# Environmental Appeal Board

**APPEAL NO. 95/30 - HEALTH**

In the matter of an appeal under Section 5 of the *Health Act*, R.S.B.C. 1979, c. 161

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| BETWEEN: | Edward Jonkman | **APPELLANT** |
| AND: | Environmental Health Officer | **RESPONDENT** |
| BEFORE: | A Panel of the Environmental Appeal Board<br>David Brown, Panel Chair | |
| DATE OF HEARING: | April 26, 1996 | |
| PLACE OF HEARING: | Richmond, British Columbia | |
| APPEARING: | For Appellant: Rob Arden | |
| | For Respondent: Nick Potter | |

**BACKGROUND**

This is an appeal of the denial by the Environmental Health Officer of the application of Mr. & Mrs. Jonkman to install a sewage disposal system on their property at 18282 - 32nd Ave., Surrey, B.C. (referred to as the "Property").

Mr. & Mrs. Jonkman applied for a permit to install on the Property an on-site sewage disposal system which was engineered by Levelton Associates Consulting Engineers. It utilizes an approved package treatment plant, the Whitewater DF-50-FF Package Treatment Plant (the "Treatment Plant") and additionally an ozonation treatment unit (the "Ozonation Unit") and a raised disposal field (the "Disposal Field"). The system as a whole is referred to hereafter as the "Proposed System". The Proposed System is intended to service a single family residence.

The application was rejected for the following reasons (direct quote from the Rejection Report, dated February 29, 1996):

> System proposed is based on performance standards. The sewage disposal regulation states in Section 3.01(1)(a)(i) that the minimum lot size for this type of system is 10 acres. System proposed does not meet standards for a conventional or alternate system as explained in the regulations and policies regarding on-site sewage disposal in regards to depth to water table.

In this hearing evidence was presented by Mr. Arden and Mr. Kneale from Levelton Engineering and by Frank Hay who is associated with the local manufacturer of the Treatment Plant and by Timothy Millard for the Environmental Health Officer ("EHO").

## THE LEGAL CONTEXT

This appeal is taken pursuant to Section 5 of the *Health Act*. The Environmental Appeal Board may confirm, vary, or rescind the ruling under appeal.

The relevant regulation is B.C. Reg. 411/85 "Sewage Disposal Regulation", a regulation passed pursuant to Section 5 of the *Health Act*.

Section 6 of the regulation provides as follows:

> Subject to Section 7, no sewage disposal system constructed after the date of this regulation which involves the use of a septic tank or package treatment plant is permitted unless the system conforms with the standards of construction, capacity, design, installation, location, absorption, operation and use set out
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> (a) for conventional septic tank systems, in schedule 2, and
>
> (b) for conventional package treatment plant systems, in Schedule 3"

Section 7 of the regulation allows in the case of a package treatment plant for the relaxation of the requirements set out in Sections 11, 12 or 18 of Schedule 3. Regulation 7(1) provides that:

> "where a medical health officer is satisfied that it is impossible for a person to comply with
>
> (b) in the case of a conventional package treatment plant system, Sections 11, 12, or 18 of Schedule 3,
>
> but that the person can comply with all other provisions of the appropriate schedule, he may issue a permit to construct under Section 3, containing conditions that he considers appropriate to meet the omitted standards having regard to safeguarding public health."

The EHO is required to exercise discretion under Section 7(1) of the Regulation. Abundant law has been developed over the years concerning the exercise of administrative discretion. In simple terms, however, discretion must be exercised objectively and with an active intelligence. It is not properly exercised when the administrative officer fails to consider the merits of a particular application but rather bases his decision on what he is told to do by "higher-ups" or on a blanket exclusion set out in an administrative policy.

Some of the policies of the Ministry of Health concerning on-site sewage disposal systems were referred to at the hearing. Most of these policies are set forth in a manual entitled "Policy On-Site Sewage Disposal (sub-titled "To Assist in the Administration of the Sewage Disposal Regulation"). Policy 6.1 states "To accommodate an owner of an existing lot, an alternate system shall be considered." This policy acknowledges that an owner of an existing lot will be accommodated in the development of his or her lot provided that this development does not constitute a risk to public health as objectivized in the regulations. There is nothing

in this policy which purports to preclude the exercise of discretion. In any event policies of this type are simply "guidelines", not "absolutes".

**THE EVIDENCE**

The Property is approximately 4.65 acres. It is located in the Clover Valley in South Surrey. The Appellants wish to build a house on the Property. This is a lightly populated farming area and there are no other dwellings in close proximity to the Property.

With respect to the issues raised by the parties and based on the evidence presented at the hearing the panel finds as follows:

a. The disposal field site does not have 18 inches of unsaturated, native soil below the natural ground surface over its entire area. There is a "perched" groundwater table which at certain points on the Site reaches the surface or close to the surface.

b. The percolation rate for the site is 29 minutes per inch or less.

This site clearly does not comply with Section 11 of Schedule 3 (referred to above). The Appellant also acknowledged that the Proposed System would not comply with Section 18 of Schedule 3.

The Respondent acknowledged that the Proposed System would meet all sections of Schedule 3 other than Sections 11 and 18.

The evidence of the Appellants was that the Proposed System would prevent the break out of domestic sewage or effluent and that the "end product" would contain virtually no contaminants.

**ANALYSIS**

When a site does not meet the basic requirements regarding percolation rates and depth of unsaturated native soil, it is incumbent upon the applicant to establish that the proposed system "safeguards public health".

Where there is a Ministry policy such as a requirement for 18 inches of unsaturated native soil, the applicant in an appeal will have to convince the Panel that this requirement is unnecessary and public health will not be at risk. It must be assumed that there is some reasonable justification for the requirement of a certain minimal depth of unsaturated natural soil in the absence of contrary technical evidence that in a particular situation it is unnecessary.

Where, however, the application is for an engineered system which is backed up by technical data which addresses the absence of 18 inches of unsaturated native soil, then it is incumbent upon the EHO to objectively assess it - with an open mind addressing the question on a case-by-case basis as to whether or not the proposed system safeguards public health.

This is clearly a situation where the EHO has "fettered" his discretion. The EHO said in fact that he had no discretion. In any event it was abundantly clear from the

evidence that no effort was made by the EHO to assess the technical merits of the Proposed System to determine whether or not it met the objective of safeguarding public health.

Much of the "evidence" given by Mr. Millard was to the effect that statute, regulation and policy precluded the Ministry from granting a permit if there is not 18 inches of unsaturated, permeable soil on a site. The Act and regulations clearly do not preclude the approval of an on-site sewage disposal system in such a situation.

The EHO was of the view that if a site does not have 18 inches of unsaturated soil that a permit could be issued only if the application fell under the Code of Good Practise or under Innovation Technology Guidelines.

This is clearly not correct. The EHO has discretion within the existing regulatory system. The EHO can approve an on-site sewage disposal system (involving a package treatment plant) notwithstanding that it does not meet Sections 11, 12 and 18 of Schedule 3. He can issue "a permit to construct under Section 3, containing conditions that he considers appropriate to meet the omitted standards having regard to safeguarding public health."

The EHO could not identify how the Proposed System would be a threat to public health other than expressing a concern about it being maintained properly. Again, however, on this issue the EHO did not present any evidence that the Proposed System has a poor maintenance record or for that matter that there is a maintenance problem generally with package treatment plants.

In his submissions Mr. Potter said that the EHO was not satisfied that the sand mound disposal field would be effective; and that he had come to this conclusion on account of his experience and on account of his discussions with other (unnamed persons) in the Ministry. Mr. Millard did not in fact given any evidence about his experience with the operation of other sand mound disposal systems in specific situations.

The EHO said that the Proposed System does not meet the Sand Mound and Pressure Distribution Guidelines. These Guidelines are at best "policy", they are not regulations passed pursuant to the *Health Act* and accordingly are nothing more than guidelines which the EHO may consider in the exercise of his discretion but can not "hide behind" as absolute criteria.

The only evidence on the effectiveness of the Proposed System was that of the Appellant. In the Panel's opinion sufficient evidence was presented that the Proposed System would very effectively treat the domestic sewage such that its disposal via the on-site disposal field would not constitute a public health hazard.

The panel also accepts the Appellant's evidence to the effect that the hydraulics of the Disposal Field design are such that the effluent will not reach the surface of the land.

Whether or not the Ozonation Unit has formal provincial approval is a non-issue. This is an add-on feature and in this case there is no reason to believe that it will not work per specifications.

None of the technical evidence of Mr. Arden and Mr. Kneale was challenged. There is no reason to believe that if the Proposed System is properly installed that it will not meet the treatment specifications claimed. Certainly the Respondent did not supply any reasons.

The panel finds that in the instant case that an on-site sewage disposal system incorporating a package treatment plant and absorption field, if installed in accordance with Schedule 3 (except for Sections 11, 12 and 18) would not constitute a risk to public health.

**THE DECISION**

The panel finds that this is a situation where, having regard to safeguarding public health, a permit should have been issued by the EHO to construct a sewage disposal system, containing those conditions set out in Sections 1 to 10, 13 to 17 and 19 to 21 of Schedule 3. Accordingly the appeal is allowed.

The appeal is allowed with the following conditions:

a. The approved on-site sewage disposal system for the Property ("Approved System") will be the Proposed System except that the raised mound disposal field will be increased in height to provide four feet of sand.

b. The Respondent may specify reasonable inspection requirements during the course of installing the Approved System.

c. The Respondent may require than an engineer verifies in writing that the Approved System has been installed in accordance with the plans and specifications as amended.

d. The Respondent may require the registration of a covenant pursuant to Section 215 of the *Land Title Act* regarding the installation and the maintenance of the system. This restrictive covenant will be in favour of the Ministry of Health and will have the following provisions:

    i. The Approved System will be monitored and maintained as follows:

        (1) During the first two years of the operation of the Proposed System the Treatment Plant will be inspected (and necessary repairs made) on a quarterly annual basis by either the manufacturer of the Treatment Plant or other qualified business or person.

        (2) In subsequent years the Treatment Plant shall be monitored on a yearly basis and the Ozonation Unit on a twice yearly basis.

        (3) Additionally the EHO may inspect the Approved System from time to time as the EHO deems fit on reasonable notice to the owner.

ii. The Approved System shall be installed in accordance with the plans and specifications prepared by Levelton Associates Consulting Engineers with the modifications outlined above.

iii. Until the Approved System has been installed as required and that has been verified by an engineering firm as per above no residence is to be built on the Property.

iv. A residence on the Property shall not be occupied unless the Approved System is properly maintained.

v. The owner releases and indemnifies the Ministry of Health from any and all claims for damages or compensation however made by the owner or third parties including successors in title to the land.

e. Any of the above terms, where appropriate, may be included in the conditions attached to the permit to be issued by the Respondent. The Respondent can also include conditions in the permit for those periodic inspection and maintenance requirements for the System set out in the proposed restrictive covenants.

f. The EHO must advise the Appellants by letter on or before May 31, 1996 whether or not the Respondent requires a registered statutory covenant.

g. The Appellant must register the Statutory Covenant within 60 days of receiving the above-described letter if the Respondent requires a registered statutory covenant.

h. The permit together with the amended specifications and conditions should be issued within 15 days of the registration of the statutory covenant.

i. The permit will be valid for one year following issuance.

David Brown, Panel Chair
Environmental Appeal Board

May 13, 1996