

**LEWIS AND CLARK CITY-COUNTY
BOARD OF HEALTH – MINUTES
1930 9th AVE, HELENA, MONTANA 59601
In-Person/Zoom Meeting, 1:00 p.m.
July 27, 2023**

Members Present

Dr. Mikael Bedell, vice chair
Commissioner Tom Rolfe
Mayor Kelly Harris
Katherine Weber
Lisa Kaufman

Staff Present

Drenda Niemann Jay Plant
Jolene Helgerson Heather Parmer
Laurel Riek
Shelly Maag
Angelique Turner
Kathy Moore
Beth Norberg

Members Absent

Mayor Wilmot Collins
Justin Murgel
Rex Weltz
Brie MacLaurin

Guests Present

Nick and Jean Frank
Deputy County Attorney Nicho Hash

Dr. Mikael Bedell, vice-chair, called the meeting to order at 1:00 p.m. A quorum was established.

REVIEW OF AGENDA

No changes were made. No public comment was given.

MINUTES

Dr. Bedell asked if there were any corrections or additions to the June 22, 2023. There being no changes, the Board approved the minutes as written. No public comment was given.

STAFF INTRODUCTIONS & EMPLOYEE OF THE QUARTER RECOGNITION

Introduction of new employees Shelly Maag, Public Health Nurse Supervisor and Angelique Turner, Public Health Nurse. Drenda Niemann, Health Officer announced that the All-Staff Meeting Planning Team members A.C. Rothenbuecher, Kathy Moore, Rae Brown, Jolene Helgerson, and Dawn Sullivan received the Quarterly Employee Recognition award. No public comment was given.

ACTION ITEMS

Variance Request, Nick and Jean Frank, 3789 Churchill Lane, Helena, MT:

Jay Plant, Lewis and Clark Public Health registered sanitarian, stated that Nick and Jean Frank of 3789 Churchill Lane, Helena, MT, are requesting two variances. One to Section 4.3 (5) of the 2020 Lewis & Clark On-Site Waste Treatment Regulations. The applicant is requesting a variance to a wastewater treatment system that must be located to maximize the vertical separation distance from the bottom of the absorption trench to the seasonally high groundwater level, bedrock, or other limiting layer, but under no circumstances may this vertical separation be less than four feet of natural soil. The other variance to Montana Department of Environmental Quality (MDEQ) Circular DEQ-4, Section 2.2.4: A minimum of 4 feet of natural soil from the bottom of the infiltrative surface of the subsurface absorption system to a limiting layer must be maintained. Fill cannot be used to overcome minimum vertical or horizontal separation distances.

Mr. Plant highlighted the staff report (on pages 11-15 of the board packet) along with Exhibit C-Vicinity Map, Exhibit E-Lot Detail, and Drone Footage 1 & 2 (see Attachment "A").

In answer to questions from Commissioner Tom Rolfe, Mr. Plant stated that it is incorrect to say that if this system was designated as a replacement system that it would qualify for approval. The issue with this current system is that the Frank's do not have 4-foot separation. Through the variance process that potentially could be the case if that was approved, but it still would not meet the requirements set forth by MDEQ or the 2020 Lewis & Clark On-Site Waste Treatment Regulations. Mr. Plant also stated there is a possibility to have soil that would have the same or better characteristics as natural soil would have by bringing in clean fill.

In answer to a question from Lisa Kaufman, Mr. Plant stated that the reason the first variance was denied is that the Board of Health did not have the scientific information that was given by Eric Regensburger, Hydrogeologist at MDEQ who acknowledged that the addition of the 2 feet of fill needed to get the 4 foot separation is adequate and would not adversely affect public health by building the sand mound in the requested location. The second reason is that the applicant did not provide adequate information to justify undue hardship.

Jean Frank, Variance applicant, stated that in their initial hearing their calculations came in good so they did not emphasize what their hardship would be if their variance was not granted. Prior to purchasing, Ms. Frank said she did review the regulations for a replacement system of a failed system and misunderstood what she read and did not know about the 4-foot separation on a sand mound system. They bought the additional property to get the easement driveway off because easements are good until they are not when you get the wrong person who buys the lot. That was their only access to their house. That or crawl up from Black Sandy Park up the hill or go to the Point and crawl through a couple of ravines to get to their house. Whoever bought that property could have dropped a tree to prevent them using the driveway because it's their property. Their main reason was to get rid of any easement issues. Ms. Frank noted that they are not wealthy, and they did not plan on keeping the lot. After speaking with a surveyor, they were informed that they could subdivide to keep each parcel over 20 acres. Ms. Frank discussed the unsafe conditions of the driveway which required them taking out a loan to buy the property to widen the driveway. Now interest rates have increased they have had to access their retirement funds to pay back the loan. Ms. Frank stated that in their first variance they had mentioned that they had gotten a loan, but it was not mentioned in the minutes and wasn't emphasized because they did not think that it was important. The important thing is that the calculations were good, and everything met the requirements and or exceeded the requirements such as the levels of nitrate in the soil. They misunderstood the State of Montana requirements since they vary from those in Minnesota. In Minnesota, mound systems are everywhere. They figured it was a common thing as long as all the calculations came out good that it wouldn't be a problem. That was their emphasis. At one point they did have a buyer for the property but because they did not have a septic permit for the lot the sale did not go through. They tried to be proactive later and get a septic permit for the lot as an incentive for a new buyer. Without a septic permit the lot is not sellable. It's tougher to sell if we don't have a septic permit.

In answer to a question from Dr. Bedell, Mr. Plant stated that what has changed since the last variance denial and the legal decision by the DEQ, was that with the addition of Mr. Regnsburger's observation of additional fill would allow for adequate separation and would not create a public health risk or threat. As for the proof of hardship requirement, Beth Norberg, Lewis and Clark Public Health registered sanitarian, stated there are very specific criteria listed both in the Administrative Rules of Montana and verbatim in our 2020 Lewis & Clark On-Site Waste Treatment Regulations along with the variance criteria that has to be met in order to grant a variance. Staff believes that the criteria has been met for public health

protection. The requirement to meet undue hardship and extraordinary conditions piece of the variance is an additional requirement. The burden is on the applicant to prove. Ms. Norberg informed the Board that it is their decision if the applicants have met the undue hardship requirement.

Ms. Niemann reminded the Board that this is a new variance and is not necessarily the same as last time since there is new information that was brought forth with some of the previous history to go with it.

Ms. Kaufman noted that it is important to understand that there is no definition of what hardship means. It is up to the board to determine if hardship means losing the use of a lot through speculation or not. Ms. Kaufman stated that she agrees with the new scientific evidence that the public health aspect of the variance has been fulfilled. It is the hardship part and how we define it. How we define hardship in this case is how we will need to carry it through on any future variance requests.

Dr. Bedell opened the variance up to public comment, there being none, Mr. Frank added that the drone footage showed that the original septic tanks were along the steep driveway. The driveway was the main focus to stop future court appearances as far as neighbors not getting along. The driveway has been a handful to keep up for the Frank's usage, and to put an additional family and try figure out who does what and shared expenses. That was the driving force for us all. We did all we could to give the new parcel as much as we could. It now has 3 to 4 times the top area to work with and we are looking at this usage to basically make peace in the neighborhood. There is nothing worse than a rival between neighbors and that is not what our whole goal of this process. Expect there was a misinterpretation of the failed septic system and that is where we are today.

Ms. Kaufman summarized the Frank's argument for undue hardship is that the sole purpose was to purchase the lot to get sole ownership of your driveway as the only means of entrance and egress from your property. And that the lot was bought with the intention of selling it. There was a misunderstanding with the designation of a new septic because the septic was installed hadn't failed. It never met the requirements from when it was constructed. Ms. Frank stated that in a letter from the Lewis and Clark County to the previous owner that it was labeled as a failed system. And we assumed that a sand mound would be a replacement for the it and it also compromised the replacement site according to the letter. Ms. Kaufman responded by saying that the hardship for the applicant was that they never intended to pay two mortgages or have a payment on this vacant lot. The applicant always intended to sell it. Ms. Frank confirmed what Ms. Kaufman stated and added that they never wanted two lots. It was to redesign it to get our driveway, so the easement part was taken out from the people who owned the lot before them. Each person who owned the lot before them, spent years in court and told the applicants they spent \$10,000 each fighting with each other about the driveway before they even bought the lot in 2012. There is a history of problems with the easement. On the original plot the driveway coming down is listed as an easement road and the people spent 6 years in court which cost them \$10,000 in legal fees. Ms. Frank stated that you could end up with great neighbors and no easement issues or the opposite. We had a chance to get rid of the easement and it was our intention of selling the other lot as we don't have that kind of money.

Commissioner Rolf stated that after the change in boundaries, there is more buildable space than before which will be an advantage to a new person in the future. Ms. Frank agreed and stated that their association has a 75' setback for a house. The lot has 2 different building sites for a new owner.

Ms. Kaufman stated that as a Board discussion needs to be had regarding if financial burdens are considered a hardship. Ms. Niemann stated that from the Frank's statement today that there is more than financial hardship and that the hardship that is not financial would be worth discussing.

Mr. Plant read the staff recommendations to the Board.

Dr. Bedell asked for any additional comments from the Board, there being none, Dr. Bedell recommended that the variance be granted with the conditions recommended by staff. Mayor Kelly Harris made a motion to approve the variance request with staff recommendations. Commissioner Rolfe seconded the motion. There being no public comment, the motion carried 4-1.

Review of the COVID-19 Emergency Rules and Regulations: Ms. Niemann presented the current COVID-19 Regulations that remain active at this time (on pages 76-91 of the board packet). Ms. Niemann stated that Federal and State emergency for COVID-19 have been lifted. Current COVID-19 cases and hospitalizations have been low for several months in Lewis and Clark County. Public Health continues to conduct active surveillance through case investigation and wastewater surveillance. Ms. Niemann is asking the board to discuss rescinding the regulations for the Governing Body's approval. Ms. Kaufman made a motion to rescind the emergency COVID-19 regulations. Mayor Harris seconded the motion. No public comment was given. The motion carried 5-0.

BOARD MEMBER DISCUSSION

FY23 Year End Financial Report: Heather Parmer, Finance Coordinator, referenced the FY23 comparison to budget and cash flow for July through June 2023 (on pages 93-94 of the board packet). Ms. Parmer noted that the department is 100% through the fiscal year. Total revenue to date is \$2,958,757 or 102% of the amount budgeted; actual expenditures are \$2,962,766 or 105% of the amount budgeted. Revenues are under expenditures by \$4,009; total ending cash is \$596,988. Ms. Parmer said that the current cash reserve is below the 90-day recommendation but has increased to a 72-day reserve due to incoming property taxes, FTE savings, and careful spending.

Inclusiveness Committee Update: Inclusiveness Committee members Julie Bir and Joel Ebert gave an update on the committee's revised vision, value and mission statement along with the 2023-2026 Diversity, Equity, and Inclusion Committee Workplan (on pages 95-98 of the board packet).

Racial Equity Update: Ms. Niemann provided an update on the Racial Equity workplan that was developed from the Widerstand Audit (on pages 99-103 of the board packet) in which Ms. Niemann highlighted the Widerstand Audit Memo and the Racial Equity Workgroup Action Plan.

No public comment was given.

HEALTH OFFICERS REPORT

General Updates: See Health Officer Report on page 105 of the board packet.

Community Health Improvement Plan (CHIP) Annual Presentation: Aug 17 from 3-5 pm at the St. Peter's Health Education Center (2475 Broadway St.) main hospital building across from the café.

Communication Bootcamp: September 28 from 9-4 pm at the Lewis and Clark Library in the large conference room.

No public comment was given.

PUBLIC COMMENT

No public comment was given.

The meeting adjourned at 2:26 p.m.

Mikael Bedell, Vice Chair

Drenda Niemann, Secretary