

BOARD OF HEALTH

Glenn Appeal Minutes

January 7, 2008



ATTENDANCE:

Board: Chairman Oberquell, Commissioners Macleod and Wolfe, Deputy Prosecuting Attorney Elizabeth Petrich, Clerk of the Board Lydia Hodgkinson

Thurston County: Sue Davis, Senior Environmental Health Specialist
Cathy Hansen, Environmental Health Specialist
Jane Futterman, Deputy Prosecuting Attorney
Art Starry, Environmental Health Division Director

Appellant: Daniel Glenn
Dick Yunker, Jim Hunter & Associates
Thomas J. Aley, Ozark Underground Laboratory

Chairman Oberquell opened the Board of Health hearing and explained that the purpose of the Hearing is to hear Daniel Glenn's appeal of an Administrative Hearing decision issued October 18, 2007 upholding the determination in a Notice of Violation that the on-site sewage system (OSS) serving his residence at 2622 Lovejoy Court NE Olympia, WA is in failure and is in violation of Article IV, section 4.10 of the Sanitary Code.

Chairman Oberquell provided introductions, explained the process for the hearing and swore in all individuals present intending to testify.

Mr. Glenn questioned the appropriateness of the inclusion of Exhibit 3 (Administrative Hearing Decision regarding Notice of Violation) in this type of hearing. Ms. Futterman responded justifying the necessity of the Exhibit. Chairman Oberquell stated Mr. Glenn's concern was noted and the Hearing would proceed.

Jane Futterman, representing the Department, presented the Department's case explaining a Notice of Violation (NOV) was issued to Daniel Glenn on May 30, 2007. An appeal to the NOV was requested by Mr. Glenn and an administrative hearing was held on October 2, 2007. The administrative hearing decision upholding the NOV was issued on October 18, 2007. Mr. Glenn is now requesting a hearing before the Thurston County Board of Health regarding the definition of a failing system, the procedures used for determining that the system is in failure and the evidence used for establishing failure on his property.

Mr. Glenn again noted concern regarding Exhibit 3. Ms. Futterman provided the Hearing procedure rules directly from the Sanitary Code which allows submittal of the Administrative Hearing Decision.

Ms. Futterman continued presenting the Department's case, stating the sewage system is failing as per Section 3 of Article IV of the Sanitary Code. She submitted Exhibit 13, Ordinance #H-3-2005 which was adopted by the Board in 2005. This Ordinance created the Henderson Inlet Shellfish Protection Area. The evaluation of Mr. Glenn's property was done as part of the Henderson Inlet Shellfish Protection Area program's dye tracing requirements. She requested that while hearing evidence the Board keep in mind that the Department does not have to prove absolute proof. The burden of proof is to establish that more likely than not the system is failing. Sue Davis and Cathy Hansen will witness for the Department.

Mr. Daniel Glenn provided an opening statement stating the property is on the edge of the Henderson Inlet Shellfish Protection area. He stated the effluent discharge that was dye tested and tested for fecal coliform has not been adequately determined to be from his property, which in turn does not confirm the septic system serving his property is failing.

Ms. Futterman called Sue Davis to testify. Ms. Davis, a Senior Environmental Health Specialist with the Environmental Health Division, stated her background and credentials pertinent to review of this case. Ms. Davis then provided a chronology of testing, the processes used and description of the dye testing and fecal coliform testing procedures performed at Mr. Glenn's property. Ms. Davis submitted exhibits 14 and 15 which provided additional testing information.

Mr. Glenn questioned Ms. Davis for clarification of testing processes and testing locations.

Ms. Futterman called Cathy Hansen to testify. Ms. Hansen, an Environmental Health Specialist with the Environmental Health Division, stated her background and credentials pertinent to review of this case. Ms. Hansen then provided the step by step process she used when performing the dye testing and fecal coliform testing she performed at Mr. Glenn's property. Ms. Hansen addressed the Board's questions.

Mr. Glenn questioned Ms. Hansen regarding testing results and testing locations. He requested verification that the fecal coliform was human and from his property. Ms. Futterman questioned Ms. Hansen to provide additional clarification. Mr. Glenn continued to question Ms. Hansen.

The Board questioned Ms. Hansen on the possibility that the fecal coliform could have been from a neighboring property. Ms. Hansen stated this could be possible.

Chairman Oberquell recommended the hearing be continued to allow Mr. Glenn to present his case.

The hearing was recessed until the next regularly scheduled Board of Health meeting on February 4, 2008 at 2:15 P.M. in room 280 of the Courthouse Building One.

Continuation of the Appeal:

The Appeal was reconvened on February 4, 2008 at approximately 2:15 P.M.

Chairman Oberquell requested clarification from Sue Davis regarding testing locations. Ms. Davis addressed her questions.

Chairman Oberquell had all present introduce themselves and swore in Thomas J. Aley.

Jane Futterman submitted a corrected Exhibit 7.

Ms. Futterman introduced and questioned Thomas J. Aley a Groundwater Hydrogeologist and owner of Ozark Underground Laboratory. Mr. Aley stated his education, qualifications, experience and certifications pertinent to review of this case. He stated he physically inspect the site and described his opinion of the topography. He does not feel the flow could be from the neighboring properties. He described in detail the dye testing process, how it works and its' effectiveness in assessing on-site sewage systems. Mr. Aley stated he worked personally through Ozark Underground Laboratories with Environmental Health Division staff to develop their dye tracing program. He stated Exhibit 6, the Thurston County Policies and Procedures for Dye Testing are correct. Mr. Aley provided his opinion of the dye testing and coliform bacteria testing analysis for Mr. Glenn's site. Ms. Futterman submitted Exhibit 17 a Certificate of Analysis from Mr. Aley dated May 25, 2007. Mr. Glenn objected to allowing submittal of Exhibit 17. Chairman Oberquell allowed the exhibit submittal. Mr. Aley provided a detailed explanation of his analysis and the significance of the results. Ms. Futterman continued questioning Mr. Aley.

Mr. Glenn questioned Mr. Aley for additional information regarding his knowledge of the site and the testing process the Department used. Mr. Glenn noted Mr. Aley's opinion is based on no knowledge of the neighboring septic systems. The Department submitted Exhibit 18 a topography map of site and surrounding properties.

Discussion ensued between the Board and Mr. Aley providing additional detailed dye test and fecal coliform testing information and his opinion of the results. Mr. Glenn continued questioned Mr. Aley. Mr. Aley stated he did not personally run tests, but he did provide supervision.

The Department closed. Mr. Glenn requested appeal be continued.

The hearing was recessed until the next regularly scheduled Board of Health meeting on March 3, 2008 at 2:00 P.M. in room 280 of the Courthouse, Building One.

Continuation of the Appeal:

The Appeal was reconvened on March 3, 2008 at approximately 2:00 P.M. in room 280 of the Courthouse Building One, but as stated for the record by Chairman Oberquell, due to illness of one of the parties the appeal was continued.

Commissioner Macleod moved to continue the Daniel Glenn appeal to March 31, 2008 at 9:00 A.M. to 11:30 A.M. in room 280 of the Courthouse, Building One. Commissioner Wolfe seconded the motion. The motion carried.

Continuation of the Appeal:

The Appeal was reconvened on March 31, 2008 at approximately 9:00 A.M.

Chairman Oberquell called the appeal to order and introduced all present.

Mr. Glenn submitted exhibits 19 through 25. Ms. Futterman objected to submittal of Exhibits 19 and 20. Chairman Oberquell requested and Mr. Glenn provided information supporting allowance of exhibits. Chairman Oberquell allowed submittal of Exhibits 19 and 20 with further consideration to follow.

Daniel Glenn called Mr. Richard (Dick) Yunker to testify. Mr. Yunker provided his background, experience, his involvement in this case, his review of the site and opinion of the alleged on-site sewage system failure. Mr. Glenn questioned Mr. Yunker referencing exhibits 21 through 25, providing additional details and opinions regarding the site and testing results. Ms. Futterman objected to questioning regarding any proposed OSS failure corrections. Chairman Oberquell overruled objection. Mr. Yunker stated he did not find any evidence of failure on Mr. Glenn's site.

Ms. Futterman questioned Mr. Yunker on specifics of his physical inspection of the site and his opinion of the testing results. Mr. Yunker did not dispute the results of the dye test for site 3, but did dispute the effluent fecal coliform testing results.

Mr. Glenn described the photographs taken of his property, included in Exhibits 21 through 24, and provided a background of his purchase of the property. Mr. Glenn stated Environmental Health records do not have an "Asbuilt" drawing for the OSS on the property. Board Members questioned Mr. Glenn regarding the maintenance of the OSS which he stated has been maintained and pumped with no evidence of failure.

Ms. Futterman re-called Cathy Hansen for further testimony. Ms. Hansen provided additional clarification of water flow on the property, reviewed the chronology of her monitoring, and reviews.

Mr. Glenn questioned Ms. Hansen requesting clarification on previous testimony regarding effluent flows and testing procedures. Ms. Hansen provided additional clarification to the Board.

Ms. Futterman provided a closing statement for the Department stating the positive dye test and fecal coliform bacteria test results establish that the Glenn on-site sewage system is in failure. This is in violation of Article IV as stated in the Notice of Violation and must be corrected. The Department followed the required process, followed the code, obtained the test results and now request that the Board uphold the Administrative Hearing Decision and require Mr. Glenn to complete repair of the on-site sewage system in full compliance with the requirements of the Sanitary Code for Thurston County within 90 days from the issuance of the Board's decision.

Mr. Glenn provided a closing statement stating the burden is on the county to prove the effluent, that tested positive for dye and a high fecal coliform count, was in fact effluent coming directly from his property. The high cost of repairing an on-site sewage system on his property requires it be proven with absolute proof the effluent was not from a neighboring property.

Ms. Futterman stated an adopted code has been violated and this fact is what is being heard at this Hearing.

Chairman Oberquell stated the Board would not render their decision today. They will meet with their attorney for discussion at a time to be determined. Mr. Glenn is to provide the Board with a citation regarding Exhibit 19 "Closing the door on the fecal coliform Assay".

Continuation of the Appeal:

On April 7, 2008 at a regularly scheduled Board of Health meeting the Board issued a decision. Conclusion: Without doing a dye trace evaluation of the adjacent properties, and ruling out their respective flows to sample site 3, especially the adjacent property to the west whose system may be near the beach and in close proximity to sample site 3, the link between the bacteria contamination and the septic system on Mr. Glenn's property is not conclusive at this time.

Commissioner Wolfe moved to remand this matter back to the Environmental Health Division for additional evidence. Staff is directed to conduct dye tracing evaluations on the adjacent properties and to include sample site 3 in their studies. Staff is also directed to re-test Mr. Glenn's property, if necessary. After the dye tracing evaluations are complete, this matter shall be rescheduled before the Board of Health for a final determination on whether Mr. Glenn's septic system is in failure. Commissioner Macleod seconded the Motion. The Motion carried.

Continuation of the Appeal:

The Appeal was reconvened on August 29, 2008 at approximately 9:00 A.M.

Chairman Oberquell opened the Board of Health hearing in the continuing matter of Mr. Daniel Glenn's appeal of an Administrative Hearing decision. This hearing is to hear additional evidence that was collected pursuant to the April 7, 2008 remand order. At the conclusion of this hearing's testimony the Board will either issue its decision or continue the hearing for additional testimony and or consideration. Chairman Oberquell swore in all individuals present intending to testify.

Chairman Oberquell stated for the record that Mr. Glenn acknowledged receipt of additional information the Department had submitted (Exhibits 26 – 29).

Chairman Oberquell directed the Department to present.

Jane Futterman submitted a revised Exhibit 27-1 providing a brief explanation of the revised information. She then provided a brief summary of the Board's direction given to the Department referring to Findings 3 and 4h as stated in the April 7, 2008 Decision. The Department will testify regarding the results they found and the additional information they found after testing both on-site sewage systems at the Stull's property and Pierce's property regarding discharge pertinent to the Glenn System.

Ms. Futterman then called Sue Davis to testify. Ms. Davis then provided a summary of testing procedures and results referring to Exhibits 26-1 which is a map of the sites where additional testing was completed. She then explained the dye test evaluation results and fecal coliform bacteria results specific to the Stull property (Exhibit 27), which determined the Stull septic system is not in failure as defined in Article IV of the Sanitary code. She then explained the dye test evaluation results and fecal coliform bacteria results specific to the Pierce property (Exhibit 28), which determined the Pierce septic system is in failure as defined in Article IV of the Sanitary Code. She explained the additional

data shows that both the Pierce and Glenn septic systems are in failure as defined in Article IV of the Sanitary Code. Ms. Davis addressed questions by the Board and Elizabeth Petrich.

Mr. Glenn questioned Sue Davis regarding the type of OSS system on the Pierce property; testing results for Pierce and Stull properties; previous testing of his property; clarification of Mr. Thomas Aley's testimony regarding direction of drainage from his property to the bulkhead; and additional dye trace testing procedures. Ms. Davis addressed Mr. Glenn's and the Board's additional questions.

Mr. Glenn called Dick Yunker to testify. Mr. Yunker addressed the Board's questions regarding type of OSS on Pierce property. Mr. Glenn continued questioning Mr. Yunker regarding results of physical inspection of his property and his opinion of dye test and fecal coliform bacteria testing and results.

Ms. Futterman questioned Mr. Yunker requesting clarification of issues brought up in Mr. Glenn's questioning.

Mr. Glenn questioned Mr. Yunker regarding the cost of a repair of his OSS. Ms. Futterman objected to, and Chairman Oberquell upheld, the question.

Mr. Glenn questioned Cathy Hansen regarding procedure and information provided to property owners prior to testing their property. Ms. Hansen addressed the question.

Chairman Oberquell requested 5 minute Summations from the both parties.

Ms. Futterman provided a Department Summation stating the system is in fact failing and request the Board uphold the Administrative Hearing Officer's decision and provide a compliance schedule and deadline for Mr. Glenn to bring the system into compliance and correct the failure.

Mr. Glenn provided a Summation stating the burden is not on the appellant it is on the Department to determine their findings are based on correct fact.

Chairman Oberquell closed the Hearing until the next regularly scheduled Board of Health meeting on September 8, 2008 at 2:00 P.M. in room 280 of the Courthouse, Building One at which time the Board will give their decision or continue the Hearing.

Continuation of the Appeal:

On September 8, 2008 at the Board of Health meeting the Appeal was continued until September 15, 2008 at 3:00 P.M. in room 280 of the Courthouse, Building One at which time the Board will give their decision. Lydia Hodgkinson, Clerk of the Board, will notify Mr. Daniel Glenn.

Continuation of the Appeal:

The Appeal was reconvened on September 15, 2008 at approximately 3:20A.M.

Chairman Oberquell opened the Board of Health hearing in the continuing matter of Mr. Daniel Glenn's appeal of an Administrative Hearing decision and provided a summary of the appeal. This

Thurston County Board of Health – Daniel Glenn Appeal
Minutes of January 7, 2008

matter originally came to the Board on January 7, 2008, February 4, 2008 and March 31, 2008 as a result of an appeal by Daniel Glenn of the hearing officer's decision dated October 18, 2007. The hearing officer's decision affirmed a Notice of Violation dated May 30, 2007, and filed against Mr. Glenn's property at 2622 Lovejoy Court N.E. Olympia, WA for a failing septic system. On April 7, 2008 the Board issued a decision remanding this matter back to the Environmental Health Division for additional evidence. Staff was directed to conduct dye tracing evaluations on the adjacent properties and to include sample site 3 in their studies. After the dye tracing evaluations were complete, this matter was rescheduled before the Board on August 29, 2008 to consider the additional evidence. Today the Board is prepared to issue a final decision in the matter. At issue in this case is whether Mr. Glenn's septic system is failing. Under Article IV Section 3 a failing septic system can be established by a positive dye test and a fecal coliform count of at least 200 organisms per 100 milliliters. Based on the evidence in the record the Board is prepared to make a number of findings and will be detailed in the written decision. Based on these findings and evidence in the record it is the Board's conclusion the Glenn system is failing as defined in Article IV Section 3. Therefore, the Board's decision is to deny Mr. Glenn's appeal. Mr. Glenn will be directed to take the following actions: Diagnose the sewage system as part of the repair process no later than November 14, 2008. Diagnostic work done early on in the repair process is required because a check of the components of the system may identify that the reason for the failure is something simple that can be repaired easily and inexpensively. The approved on-site sewage system repair must be installed according to the requirements of the Sanitary Code for Thurston County. All Board Members concurred with the Decision. A written Decision will be signed and copies given to Mr. Glenn.

The Appeal was adjourned.

BOARD OF HEALTH
Thurston County, Washington

ATTEST:

DIANE OBERQUELL, Chairman

LYDIA HODGKINSON, Clerk of the Board

ROBERT N. MACLEOD, Member

Date: _____

CATHY WOLFE, Member