position No. 11. Both position terms will run until March 31, 2011. Mayor Slowik moved that Ms. Niiro and Mr. Macys be reappointed as recommended. Commissioner Bakke seconded and the motion passed unanimously.

Resolution No. HD-01-08 – In the Matter of Revision of the Environmental Health Service Fee Schedule of the Island County Health Department: Keith Higman, Acting Health Services Director, advised the Board that they had before them Resolution No. HD-01-08 for their consideration. He noted that the Health Department had worked extensively with the Board of Health to consider and adopt changes to the On-Site regulations and adopt the On-Site Management Plan. During those dialogs, the Board gave direction to develop and adopt a licensing program for maintenance service providers who are private industry representatives that will be selling their services to homeowners to conduct inspections of their on-site sewage systems. So commensurate with that direction, the Health Department is now proposing a revised fee schedule. The proposed change to the Liquid Waste fee schedule is an addition of a "Maintenance Service Provider License" fee of \$163 and a "Maintenance Service Provider Application Review (includes first year license fee)" fee of \$369. These fees are consistent with what is being charged in other county jurisdictions. Mr. Higman clarified that the application fee is a one-time charge.

Mayor Slowik asked for a clarification on how the hourly rate is computed on permit fees, which are not proposed for change. Mr. Higman explained that the hourly rate is based upon a combination of staff's time. We try to assign a rate that is commensurate with the level service.

Commissioner McDowell moved for approval of Resolution No. HD-01-08 for the two additions to the Liquid Waste fee schedule. Kristy Miller seconded the motion. There was no further discussion and the motion passed unanimously.

Contracts: Keith Higman presented the contracts to be considered as a group.

1. Department of Health – Consolidated Contract
Contract No. C14949, Amendment No. 8
Contract Amount: \$1,415,680
Amendment Amount: \$ 179,737

2. Whidbey Island Conservation District – Low Impact Development Workshops
Contract No. HD-02-08
Contract Amount: \$ 15,000
3. Department of Ecology – Site Hazard Assessment
Contract No. G0800524
Contract Amount: \$ 103,000
4. Balanced Action Inc. – Database Development
Contract No. HD-24-06, Amendment No. 1
Contract Amount: \$ 86,100
Amendment Amount: \$ 48,600

Mr. Higman noted that the Department of Ecology contract had an incorrect reference to Snohomish County on page 2 which will be corrected. Commissioner McDowell moved that the group of four contracts be approved as presented, including the correction to the Department of Ecology contract as noted. Mayor Slowik seconded and the motion was approved unanimously.

Health Department Report: Keith Higman noted that, in the past, the Health Department has provided communicable disease reports at each Board of Health meeting. That will continue but the generation of the report will be based on activity. This month staff continues to follow a TB case and a mumps case. In the future, we will include discussions of our many other worthy programs and information on the populations we serve. We are continuing to work on Board of Health resource packets and will be providing them to Board members and will then have them for new members.

Appeal – L. Danielson and Mayrine Beckett: The Chair opened the hearing of the appeal of Island Public Health denial of a waiver request. For the record, the Chair read a letter from Greg Banks, Island County Prosecuting Attorney. The letter reads:

“Celestial Initiates Exonerare (“SIE”) has appealed the decision by the Environmental Health Department denying its request for waiver of certain on-site sewage disposal regulations. SIE’s appeal will be heard by the Island County Board of Health. The Prosecuting Attorney is the legal advisor to the BOH. In this matter, the Environmental Health Director requested assistance from my office in responding to the appeal by SIE. I plan to be responsive to the needs of both the Board and the Director but such dual representation creates the potential for a conflict of interest in my office. Here it would be inappropriate for an attorney to give advice to one of the parties, the Director, and to the impartial decision maker, the Board. Under lawyer’s rules of ethics, if a single attorney cannot represent two different entities in the same matter, neither can two attorneys from the same firm or office. However, such split representation may be allowed if the two attorneys are effectively screened from each other. In order to meet our ethical obligations and provide cost effective representation to the County, I have assigned Dave Jamieson to represent the Board of Health in this appeal and assigned Dan Mitchell to represent the Environmental Health Director. Further, Dave and Dan will be screened from each other’s attorney’s work product. We will accomplish this by placing a prominent label on the outside of their files designating them as restricted files. The top sheet in each of their respective files will contain warnings that the restricted attorney is prohibited from handling the file or being present in any meetings where the other’s attorney’s matter is discussed. They will not share clerical support staff or this representation. They have been directed to maintain any electronic files they generate in special drives that are not accessible by any other member of the office. Finally, I have directed them both to refrain from discussing the substance of their representation with me while the matter is pending.”

The Chair went on to explain how the Board will proceed in this hearing. The first order of business will be a staff report and staff recommendations. The Appellants or his or her representative will follow the presentation of the staff report with an appeal presentation. Board members may ask questions of clarification to staff or Appellants. Cross-examination by Appellants or by staff is not appropriate. The Board will continue this hearing to our next meeting May 19, 2008 for closed deliberations as allowed under RCW 42.30.140(2). The Chair asked for comments or initial announcements from the Board. Commissioner Phil Bakke advised the Chair that he was recusing himself from the hearing.

Keith Higman, Acting Health Services Director, addressed the Board. He advised the Board that the Island County Health Department received an appeal of a decision that was rendered by one of the Health Officer's delegates. The appeal received was quite extensive and contained many issues, some of them within the purview of the Health Department and some not. The staff report is quite detailed and does respond to issues raised in the appeal. Staff is limiting their presentation to the Board to the singular item that, in staff's opinion, is solely within the purview of the Island County Board of Health, that being the decision that was rendered on the request for waiver and a denial of that waiver. Staff has asked Matt Kukuk, Planning Department Resource Enhancement Manager, to be in attendance so he could be available for Board questions.

Jim Exe, On-Site Sewage System Program Manager, presented the staff report to the Board. The issue is whether the Health Department properly denied the waiver request for the resident owner to install their own alternative sewage system. Island County code 8.07D prohibits a homeowner from installing alternative systems. The Health Department denied the waiver application accompanying the permit application to construct a sewage system for a two-bedroom home and a one-bedroom guest home. The applicant has appealed the Health Department decision. Currently, there is an approved 2005 site registration, a pending alternative sewage permit application and a denied waiver application. The sewage code prohibits a homeowner from installing their own system. Two sections of code relating are ICC 8.07D.250 titled "Installation" and ICC 8.07D.070 titled "Licensing". The Licensing section includes the resident owner exemption for a homeowner to install their own conventional system. Staff believes that those sections of code clearly exclude resident owners from installing their own alternate systems. Secondly, the Health Department bases waiver reviews on criteria outlined in a Washington State Department of Health guideline titled "Waivers". The waiver process is mitigation-based, meaning that whatever item is proposed to be waived needs to be offset with appropriate mitigation.

Mr. Exe summarized the waiver criteria. First, the applicant needs to provide justification as to why they can't conform. In this case the applicant argues that they have a prescriptive right to install their system. The Health Department does not view that as adequate justification. Second, the appellant needs to provide appropriate mitigation. The mitigation offered in this case is that the designer would be present during the construction to oversee the work. The Health Department's view is that the role of the installer is much different than the role of the designer; much like the role of a contractor is much different than the role of an architect when building a home. An installer and designer do not necessarily cross over in a way that is beneficial. Third, the proposal still must meet the intent of the code which is outlined in Section 8.07D.010 titled "Purpose, Objectives and Authority". Every sewage system installed must meet the standards within the code, function long term and not adversely impact the environment. Finally, the fourth criteria is that the proposal must not increase the risk to public health or to water quality. Mr. Exe went on to describe the proposed bottomless sand filter system and described it as a challenging system to install on a site with shallow, moisture sensitive soils. He described the construction requirements of this type of system. He characterized the soil types around the proposed site as "not very forgiving and very thin" which can, if heavy equipment is run over it, compact and not drain water the same way as before. Staff believes this is too complex a system for a homeowner to tackle with over 50 pages of construction detail in the design. Mr. Exe described the design as a very good one but very detailed and very complex for a homeowner to install. Improper installation or altering the surrounding soils will cause the system to never operate properly so staff believes that having a resident owner installation creates unnecessary increased risk to public health and water quality and staff asks that the Board of Health uphold the decision to deny the waiver.

The Board asked staff questions of clarification on the system design. At the conclusion of questions, the Chair requested the Health Department supplement the record with a copy of the original land use petition and complaint filed in Snohomish Superior Court.

The Chair invited the Appellants, Mr. Larry Danielsen or Ms. Mayrine Beckett, to address the Board. Mr. Larry Danielsen, 75152 N White Rock Road, White Rock, B.C., Canada addressed the Board and noted that he is licensed designer in the Washington. He asked correspondence be sent to Mayrine Beckett at the P.O. Box 1521, Oak Harbor, WA 98277 address and to Dan Tankersley, P.O. Box 29, Nubieber, CA 96068. Mr. Danielson stated that he is representing both Mayrine Beckett and Dan Tankersley and the applicants and resident owners will stand on their briefs and the documents submitted so far. He noted that his qualifications are listed on page 9 of his December 31, 2007 OSS Delineation Report. Mr. Danielson handed out copies of an Addendum (Amended) dated April 20, 2008, which is a complete copy. An earlier version dated April 4, 2008 had several pages omitted.

Mr. Danielson continued that the applicants are requesting a variance from ICC 8.07C.220 A and B to construct an alternative on-site system. Mr. Danielson suggested that WAC 246-272A-0250 provides that resident owners can install any type of on-site system. He further suggested that this Board has authority to provide a variance or void ICC 8.07C.220 A and B based upon the constitution, Article 11, Section 11 and Skagit Surveyor Supreme Court Case not being consistent with general laws of this state. He further advised that MOC Construction did clearing on the reserve site registration area in conformance with Environmental Health regulations in July 2005. Mr. Danielson stated that RCW 18.43 provides for engineer supervised construction and that he would be under the supervision of Aiden Watson, Civil Engineer, and or one of his contracted Civil Engineering firms. He suggested that resident owners, installers or engineers would be fully capable of installing his on-site system under supervision. He could provide the supervision as a licensed designer or work under an engineer.

Mr. Danielson contends that the cottage on-site system is in an undisturbed non-moratorium area with soils of 29 inches and a high loading rate. Relative to the moratorium, the applicants are requesting the Board approve the construction of an alternative system in the remaining 3.32 acres in the non-moratorium portion of the property per ICC 17.03.250(B)(3). The applicants "demand" the definition of vegetation, hydric soils and hydrology found in the Federal Register WAC 173.220.080 and Supreme Court *Rapanos* decision, Justice Kennedy in particular. Mr. Danielson stated that the soils on the property site are non-hydric therefore non-wetlands. Discussion followed on the logistics of construction of the proposed on-site system and some of the design features of the system design. Mr. Danielson confirmed that Dan Tankersley, trustee owner, would be doing the construction. Mr. Tankersley is a heavy equipment contractor in California and is not licensed in Washington. A discussion followed regarding licensure and bonding. Discussion continued regarding the notations of soil depths on soil logs, the proposed location of the on-site system and the definition of wetlands. Mr. Danielson recapped the chronology of purchase of the property through this appeal. The Chair thanked Mr. Danielson.

Commissioner McDowell asked Keith Higman if staff had comments regarding today's hearing. Mr. Higman responded that the Health Department's authority clearly lies in the issuance of an on-site sewage disposal permit and the application submitted was a waiver. Mr. Higman indicated that the Health Department did receive a design that meets the standards and regulations of local and state code, and nothing presented should be construed that the Health Department was not supportive of the design of the system. Rather, the Staff merely acted on the waiver and the application for a homeowner installed system. The Health Department licenses installers in this community and they are held to a high standard. They know how to construct systems commensurate with the design standards so we believe it appropriate that licensed installers install a system if the Health Department has the capacity to issue a permit. A discussion followed regarding the process for issuance of an installer's license. Commissioner McDowell asked Keith Higman what he thought was the purview of the Board of Health in this matter. Mr. Higman advised that it is staff's opinion that this Board has authority over factors involving the on-site sewage disposal permit for which the only decision the Health Department rendered is the decision on the waiver. Mr. Higman indicated that the Health Department has not denied an application to construct an on-site system nor has the Health Department approved an application to construct an on-site system.

Mr. Higman stated: "We have rendered a decision on the waiver and that decision was a denial." It is the Health Department staff's opinion that that is the narrowness of today's dialog and that is the decision that is before this board. The Health Department's view is that neither the Health Department nor the Board of Health has any authority over development moratoriums or defining wetlands. Commissioner McDowell asked about procedure if the applicant opted to use a licensed installer for the installation. Mr. Higman responded that the Health Department would, prior to being able to issue a permit, seek advice as to whether there is or is not a development moratorium on the property assigned by other departments or courts that may have legal authority. Mr. Higman said that it is staff's opinion that this Board has authority over factors involving the on-site system permit for which the only decision to be rendered is the decision on the waiver.

Mr. Danielson responded that the cost of labor in a homeowner installation would be less and that he felt that there was a prescriptive right to build your own home and install your own on-site system.

The Chair announced that the hearing was continued to the next Regular Board of Health meeting on May 19, 2008 at 1:15 p.m. for deliberations as allowed in RCW 42.30.140(2).

Public Input or Comments: There was no public input or comment.

Adjourn: There being no further business, Commissioner Dean adjourned the meeting at 2:39 p.m. The next Board of Health will be a Regular Meeting to be held on May 19, 2008.

Submitted: _____
Roger S. Case, MD, Executive Secretary to the Board

Minutes approved this 19th day of May 2008
ISLAND COUNTY BOARD OF HEALTH

John Dean, Board Chair